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Representing the Fiduciary: To Whom Does the Attorney Owe Duties?

Kennedy Lee

I. Introduction

A fiduciary relationship is a familiar concept to attorneys. When representing a client, attorneys are expected to "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[1] Judge Cardozo eloquently explained that fiduciaries, which include attorneys, should act with "the punctilio of an honor the most sensitive."[2] However, even though an attorney owes a high degree of diligence and commitment to a client, questions abound regarding the attorney-client relationship when the client is acting in a fiduciary capacity. These situations can arise when an attorney represents a conservator, a guardian, a custodian under the Uniform Transfers to Minors Act, an agent acting under a power of attorney, a trustee of a trust, or a personal representative of an estate. These last two situations, a trustee and a personal representative, are likely the most common and therefore will be the primary examples used in this paper.

When an attorney represents a fiduciary, some confusion exists as to who the real client actually is and to whom the attorney owes fiduciary duties. Most theories suggest that the client is either the fiduciary, the beneficiary, the estate, or some combination thereof. Unfortunately, courts have not been uniform in answering this question, leaving attorneys without clarity and guidance. While most jurisdictions have no law on this issue, the various jurisdictions that have attempted to provide direction in this area have adopted one of three major approaches: (1) the traditional theory, under which the attorney represents only the fiduciary, (2) the joint-client theory, under which the attorney represents the fiduciary and the beneficiary, or (3) the entity theory, under which the attorney represents the trust or estate. This paper will examine each approach and some of the associated consequences.

Some commentators propose that the inquiry of who is the attorney's client and to whom the attorney owes fiduciary duties "is of academic interest only, because the potential for a real conflict among the fiduciary, beneficiaries, and claimants such as creditors or disappointed

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1 Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2002).

2 Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

heirs never ripens into a real controversy."[3] However, simply reviewing the varying cases that have addressed this issue will reveal that this is more than a mere academic exercise. Ripened controversies do occur, and will likely continue to occur at an increasing rate in this litigious and increasingly wealthy society. An attorney would be prudent to seek clarity and guidance in order to minimize the likelihood of a malpractice suit or state bar disciplinary action due to conflicting fiduciary duties.

Several major questions must be answered regarding fiduciary representation in order to provide attorneys with necessary guidance. Because of the potentially serious consequences, including various sanctions, disciplinary measures, or malpractice suits, issues of confidentiality and conflicts of interest must be addressed and clearly resolved. These should be major concerns of an attorney representing a fiduciary. If a fiduciary discloses information, or the attorney discovers information that is harmful to the beneficiary, must that information be disclosed to the beneficiary? And when the beneficiary discloses information to the attorney, must that information be disclosed to the fiduciary?

One of the most difficult issues an attorney may face in the representation of a fiduciary relates to conflict of interest. If the attorney owes duties to a beneficiary while representing the fiduciary, do those duties to the beneficiary conflict with the duties to which the fiduciary is entitled? When there are disagreements between the fiduciary and a beneficiary, and the governing instrument is silent on the issue, to whom does the attorney's loyalty run? Moreover, to which beneficiary does an attorney's loyalty belong when there is a conflict between multiple beneficiaries? Does one beneficiary take priority over the other?

Another unanswered question that courts have struggled with is whether the fiduciary's attorney has a duty to protect the individual interests of a beneficiary if the fiduciary or a third party is taking advantage of the beneficiary. If no one else is taking measures to protect the beneficiary, must the attorney act in order to do so?

Finally, if a beneficiary is entitled to duties from the attorney, must the attorney receive the informed consent from each beneficiary and the fiduciary in order to carry out various aspects of the representation despite potential conflicting interests? Further, if the estate is paying the attorney's fees and the attorney wishes to limit the representation to just the fiduciary, must both the beneficiary and the fiduciary give informed consent?

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[3] Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who is the Client?*, 62 FORDHAM L. REV. 1319, 1319 (2004).

As can be seen, there are many unanswered questions when an attorney assumes representation of a fiduciary. All of these questions lead to the final inquiry of whether a beneficiary may have standing to bring a suit against an attorney for the fiduciary. In order to succeed in a malpractice claim, one of the elements a plaintiff must prove is that the attorney owed a duty that was violated.[4] Traditionally, an attorney was not liable to any party other than the client because an attorney owed a duty only to the client and no one else.[5]

In most situations, the attorney is retained by the fiduciary in order to counsel and advise the fiduciary in his fiduciary capacity, thus forming an attorney-client relationship between the fiduciary and the attorney. Conversely, the beneficiary and the attorney generally have not entered into an attorney-client relationship. Thus, under the traditional theory a beneficiary would not be permitted to bring a malpractice suit against the fiduciary's attorney. However, courts sympathetic to the beneficiary have adopted the joint-client theory and the entity theory in order to create an attorney-client relationship between the attorney and the beneficiary. Under these two theories, a beneficiary would be permitted to bring a claim against the fiduciary's attorney.

When a beneficiary is particularly vulnerable or where the beneficiary lacks competence, the fiduciary's attorney may owe special duties to the beneficiary. However, this paper assumes a fiduciary relationship with a competent beneficiary and will not address situations of beneficiary incompetence.

II. Traditional Theory

A. Traditional Theory Structure

While several theories concerning fiduciary representation have been adopted in one jurisdiction or another, most states have not sufficiently addressed this issue and therefore it is unclear what approach courts will adopt in most jurisdictions. However, of the states that have provided a clear ruling,[6] the traditional theory is the most prevalent approach. According to the traditional theory, the fiduciary is the sole client of the attorney and the attorney has no special duties or obligations to a beneficiary other than those negative duties an attorney owes to all third parties, i.e. the duty to do no harm.[7] When an attorney is

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4 *E.g.*, Sorenson v. Pavlikowski, 581 P.2d 851, 853 (Nev. 1978).

5 *E.g.*, Sav. Bank v. Ward, 100 U.S. 195, 200 (1879).

6 *See, e.g.*, FL Rules of Prof'l Conduct R. 4-1.7 (2006); Mich. Prob. Ct. R. 5.117(A) (2012); S.C. Code Ann. §62-1-109 (2011).

