

ETHICS: THE POWER OF ATTORNEY

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A. Who is the Client?

The diligent attorney is often faced with difficult multi-faceted legal questions and intricate situations which require the attorney to address an array of ethical considerations. However, surprisingly enough, one of the most difficult questions an attorney must answer, especially in the realm of elder law, even before accepting an engagement to perform legal services, is “who is my client?” An attorney must always clearly define who his or her client is in order to answer questions such as whether a potential conflict of interest exists in the event the attorney should wish to accept an engagement with a potential client. Once the attorney makes an affirmative decision as to who is the client, the attorney must be mindful of the professional duties which he or she owes to the new client, including, but not limited to, duties of loyalty, diligence, confidentiality, and competence.

How does an attorney overcome the apparent complexity of the relatively simple question “who is the client?” Attorneys should be aware that several factors may affect this decision-making process, ranging from the dependence of the elder on one or more

family members and/or close friends to the elder who experiences momentary lapses in lucidity creating a question of whether the elder has the capacity to enter into certain contemplated transactions.

No litmus test exists for the determination of who is the client in the realm of elder law. Accordingly, the goal of this section is to set forth variables that are likely to be present in the situation of the elder seeking the advice of an attorney through a discussion of several hypothetical situations. The lack of clarity often associated with a determination of who is the client in the situation of the elder seeking the assistance of an attorney emphasizes the need for any attorney who practices elder law to maintain an acute awareness of the surrounding circumstances and also to develop skills whereby the attorney is able to interpret familial relationships in order to understand any implicit factors that may be present. Through the development of such skills, the elder law attorney will be better equipped to make a well-informed, astute decision concerning whether to accept a potential engagement with an elder as well as who the attorney's client will be in the event the attorney should choose to accept the proffered engagement.

I. Scenario One: Joint Representation of Husband and Wife

A common scenario in elder law and estate planning is the husband and wife who wish for an attorney to jointly represent the husband and wife in connection with the preparation of estate planning documents on their behalf, such as reciprocal wills and powers of attorney instruments. Joint representation of a husband and wife presents a potential conflict of interest which an attorney must address; however, such a joint representation of a husband and wife limited to the preparation of reciprocal estate planning documents does not typically result in an impermissible conflict of interest with regard to the attorney's representation of both the husband and wife. Even so, the exception to the typical situation all too often becomes the reality.

Assume the factual scenario set forth above remains the same except the following facts are added to the scenario:

Several years have now passed since husband and wife executed their respective reciprocal estate planning documents prepared by the attorney in connection with the joint representation engagement, including a will in which husband and wife each named the other as the sole beneficiary, if he or she is living at the date of death of the other, and, if not, then in equal shares to each of their children. Attorney/drafter has not had contact with either husband or wife since the conference held for the purpose of execution of such documents by husband and wife. Husband now telephones attorney and explains that he would like to revoke his will (which refers to the will earlier drafted by such attorney) and would therefore like the attorney to prepare a new will which bequeaths his entire estate to his longtime, much younger mistress. However, husband cautions (as one might expect) that the attorney should not discuss this matter with husband's wife.

The foregoing fact pattern presents multiple questions which must be addressed by the attorney before the attorney notifies the husband whether the attorney is willing to prepare a new will on behalf of the husband. The conflict of interest created by this fact pattern will be discussed in greater detail in the "Duty of Loyalty" section with regard to an attorney's joint representation of a husband and wife.

As stated earlier, joint representation of a husband and wife presents a potential conflict of interest (as evidenced by the additional facts) which must be communicated to the husband and wife by the attorney prior to the attorney's agreement to joint representation of the husband and wife. Comment 18 of Rule 1.7 of the Virginia Rules of Professional Conduct recognizes the potential for a conflict of interest in the event an attorney accepts a joint engagement to prepare wills on behalf of two or more family members and advises that the attorney "should make clear his relationship to the parties

involved”.¹ In addition, prior to acceptance of an engagement involving joint representation of a husband and wife, an attorney should review Rule 1.7 of the Virginia Rules of Professional Conduct, which sets forth guidelines the attorney must consider in making a determination as to whether a conflict of interest exists as well as how the attorney may proceed in the event of such a conflict of interest.²