7 See generally the materials cited *supra* note 6 and *infra* notes 10-13 for several examples of states following the traditional approach.

retained by a fiduciary, "such retention constitutes the counselor the attorney for the fiduciary, and not the attorney for the estate, its beneficiaries, its creditors or others who may be interested therein."[8] The American Bar Association released a formal opinion adopting this approach and concluded that "the fact that the personal representative client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer."[9]

Some states have enacted legislation or policy addressing who the client is when a fiduciary retains an attorney. In Florida, "the personal representative is the client rather than the estate or the beneficiaries."[10] A South Carolina statute also addresses the payments of the attorney's fees while clarifying the identity of the client. The statute states,

> Unless expressly provided otherwise in a written employment agreement, the creation of an attorney-client relationship between a lawyer and a person serving as a fiduciary shall not impose upon the lawyer any duties or obligations to other persons interested in the estate, trust estate, or other fiduciary property, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary.[11]

In Michigan, the Probate Court Rules declare that "[a]n attorney filing an appearance on behalf of a fiduciary or trustee shall represent the fiduciary or trustee,"[12] not the beneficiary or the estate.

California has not enacted legislation addressing this specific issue; however there is a significant amount of case law adopting the traditional theory.[13] Most other jurisdictions adopting the traditional theory have extensively relied on and cited to California's case law. One of the principal cases clarifying many questions in fiduciary representation is the 1990 California Court of Appeals case of *Goldberg v. Frye*.[14] The vast majority of California cases and other jurisdictions that have adopted the traditional theory follow the rulings laid forth in this case.[15]

The court in *Goldberg* confirmed that the attorney for the fiduciary represents only the fiduciary and no other party. In its opinion the court

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8 Goldberg v. Frye, 217 Cal. App. 3d 1258, 1268 (Cal. Ct. App. 1990).

9 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (May 9, 1994).

10 FL Rules of Prof'l Conduct R. 4-1.7 cmt.

11 S.C. Code Ann. § 62-1-109.

12 Mich. Prob. Ct. R. 5.117(A) (2012).

13 *See, e.g.*, *Goldberg*, 217 Cal. App. 3d at 1268.

14 *Id.* at 1258.

15 *See, e.g.*, John T. Rogers, Jr., *Who's the Client? Ethics for Trust and Estate Counsel (Including Comments on the Fourth Edition of the ACTEC Commentaries)*, 339 PLI/Est 675, 691 (2006).

succinctly stated, "the attorney by definition represents only one party: the fiduciary."[16] Continuing, the court declared, "By assuming a duty to the administrator of an estate, an attorney undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate."[17] The court recognized that representation of a fiduciary often benefits a beneficiary. However, this is not the primary purpose of the fiduciary forming the attorney-client relationship. At best, the beneficiaries "are incidental beneficiaries, and '[a]n incidental benefit does not suffice to impose a duty upon the attorney.'"[18]

After ruling that the attorney owes no duties to a beneficiary, the court then addressed the issue of a beneficiary's ability to bring a malpractice claim against an attorney. The court declared,

> The fact that [beneficiaries] are thus benefited, or damaged, by the attorney's performance does not give rise to a duty by the attorney to such [beneficiaries], and hence cannot be the basis for a cause of action by the [beneficiaries] for the attorney's negligence.[19]

The court recognized that many hazards exist if the attorney has special duties to a beneficiary and could be liable for violating these duties. The court's opinion states, "It would be very dangerous to conclude that the attorney, through performance of his service to the administrator and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries."[20] Among the many dangers would be issues of loyalty, attorney-client privilege and confidentiality, and conflicts of interest.

Even though a beneficiary may not be able to bring a suit based on an attorney-client relationship, she may be able to succeed if she can "prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the [beneficiaries]."[21] However, the court in *Goldberg* noted that a beneficiary would not succeed under this claim either.[22] While a beneficiary is almost always specifically benefited from the fiduciary's attorney-client relationship, "it is impossible to conclude that the parties to the attorney's contract . . . entered into same for the principal purpose of providing benefit to the

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16 Goldberg v. Frye, 217 Cal. App. 3d 1258, 1269 (Cal. Ct. App. 1990).

17 *Id*. at 1267.

18 *Id*. at 1268-69.

19 *Id*. at 1268.

20 *Id*. at 1269.

21 Pelham v. Griesheimer, 440 N.E.2d 96, 100 (Ill. 1982).

22 Goldberg v. Frye, 217 Cal. App. 3d 1258, 1267 (Cal. Ct. App. 1990).

legatees."[23] After addressing many issues, the court in *Goldberg* concluded that the attorney represents only the fiduciary, a beneficiary is not entitled to any special duties, and the beneficiary has no standing to bring a malpractice suit against the attorney.[24]

B. Conflict of Interest

One of the benefits of the traditional theory is that attorneys are provided sufficient guidance when faced with a conflict of interest question. When an attorney is retained to counsel a fiduciary, three types of conflict of interest may arise: (1) a conflict between the fiduciary and a beneficiary, (2) a conflict between a beneficiary and the governing instrument of the estate, and (3) a conflict between the fiduciary and the governing instrument of the trust or estate.

Under the traditional theory, an attorney has little concern if the interests of the fiduciary and beneficiary conflict. This is because the attorney has no attorney-client relationship with the beneficiary and owes no special duties to her. If the attorney owes no duties to the beneficiary, there can be no concurrent conflict of interest.

A conflict between a beneficiary and the governing instrument of the trust or estate is of little consequence as well. Under these circumstances, the attorney has a duty to advise the fiduciary to take actions "in accordance with the terms of the will and the law and 'consistent with the best interests of the estate.'"[25] A deviation from the governing instrument is not permitted simply because a beneficiary desires it.

Finally, if a conflict arises between the fiduciary and the governing instrument of the estate, the fiduciary is obligated to yield his interests and align his actions in accordance with the governing instrument. "The principal function of the fiduciary of an estate under a will is to protect, preserve and pay out the assets according to law and the will."[26] Where a fiduciary does not follow the directions provided in the governing instrument, he has breached his fiduciary duties. An attorney has an obligation to advise a fiduciary to follow the governing instrument. The attorney could be subject to discipline and potential malpractice claims if the attorney counsels or assists the fiduciary to disregard the governing instrument.[27] In each potential conflict of interest, it is clear where the attorney's loyalty lies under the traditional theory.

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[23] *Id*. at 1268.

[24] *Id.* at 1269-70.

[25] Goldberger v. Kaplan, Strangis & Kaplan, P.A., 534 N.W.2d 734, 739 (Minn. Ct. App. 1995).

[26] Hecker v. Schuler, 231 N.E.2d 877, 879 (Ohio 1967).

[27] *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

C. Negative Duties of the Attorney

As the case law in this area has developed, courts have found exceptions to the general rule under the traditional theory. These courts have ruled that there are some situations in which the attorney for a fiduciary does owe duties to a beneficiary. However, these exceptions are not really exceptions. While an attorney may not owe any special duties to the beneficiary, she does owe the beneficiary those negative duties that an attorney owes to all third parties. The exceptions that courts have found are nothing more than violations of these negative duties.

The negative duties an attorney owes to all third parties include (1) the duty to not embarrass, harass, or violate the legal rights of a third party;[28] (2) the duty to not make false or misleading statements to a third party;[29] (3) the duty to not counsel or assist a client to commit a crime or fraud against a third party;[30] and (4) the duty to notify and inform a third party who may believe they are clients of the attorney that they are not represented by the attorney and have no attorney-client relationship.[31] When representing a fiduciary, the two most commonly violated negative duties are the duty to not make false or misleading statements to a third party and the duty to not counsel or assist a client to commit a crime or fraud against a third party.

1. *The Duty to Not Make False or Misleading Statements*

A violation of the duty to not make false or misleading statements to a third party can arise when an attorney makes affirmative representations of care to a beneficiary. When representing a fiduciary, an attorney must be cautious so as to not inadvertently assume a second fiduciary duty to a beneficiary.

An attorney will often be required to communicate information to a beneficiary in the course of representing the fiduciary. However, this communication should not extend beyond what is required in order to convey the necessary message. Any further communication, especially statements of assurance, may mislead a beneficiary into believing that her interests are protected and will result in the creation of a new fiduciary relationship between the attorney and beneficiary. "A fiduciary or confidential relationship can arise when confidence is reposed by persons in the integrity of others, and if the latter voluntarily accept or

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28 MODEL RULES OF PROF'L CONDUCT R. 4.4(a).

29 MODEL RULES OF PROF'L CONDUCT R. 4.1(a).

30 MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

31 *See* Butler v. State Bar, 721 P.2d 585, 589 (Cal. 1986).

assume to accept the confidence, they cannot act so as to take advantage of the others' interests without their knowledge or consent."[32]

2. *The Duty to Not Assist a Client to Commit Fraud*

The second common violation of the negative duties occurs when an attorney participates in a breach of her client's fiduciary duties. This is the negative duty to not counsel or assist a client to commit a crime or fraud against a third party. When this negative duty is breached, the injured party may bring a claim for damages.

An attorney will be liable to a beneficiary under this negative duty only when the attorney has "notice that the trustee is committing a breach of trust and participates therein."[33] For an attorney to breach this duty, simply giving "legal advice to the trustee [is] insufficient; the attorney must have actively colluded with the trustee in breaching the trustee's fiduciary duties."[34] Further, mere knowledge of a breach by the fiduciary is not an active participation in the breach and thus will not subject an attorney to liability. There is no requirement that the attorney must prevent the breach or inform the beneficiary of the breach. Although nondisclosure may be morally questionable, the law generally does not prohibit it.

D. Discovery of Attorney-Fiduciary Communications

The negative duties an attorney owes to a beneficiary are clear and apply uniformly across most jurisdictions. Beyond these negative duties, a beneficiary also benefits from an exception to the general duty of confidentiality that exists in certain fiduciary relationships.

In some jurisdictions, an exception to the general rule of confidentiality exists where a trust pays for the attorney's fees. A beneficiary is entitled to, "upon request, any communications with an attorney that are intended to assist in the administration of the plan."[35] Even when the court has held that "an attorney has no duty to a nonclient beneficiary of a client fiduciary,"[36] the trustee is still "disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration."[37] This exception, however, does not permit an attorney to voluntarily release information concerning the representation to a beneficiary without her request. Also, communications in anticipation

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32 Tri-Growth Ctr. City v. Silldorf, 216 Cal. App. 3d 1139, 1150 (Cal. Ct. App. 1989).

33 RESTATEMENT (SECOND) OF TRUSTS § 326 (1959).

34 Pierce v. Lyman, 1 Cal. App. 4th 1093, 1103 (Cal. Ct. App. 1991) (citations omitted).

35 *In re* Long Island Lighting Co., 129 F.3d 268, 272 (2d Cir. 1997).

36 Murphy v. Gorman, 271 F.R.D. 296, 313 (N.M. 2010).

37 *Id*. at 305.

of litigation will remain protected. The discovery rule "does not require disclosure of privileged materials concerning a pending lawsuit."[38]

When applying this attorney-client privilege exception, some courts have mistakenly ruled that the beneficiary is a joint client in all matters. While the fiduciary and a beneficiary may be thought of as joint clients for discovery purposes, it is only for this limited purpose. The exception to the attorney-client privilege does not stand for the proposition that an attorney owes any other fiduciary duties to a beneficiary.

III. Joint-Client Theory

A. Joint-Client Theory Structure

Most courts agree that the fiduciary is a client of the attorney and is therefore entitled to privileges and duties. Some courts have found that the attorney also owes duties to the beneficiary as well. In these jurisdictions, a beneficiary is entitled to essentially the same duties as the fiduciary is entitled, effectively making her a client of the attorney and thus a joint-client with the fiduciary.

In 1992, the Supreme Court of Nevada adopted the joint-client theory in *Charleson v. Hardesty*.[39] In this case, the trustee had been writing bad checks and withdrawing trust funds for personal use. The attorney for the trustee was aware of some of the problems in the administration of the trust but never informed the beneficiaries. The beneficiaries brought a suit against the trustee's attorney alleging that he breached his duties to the beneficiaries when he failed to properly protect their interests. The court stated, "when an attorney represents a trustee, the attorney also assumes a duty of care toward the beneficiaries."[40] The court also held that the attorney "in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary."[41] According to the Nevada Supreme Court, the attorney owes the same fiduciary duties to the beneficiary that the trustee owes to the beneficiary.