If an attorney decides that his or her acceptance of the contemplated joint representation engagement would not violate the standards set forth in Rule 1.7 of the Virginia Rules of Professional Conduct, then the attorney should discuss the potential conflict of interest with both the husband and wife in order to ensure each fully understands the implications of joint representation. Paragraph (b) of Rule 1.7 of the Virginia Rules of Professional Conduct requires that, in the event a concurrent conflict of interest exists, the consent of the clients to joint representation must be memorialized in

¹ Virginia Rules of Prof'l Conduct R. 1.7 cmt. 18 (Virginia State Bar 2005-2006).

² Virginia Rules of Prof'l Conduct R. 1.7 (Virginia State Bar 2005-2006) states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
- (1) the representation of one client will be directly adverse to another client; and
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) the consent from the client is memorialized in writing.

writing.³ Although the consent may be memorialized by any writing, “including, but not limited to, an attorney’s notes or memorandum,” even if such notes or memorandum are not “signed by, reviewed with, or delivered to the client”, the attorney may consider asking the husband and wife to sign a waiver of the potential conflict of interest.⁴ An attorney may draft a waiver of the potential conflict of interest in the form of a letter which addresses the treatment of confidential information in the event of joint representation of the husband and wife. An attorney should clearly state in such letter that communications between the attorney and husband or wife with regard to the estate planning engagement will not be considered privileged and private in the event the husband and wife agree to the joint representation. The attorney may also wish to include language explaining that had the husband and wife each sought independent, individual legal counsel in connection with the contemplated joint estate planning engagement, then both husband and wife would have received independent advice and the confidential communications between husband and wife and their respective attorneys would have most likely been privileged and kept private. The attorney may also wish to advise the husband and wife of the potential conflict of interest which may arise in connection with differing interests of the husband and wife with regard to matters such as the selection of an executor and trustee and legal and tax implications, including the disposition of their respective estates should husband and wife die simultaneously.

Should a husband and wife wish for their respective communications with the attorney to remain privileged and private, the attorney may wish to consider the permissibility and feasibility of a recommendation of concurrent, yet separate representation of the husband and wife by the attorney even though the husband and wife seek to engage the attorney for a similar purpose. However, attorneys should understand,

³ *Id.*

⁴ *Id.* at cmt. 10.

that unless otherwise stated in an engagement letter or similar document, an attorney's representation of a husband and wife in connection with the preparation of various estate planning documents is presumed to be a joint representation of the husband and wife and the attorney is permitted to share confidences related to the subject of the representation between the husband and wife. ⁵ In its commentary on Rule 1.6 of the Model Rules of Professional Conduct with regard to confidentiality of information and an attorney's separate representation of multiple clients in connection with similar matters, The American College of Trust and Estate Counsel emphasizes that an attorney who makes the decision to employ a series of separate representations under such circumstances "should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately". ⁶ The American College of Trust and Estate Counsel also emphasizes that an attorney should agree to separate representation of a husband and wife under the aforementioned circumstances only if the attorney fully discloses to the husband and wife the implications associated with separate representation and both the husband and wife consent to the separate representation after such full disclosure by the attorney. ⁷

An attorney should always prepare an engagement letter for review and acceptance by a potential client, regardless of whether a joint or separate representation is being considered. The National Academy of Elder Law Attorneys prepared a series of aspirational standards in the Fall of 2005 which enumerate various topics which should be addressed by an attorney in the preparation of an engagement letter, including

⁵ See ACTEC Commentaries on the Model Rules of Professional Conduct on Model R. 1.6 (The American College of Trust and Estate Counsel) (3d ed. 1999) <http://www.actec.org/pubInfoArk/comm/toc.html> [hereinafter ACTEC Commentaries].