The joint-client theory is illustrated well in Professor Hazard's triangle metaphor.[42] The first leg of the triangle is composed of the attorney-fiduciary relationship. The second leg of the triangle is the fiduciary-beneficiary relationship. "The parameters of these two relationships are relatively settled in substantive law: the fiduciary's duties run to the beneficiary, and the attorney's fiduciary duties run to the fi-

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38 Barnett Banks Trust Co., N.A. v. Compson, 629 So.2d 849, 851 (Fla. Dist. Ct. App. 1994).

39 839 P.2d 1303 (Nev. 1992).

40 *Id*. at 1306 (quoting Shick v. Lerner, 238 Cal. Rptr. 902, 908 (Cal. Ct. App. 1987)).

41 *Charleson*, 839 P.2d at 1306.

42 *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 Geo. J. Legal Ethics 15, 15-19 (1987).

duciary."[43] The third leg of the triangle is composed of the attorney-beneficiary relationship.

This metaphor is illustrated in *In re Estate of Larson*,[44] a Washington Supreme Court case decided in 1985. The court declared the sole purpose for the attorney-client relationship is "to assist [the personal representative] in the proper administration of the estate. Thus, the fiduciary duties of the attorney run not only to the personal representative but also to the heirs."[45]

Courts that have applied the joint-client theory agree that the attorney owes duties to both the fiduciary and the beneficiary. However, they do not agree on whether both clients are equal in relation to the attorney, or if one client should be favored above the other when conflicts arise. Justice Pashman of the New Jersey Supreme Court noted in a dissenting opinion that there is a primary client and a derivative client.[46] When representing a fiduciary, the fiduciary would be the primary client and the beneficiary would be the derivative client. This classification expresses the idea that one of the joint-clients takes precedence over the other joint-client.

Other courts adopting the primary-derivative client approach to the joint-client theory disagree that the beneficiary is the derivative client. These courts have ruled that the beneficiary may actually be the primary client while the fiduciary is the derivative client. In *Riggs National Bank v. Zimmer*,[47] the Delaware Court of Chancery declared in 1976 that "the beneficiaries were the clients of [the attorney] as much as the trustees were, and perhaps more so."[48] Also in 1976, an Arizona Court of Appeals echoed this same opinion in *Fickett v. Superior Court*.[49] The court noted that when an attorney represents a fiduciary, "he assumes a relationship not only with the guardian but also with the ward. . . . In fact, we conceive that the ward's interests overshadow those of the guardian."[50] Both of these cases indicate that not only is a beneficiary a joint-client, but likely is the primary client. If the beneficiary's interests overshadow those of the fiduciary, then the duties owed to the fiduciary by the attorney would be secondary to the duties owed to the beneficiary.

It is clear that the primary client in either classification would be entitled to all of the duties a typical client receives. The derivative client

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43 Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation,* 1994 U. ILL. L. REV. 889, 902 (1994).

44 694 P.2d 1051 (Wash. 1985).

45 *Id*.

46 *In re* Dolan, 384 A.2d 1076, 1082 (N.J. 1978).

47 355 A.2d 709 (Del. Ch. 1976).

48 *Id*. at 714.

49 558 P.2d 988 (Ariz. Ct. App. 1976).

50 *Id*. at 990.

would also be entitled to certain duties as a joint-client. However, it appears that these duties would be secondary to the duties to which the primary client is entitled when a conflict arises. Further, the courts have not sufficiently clarified exactly what duties are owed to the derivative client. It is unclear whether there is a duty of competence, a duty of diligence, a duty of communication, a duty of confidentiality, or a duty of loyalty to the derivative client. And if any of these duties do exist, there is no guidance on what the implications are if these duties are violated. When a conflict of interest exists between the fiduciary and a beneficiary, attorneys are left wondering to what extent they must protect and serve the derivative client.

B. Arguments in Favor of the Joint-Client Theory

Despite the lack of clarity regarding the duties owed to the derivative client, courts have adopted the joint-client theory for several reasons. Two of the most important reasons are, first, the fiduciary client owes fiduciary duties to the beneficiary, and second, the fee structure implies that the beneficiary should be a client as well.

Proponents of the joint-client theory argue that the fiduciary and the beneficiary have joint interests, and therefore they can be regarded as joint-clients. The representation of joint-clients in a fiduciary relationship is equivalent to "joint representation in which a lawyer represents two or more closely connected parties, one of whom serves as spokesperson."[51] According to this paradigm, the interests of the beneficiary seem to flow to and become the interests of the fiduciary. Therefore, because the beneficiary's interests are imposed on the fiduciary, counsel for the fiduciary must recognize this relationship and also adopt the beneficiary as a joint-client.

The fee structure is another rationale for adoption of the joint-client theory. Attorney fees incurred by the fiduciary in the administration of the trust or estate are generally paid by the trust or estate. The theory is that because the beneficiary's interest ultimately pays the attorney's fees, the attorney should also represent her as a client. Although the fees are generally withdrawn from the estate and disbursed by the fiduciary, it is in reality the beneficiary, and not the fiduciary, who has paid. All assets in the estate are to be used for the benefit of the beneficiary. Any funds withdrawn in order to administer the estate decreases the benefits the beneficiary will receive. The court in *Riggs* stated, "the payment to the law firm out of the trust assets is a signifi-

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[51] Hazard, *supra* note 42, at 36.

cant factor . . . it is in itself a strong indication of precisely who the real clients were."[52]

C. Criticism of the Joint-Client Theory

1. *Adverse Case Law*

While the *Riggs* and *Larson* cases are two of the primary examples used by advocates of the joint-client theory, many other courts have directly rejected the reasoning in these cases and have chosen not to follow *Riggs* and *Larson*. Many of these courts have clearly ruled that a beneficiary is not entitled to fiduciary duties from the fiduciary's attorney. The joint-client theory leaves many questions unanswered. Without more guidance, the problems posed by the joint-client theory outweigh the benefits it may provide.

In *Neal v. Baker*,[53] a 1990 Illinois Appellate Court held in direct opposition to the joint-client theory. The beneficiary in this case sued the attorney for negligently advising the personal representative, and the court clearly announced that an attorney for a fiduciary owes no fiduciary duties to a beneficiary. The court stated, "Plaintiff's mere assertion that the attorney was hired with the intent to directly benefit plaintiff is not sufficient to state a cause of action. . .. We hold no duty extends to a beneficiary under these circumstances."[54] The mere fact that a beneficiary may receive benefits from an attorney-client relationship between the fiduciary and his attorney does not make the beneficiary a client.

Not only is the *Larson* case in the minority, but the Washington Supreme Court again addressed this issue in 1994 in *Trask v. Butler*[55] and ruled that a beneficiary is not entitled to fiduciary duties from the attorney for the fiduciary. This case concerned a beneficiary who brought a claim against the personal representative's attorney for negligently advising the personal representative and not protecting the beneficiary's interests. The beneficiary based his position upon the ruling in *Larson*.

In granting summary judgment in favor of the attorney, the court held that the beneficiary was merely an incidental beneficiary of the attorney-client relationship and there would be an "unresolvable conflict of interest"[56] if the attorney must represent a beneficiary as well as the fiduciary. Therefore, "a duty is not owed from an attorney hired by the

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52 *Riggs*, 355 A.2d at 712.
53 551 N.E.2d 704 (Ill. App. Ct. 1990).
54 *Id*. at 706.
55 872 P.2d 1080 (Wash. 1994).
56 *Id.* at 1085.

personal representative of an estate to the estate or to the estate beneficiaries."[57] Since *Trask*, Washington has not followed the joint-client theory.

2. *Arguments Against Joint Interests: Conflict of Interest*

As the personal representative acts in his fiduciary capacity, his interests will likely align with the interests of the beneficiary in many instances. However, there are several situations that commonly occur in which the interests of the fiduciary and the interests of the beneficiary may not coincide. While a conflict of interest may not arise in every fiduciary relationship, the potential for the conflict of interest must be considered. If an attorney has multiple clients that have potential or indirect adverse interests, the attorney should refer to the ABA Model Rules of Professional Conduct (MRPC) 1.7 for guidance.

Even though an actual conflict may not have arisen yet, the MRPC consider a relationship that has a significant risk of becoming a conflict of interest as actually being a concurrent conflict of interest.[58] Further, the MRPC clarify that unless all parties involved waive the potential conflict in writing, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[59] Thus, an attorney should not represent multiple clients whose interests have a significant risk of conflicting because the representation will be considered a concurrent conflict of interest.

Fiduciary and beneficiary conflicts of interest are not rare. If a beneficiary were deemed to be a joint-client, an attorney would face a situation where a conflict of interest either exists or has a significant risk of arising. Therefore the attorney would be prohibited from continuing this type of relationship unless each party gives informed consent to the representation despite the conflicting interests. If even one beneficiary refuses to consent, the fiduciary would be effectively unable to obtain legal counsel.

Many courts have recognized the potential, if not actual, conflict of interest inherent in the joint-representation of both the fiduciary and the beneficiary. In most situations, courts have explained that this type of representation is not proper, as it would hinder the ability of the attorney to act in the best interest of both clients. The Supreme Court of Massachusetts acknowledged that when an attorney represents a fiduciary the attorney should not owe duties to a beneficiary because "conflicting loyalties could impermissibly interfere with the attorney's task of

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57 *Id*.

58 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002).

59 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(a).

advising the trustee."[60] The Washington Supreme Court ruled, "Because estate proceedings may be adversarial, we conclude that policy considerations also disfavor the finding of a duty to estate beneficiaries."[61]

Although simple, the single-beneficiary fiduciary relationship is not immune to a conflict of interest. A single beneficiary could easily create a conflict by demanding the fiduciary take action that is not in harmony with the governing instrument. This situation surfaced in the Massachusetts Supreme Court case of *Claflin v. Claflin*[62] where a beneficiary brought a suit to terminate the trust early in order to receive the principal. The provisions of the trust stated that the beneficiary was to receive the principal upon reaching a certain age. The court ruled that the demands of the beneficiary should be disregarded and the terms of the trust should be upheld.

Generally, a fiduciary must act in the best interest of the beneficiary, and also must follow the terms of the governing instrument. However, the court ruled that when these two principles conflict, the governing instrument is to take precedent. The RESTATEMENT (SECOND) OF TRUSTS also affirms this idea: "The court will not permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction."[63]

The *Claflin* case and other similar cases may provide guidance to the fiduciary, but it does not provide sufficient guidance for the attorney representing a fiduciary under the joint-client theory. The question still looms, to whom does the attorney's loyalty belong? An attorney has the duty to advise the trustee to follow the terms of the trust because if a trustee departs from the directions provided, he may be liable for any loss or damages that may result.[64] But, there may be times where a departure from the terms of the trust is truly in the best interest of a beneficiary. According to the joint-client theory, an attorney would also owe the beneficiary a duty to pursue a modification of the trust by showing the modification is one "that the settlor would have permitted"[65] under the circumstances. While advocating modification for the beneficiary, and advising strict adherence to the trustee, the attorney would be

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60 Spinner v. Nutt, 631 N.E.2d 542, 544-45 (Mass. 1994).

61 *Trask*, 872 P.2d at 1085.

62 20 N.E. 454, 455 (Mass. 1889).

63 RESTATEMENT (SECOND) OF TRUSTS § 167(b) (1959).

64 *See* Rodgers v. Herron, 85 S.E.2d 104, 111 (S.C. 1954).

65 Stanton v. Wells Fargo Bank & Union Trust Co., 310 P.2d 1010, 1017 (Cal. Ct. App. 1957).

in a serious conflict of interest and should withdraw from representing both parties.[66]

As the number of beneficiaries is increased, the likelihood of a conflict of interest also increases. With multiple beneficiaries, interests become more diverse, especially in situations involving lifetime beneficiaries and remainder beneficiaries. Just by the nature of the beneficiaries' interests in the estate, their interests may conflict. A lifetime beneficiary will desire assets to be invested in order to produce income, which will generally require more risk. Conversely, a remainder beneficiary will be interested in the safety and growth of the principal. It would be very difficult, if not impossible, for an attorney to advise a fiduciary in this situation while still protecting the interests of each beneficiary.

Even if an attorney receives consent from all parties, outside of the simplest fiduciary relationships, the interests of the parties will likely "be sufficiently diverse and contradictory to raise a serious question of whether the lawyer can represent each of these interests with the full and undivided loyalty that a lawyer owes to every client."[67] The joint-client theory would, in many cases, result in a situation where a fiduciary could never retain an attorney to advise him unless the beneficiary chooses to retain separate counsel as well. With a high potential for a conflict of interest, representation of both the fiduciary and the beneficiary should be the exception and not the rule.

3. *Arguments Against Joint Interests: Problems with the Fee Structure*

Advocates of the joint-client theory assert that the beneficiary ultimately bears the burden of the attorney's fees and therefore should be a client as well. However, in the legal field, there are many times where the client is not the party responsible for the attorney's fees. Some examples include parents paying for the representation of a child, or a business entity paying for the representation of an employee. In these situations, the fact that someone other than the client is paying the fee does not make the responsible party a joint-client. If the responsible party were a client, he or she would be entitled to certain duties, including attorney-client privilege. However, "payment of fees does not determine ownership of the attorney-client privilege."[68]

The MRPC state that not only is the responsible party not a client, but he or she must completely refrain from interfering with the repre-

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66 *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(3) (2002).

67 Tuttle, *supra* note 43, at 913.

68 Wells Fargo Bank v. Super. Ct., 990 P.2d 591, 598 (Cal. 2000).

sentation.[69] Additionally, information relating to the representation is generally protected and may not be disclosed to the responsible party. The comments to the MRPC clarify, "Because third-party payers frequently have interests that differ from those of the client . . . lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment."[70] If a beneficiary is deemed a joint-client, it will be very difficult for interference not to occur. If a beneficiary interferes with the representation, the attorney will have to withdraw.

In order to completely avoid any problems with the fee structure, the fiduciary could pay the attorney's fees from his own pocket. This would completely circumvent the argument that a beneficiary is the attorney's real client because she is paying for the attorney's services. However, the fiduciary would likely raise his fees as a result and pass the burden right back to the beneficiary. In the end, the beneficiary would bear the burden in either case.

4. *Attorney as a Co-Fiduciary*

If the joint-client theory were widely adopted, a fiduciary could become very hesitant to even retain an attorney to counsel him in administering his fiduciary duties. This is because the attorney would no longer simply be an advisor to the fiduciary, but would take on a role that would be more equivalent to a co-fiduciary to the beneficiary. With the beneficiary as a joint-client in the fiduciary representation, issues of confidentiality could arise. Information disclosed to the attorney by one party could not be withheld from the other party if the fiduciary and beneficiary are deemed to be joint-clients as opposed to separate clients in a multiple representation situation.

Courts that have adopted the joint-client theory have not specified whether both the fiduciary and the beneficiary are clients as joint-clients or separate clients. If they are both clients but represented separately, then issues of confidentiality would not be a problem. However, in a joint representation, issues of confidentiality would be a problem. While the courts have not specifically made this clarification, it appears that most cases indicate that the fiduciary and the beneficiary are clients in a joint representation and therefore issues of confidentiality will arise.[71]

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69 *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(f).

70 MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 11.

71 *See, e.g.*, Pennell, *supra* note 3, at 1319-20.

In an attorney-client relationship, the duty of confidentiality and its benefits are well settled. Confidentiality is desired between an attorney and her client because "[w]hen a client feels free to disclose all information to his attorney, without fear that the attorney will disclose the information to others, the attorney is better able both to represent the client (promoting justice) and to dissuade the client from undertaking wrongful acts (promoting social utility)."[72] If the beneficiary is able to intrude on the confidentiality between the fiduciary and the attorney, the fiduciary may have a tendency to shy away from revealing information about any act that could potentially be harmful to a beneficiary. Many of these potentially harmful acts could likely be corrected easily without harm to the beneficiary if an attorney is counseled early and often. But, if a fiduciary is not getting the full benefit of legal counsel because of a lack of confidentiality, the beneficiary will be harmed in the end from an ill-informed and unadvised fiduciary.

Many fiduciaries may want advice and counsel on how to proceed if a joint-client theory, along with its many complications, is adopted. In order to receive conventional legal representation, fiduciaries may be forced to retain a separate attorney to act solely as the fiduciary's individual counsel with duties of loyalty and confidentiality to the fiduciary alone. Thus, the joint-client theory would result in the bizarre result of reassigning the fiduciary's attorney to the beneficiary and forcing the fiduciary to retain a separate attorney to act as traditional legal counsel for the fiduciary.

IV. Entity Theory

A. Entity Theory Structure

The entity theory is another approach used in order to justify the conclusion that a beneficiary is entitled to duties from the fiduciary's attorney. Under this approach, the estate is considered a separate legal entity and the estate, not the fiduciary or the beneficiary, will be considered the client. As the client, the estate would be treated similarly to a business entity such as a corporation or partnership in the course of the representation and "an attorney representing [the] estate must give his first and only allegiance to the estate."[73]

Just as business entities act through an agent, the estate would act through the fiduciary as its agent. As agent for the estate, the fiduciary would hire the attorney to become a co-agent of the estate, and the attorney would ultimately be responsible to the estate rather than to the fiduciary agent. This is because "[a] coagent may be appointed by . . .

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72 Tuttle, *supra* note 43, at 938.

73 Jewish Hosp. v. Boatmen's Nat'l Bank, 633 N.E.2d 1267, 1277 (Ill. App. Ct. 1994).

another agent actually or apparently authorized by the principal to do so."[74] Thus, under these circumstances, the attorney's client would be the principal estate, not the fiduciary. The attorney, as co-agent, would therefore have duties to the estate and all its interested parties, including the beneficiaries.

One of the most cited cases in favor of this approach is *Steinway v. Bolden*,[75] a Michigan Court of Appeals case from 1990. In this case the court stated, "although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative."[76] However, this case was later superseded by an amendment to the Michigan Probate Court Rules, which states, "An attorney filing an appearance on behalf of a fiduciary or trustee shall represent the fiduciary or trustee."[77] In a comment to this rule, the Probate Rules Committee "clarifie[d] that the lawyer represents the fiduciary or trustee and not the estate."[78] Further, a Michigan Ethics Opinion affirms, "When a lawyer undertakes representation at the request of a fiduciary in a situation involving an estate, trust, conservatorship or guardianship, his or her client is the fiduciary, not a fictional entity to which the fiduciary owes its duties."[79]

B. Arguments in Favor of the Entity Theory

Even though the entity theory does not have much case law supporting it, advocates raise several arguments in favor of this approach. Similar to the joint-client theory, entity theory proponents assert that because the attorney's fees are paid by the entity, the entity should be the real client. The court in *Steinway* adopted this idea and reasoned, "The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion."[80]

Another argument in favor of the entity theory is that it avoids a conflict of interest. Unlike the joint-client theory where conflict of interest issues are complicated and unsettled, the entity theory largely averts this problem. With the estate entity as the client, the attorney may deal with the fiduciary, a beneficiary, and any other interested

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74 RESTATEMENT (THIRD) OF AGENCY § 1.04 (2006).

75 460 N.W.2d 306 (Mich. Ct. App. 1990).

76 *Id*. at 307.

77 MICH. PROB. CT. RULE 5.117(A) (2011) *available at* http://coa.courts.mi.gov/rules/documents/1Chapter5ProbateCourt.pdf (last visited Aug. 15, 2012).

78 MICH. PROB. CT. RULE 5.117(A) cmt.

79 MICH. ETHICS OP. RI-342 (2007) *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/RI-342.htm (last visited Aug. 15, 2012).

80 *Steinway*, 460 N.W.2d at 307.

party as constituents of the entity. These constituents' interests may or may not be consistent with the interests of the estate. However, the interests of the constituents are irrelevant; the lawyer's only obligation is to the entity and the lawyer "should advise any constituent, whose interest the lawyer finds adverse to that of the [entity] of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation."[81]

With the estate being analogous to a business entity, the estate theory approach benefits from "the fact that the law informing the resolution of questions that arise in representing entities such as corporations is relatively well-developed and can be relied upon to inform the resolution of analogous issues that arise in the fiduciary context."[82] Among the well-developed law is the fact that confidentiality does not apply within an organization to the extent necessary to carry out the representation or to prevent substantial injury to the organization.[83] This enables the attorney to protect a beneficiary when facing a situation where the fiduciary has breached his fiduciary duties. In these circumstances, an attorney would not be liable to the fiduciary for revealing necessary information in order to protect the entity.

C. Criticism of the Entity Theory

1. *Attorney as a Co-Agent*

Despite the existent case law, albeit limited, and the benefits advocated by entity theory proponents, most jurisdictions have not adopted the entity theory because of inherent flaws in this approach. First, not every action taken by an agent must necessarily be attributed to the principal. An agent's actions will be attributed to the principal only when the agent is acting in his capacity as an agent in behalf of the principal. An attorney would become a co-agent of the estate only if the fiduciary retained the attorney for that specific purpose. There is no limitation that prohibits an agent from retaining personal legal counsel in order to advise him in his role as an agent. If a fiduciary retains an attorney, the attorney should not automatically become a co-agent unless the fiduciary was carrying out specific orders of the governing instrument to accomplish that purpose.

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81 MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (2002).
82 Pennell, *supra* note 3, at 1339.
83 *See* MODEL RULES OF PROF'L CONDUCT R. 1.13.

2. *The Fee Structure*

Similar to the joint-client theory, entity theory advocates also try to support their position by the payment arrangement of the attorney's fees. However, as mentioned before, an attorney-client relationship is not formed merely because a third party has paid the attorney's fees. For a more detailed discussion on this topic, refer to section III.C.3, *supra*, regarding the joint-client theory.

3. *Conflicts of Interest*

One of the benefits proposed by adopting the entity theory is that, unlike the joint-client theory, a conflict of interest will not occur. While the entity theory may help minimize these conflicts, it is not necessary to ignore precedent in order to avoid these conflicts. Applying the traditional theory will avoid these conflicts just as well as the entity theory. For a more detailed discussion on this topic, refer to section II.B, *supra*, regarding conflict of interests under the traditional theory.

4. *The Entity as a Separate Legal Entity*

Finally, most courts have likely rejected the entity theory because a trust or estate does not have a recognized separate legal existence. Some trust and estate purists even maintain that a trust is not an entity at all, but merely a relationship between the fiduciary and the beneficiaries.

V. Engagement Letters Considerations

While the joint-client theory and the entity theory are not the majority rule, an attorney representing a fiduciary should still be cautious in her representation until the law is more settled. When taking on a new fiduciary client, an attorney may want to draft an engagement letter that clarifies the limits of the attorney's duty to the fiduciary, the beneficiary, and the estate. In addition to providing the fiduciary with this engagement letter, an attorney should also provide a copy to the beneficiaries to make clear that the attorney does not represent them.

Currently, there appears to be little or no authority on whether such restrictions in an engagement letter limiting the representation of an attorney would be effective to limit the representation in a jurisdiction that follows one of the minority approaches. In one of these jurisdictions, an attorney should keep in mind that an attorney "generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the

beneficiaries of the fiduciary estate"[84] without first obtaining the beneficiary's consent.[85] In other jurisdictions, although an engagement letter may not be binding, it will help to clarify the representation to both the fiduciary and the beneficiary until further direction is provided.

VI. Modification to the Traditional Theory

A. Modifications to Permit Further Attorney Disclosure

Opponents of the traditional theory demand that more protection be provided for a beneficiary. They argue that discovery of some communications does not sufficiently protect the interests of a beneficiary. An attorney could further protect a beneficiary by drafting the engagement letter to state that if there is a breach by the fiduciary, the attorney may disclose the breach to the beneficiary. Although a provision like this may be helpful, it is likely not enough to satisfy opponents of the traditional theory and therefore the traditional theory must be modified to provide more protection to the beneficiary.

Despite the lack of a fiduciary relationship, advocates of modification claim that there are circumstances in which an attorney should be permitted to inform the beneficiary of a fiduciary's misconduct. This is because the beneficiary is in such a vulnerable position. Those in support of disclosure assert that at some point, the reasons in favor of disclosure outweigh those in favor of confidentiality.[86] However, modification to permit disclosure would make an attorney liable to a beneficiary when she knows of a breach and does nothing to prevent or rectify it. This is a substantial deviation from the current law, which holds an attorney liable only when she knows of and participates in a fiduciary's breach. As long as the attorney does not assist in the breach, the duty of confidentiality trumps and the attorney must not disclose information to the beneficiary unless specifically requested by the beneficiary.

Over the years, some jurisdictions have recognized the need for a balance between confidentiality and protection of the beneficiary. However, if the traditional theory is to be modified, several difficult questions must be addressed in order to find the right balance between confidentiality and protection. Questions that must be considered include whether a minor negligent breach that is easily remedied is a suffi-

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84 ACTEC Commentaries, MPRC 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer, http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (4th ed. 2006).

85 Model Rules of Prof'l Conduct R. 1.8(h).

86 *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (3d ed. 2011).

cient breach to warrant disclosure, or must the breach actually include fraudulent activity? If disclosure is permitted, will it be mandatory or discretionary? These and other similar questions regarding disclosure remain unanswered.

If disclosure were to be permitted, a discretionary disclosure would likely have more success than a mandatory disclosure. Without bright line rules covering various scenarios, a mandatory disclosure could create more problems than the benefits it would provide. There would likely be insufficient guidance as to what type of breach requires disclosure. How serious must a breach be before mandatory disclosure is required? In order to avoid personal liability, an attorney would likely err on the side of caution and report much if not all fiduciary negligence or misconduct. However, because what may and may not be disclosed is unclear, there is the possibility that a disclosure by the attorney would be improper and therefore a violation of the duty of confidentiality between the attorney and the fiduciary. In this case, the attorney would now be liable to the fiduciary.

With the attorney facing a difficult and unclear problem, much of her time will be spent replicating or examining many of the fiduciary's functions in order to protect herself. By doing so, the attorney would be acting more as a co-fiduciary instead of legal counsel to the fiduciary. With an attorney acting as a co-fiduciary, the fiduciary would not receive the full benefit of legal counsel, and as mentioned before, the beneficiary would ultimately be harmed from an ill-informed and unadvised fiduciary.

The state of Washington has taken the opposite approach and authorizes an attorney, at her discretion, to reveal any breach of fiduciary duty by a court-appointed fiduciary.[87] Under this approach, an attorney can make a judgment call about what actions to take when a breach does occur. An attorney may inform the court of the breach so that the court may take the necessary measures in order to protect the beneficiary. An attorney would not be responsible to protect the beneficiary beyond this, as there is no attorney-client relationship.

An attorney could also simply withdraw from representation of the fiduciary and separate herself from the situation. Last, an attorney could continue to represent the fiduciary so long as the attorney does not assist or participate in the breach. Except in cases involving a very minor breach, this last option is not very likely, especially when fraud has been committed. These options are available in Washington only when representing a court-appointed fiduciary. In all other fiduciary

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[87] WASH. ST. CT. RULES OF PROF'L CONDUCT R. 1.6(b)(7) (2006).

representations, a disclosure of a fiduciary breach would be impermissible.

B. Remedies for the Beneficiary

Opponents of the traditional theory claim that justice would not be served if the attorney were permitted to simply withdraw from representation or withhold information while the beneficiary's interests are injured. While disclosure and other protections against fiduciary misconduct are debated, a beneficiary is not completely left without a remedy when her interests are violated. The traditional theory permits a beneficiary to seek a remedy for misconduct by bringing a claim against the fiduciary. The court in *Allen v. Stoker*[88] addressed this issue after ruling that a beneficiary may not bring a claim against the attorney.

> Our ruling does not leave heirs without protection. If malpractice by the attorney for a personal representative causes injury to an estate, the injury ordinarily may be rectified through a malpractice action brought by the personal representative. If, on the other hand, a loss to the estate is caused by the malfeasance of the personal representative, the personal representative may be sued by the heirs.[89]

If fiduciary misconduct is a major concern, then the requirement for a fiduciary bond should be an essential element in the governing instrument in order to ensure the safety of a beneficiary.

As it stands now, the traditional theory provides benefits to all parties involved, including the beneficiary. The rule is simple, clear, and provides sufficient guidance. The traditional theory provides that (1) the fiduciary is the attorney's client, (2) the attorney owes fiduciary duties to the fiduciary alone, and (3) no other special duties are owed to a beneficiary or any other third party. This helps clarify the attorney's role and avoids a conflict of interest. Also, by clarifying where the attorney's loyalties rest, the fiduciary is able to openly communicate with the attorney in order to receive the best advice and representation. With the fiduciary and attorney communicating openly, the fiduciary will not suffer from being ill-informed and will be more capable of fulfilling his fiduciary duties and properly administering the trust or estate, which will benefit the beneficiary.

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88 61 P.3d 622 (Idaho Ct. App. 2002).

89 *Id*. at 624.

VII. Recommendations

Overall, the traditional theory is the best approach to satisfy the needs of all parties. It is clear who the attorney's client is and to whom fiduciary duties are owed. The fiduciary is able to take full advantage of legal counsel and thus more competently fulfill his fiduciary duties. A beneficiary will benefit from having a well-advised fiduciary administering the trust or estate. While a beneficiary may not bring a suit against the fiduciary's attorney unless a negative duty was violated, she may still seek redress from the fiduciary for his misconduct. Further, if there are any issues of concern to the beneficiary, she is free to retain her own independent legal counsel for her own personal benefit.

In order to strengthen the traditional approach, states should adopt a change to their rules of professional conduct. Most states' rules do not grant an attorney the discretion to disclose a fiduciary's breach. States should follow Washington's lead and amend their rules to permit this disclosure. However, Washington's rule is still too narrow. Permitted disclosure should not be limited to disclosures to the court for court-appointed fiduciaries only. Disclosure for a breach should be permitted to the beneficiary as well as to the court when an attorney represents any fiduciary, court-appointed or not. The decision to disclose a fiduciary's breach should belong exclusively to the attorney. The attorney should not be liable to either the fiduciary for disclosing nor to the beneficiary for failing to disclose a breach. While disclosure of a fiduciary's breach should be permitted, the rules should clarify that disclosure is permitted only for fraudulent activity or another activity that may result in a substantial loss to the beneficiary. A small and negligent act that results in a breach should not be disclosed, especially when it can easily be remedied without harm to the beneficiary.

States should adopt a rule that reads similar to the following: A lawyer, to the extent the lawyer reasonably believes necessary, may reveal information relating to the representation of a client to inform a tribunal or a beneficiary about any material breach of fiduciary responsibility when the client is serving as a fiduciary such as a guardian, personal representative, trustee, or receiver.

The joint-client and entity theories may have certain advantages that are not incorporated in the traditional theory. However, the inherent problems that accompany those theories come at too great a cost. States that have not already done so should adopt the traditional theory and clarify that the fiduciary, and not the beneficiary or the estate, is the attorney's only client and the beneficiary is entitled only to negative duties from the attorney.