⁶ *Id.*

⁷ *Id.* on Model Rule 1.7.

identification of the client who is the subject of the representation, a description of the scope and objective(s) of the representation as agreed upon by the client and the attorney, a description of “any relevant foreseeable conflicts among the clients”, the manner in which the fee will be determined and any hourly rates, if applicable, events that may terminate the attorney-client relationship, and, as discussed earlier, a representation by the attorney that he or she will share confidences between the husband and wife should the attorney accept an engagement to jointly represent the husband and wife. ⁸ For an example of a joint spousal representation engagement letter and a concurrent separate spousal representation engagement letter, refer to *Engagement Letters: A Guide for Practitioners* prepared by The American College of Trust and Estate Counsel. ⁹ Prior to preparation of an engagement letter which addresses concurrent separate spousal representation, an attorney should seriously consider the cautionary language associated with the latter sample engagement letter referenced in the preceding sentence, “[c]onflicts of interest and confidentiality are of paramount concern if a lawyer undertakes concurrent separate representation of spouses. Such representation should only be undertaken after careful consideration of all possible conflicts of interest”. ¹⁰

⁸ Aspirational Standards for the Practice of Elder Law with Commentaries Standard A-3 (Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys 2005) [hereinafter NAELA Aspirational Standards]. Note the Preamble to the NAELA Aspirational Standards states, in part, “[e]ach state’s professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses. The NAELA Aspirational Standards build upon and supplement those rules. Attorneys who aspire to and meet these Standards will elevate their level of professionalism in the practice of Elder Law, and enhance the quality of service to their clients. As attorneys meet these Standards, the practice of Elder Law will be raised to a higher standard of professionalism.” *Id.* at Preamble.

⁹ *Engagement Letters: A Guide for Practitioners* (The American College of Trust and Estate Counsel) (June 1999), § I, <http://www.actec.org/pubInfoArk/comm/engltrch1.htm> [hereinafter *Engagement Letters: A Guide for Practitioners*].

¹⁰ *Id.*

II. Scenario Two: Third Party Participation in Engagement

An attorney may also be presented with a situation in which an elder arrives at the attorney's office for an initial conference accompanied by a third party who may be a family member, close friend, or even a neighbor who purports to be present at your office either at the request of the elder, or, at the very least, on behalf of the best interests of the elder. The range of involvement by such third party, whether family member, close friend, or neighbor, varies on a case by case basis. In some instances, the third party may act as a facilitator or personal planner for the elder, telephoning the attorney's office to schedule appointments between the elder and the attorney and then driving the elder to and from such scheduled appointments. At other times, the third party may accept a much more active role in which the third party conducts much or all of the action referenced in the preceding sentence and also expresses a desire to attend meetings between the elder and the attorney.

Just as there is no litmus test for determining who the client is in connection with a potential elder law engagement, no litmus test exists for determining the appropriate level of involvement of a third party in an elder law engagement. An attorney must initially determine whether the elder truly wishes for the third party to be involved with the engagement or whether undue influence is a potential factor. In order to make such a determination, the attorney should recommend a private meeting with the elder prior to meeting with both the elder and the third party and encourage the elder to speak freely concerning the involvement of the third party. If the elder will not agree to a private meeting, the attorney must try and absorb as much as possible during his or her initial conferences with the elder and the third party, including an observance of the interaction between the elder and the third party, in order to independently determine the likely role of the third party without reliance on the purpose expressed by either the elder or the third party himself or herself. Once an attorney determines the role of the third party in the professional relationship between the attorney and the elder, the attorney must also

consider how such third party involvement may impact the confidentiality of information shared between the elder and the attorney throughout the course of the representation.

a. Diminished Capacity Considerations

Important factors to consider when a third party accompanies an elder are the mental and physical capacity of the elder. The attorney may be faced with a situation in which the elder has at least some diminished mental capacity and, while mostly lucid, the elder does experience momentary lapses of memory loss. In such event, the utility of the third party being present at meetings between the elder and the attorney becomes much more understandable than the situation in which the elder does not appear to suffer from any diminished capacity. Since an attorney may not be able to make a determination concerning whether an elder is of questionable capacity at the attorney's initial meeting with the elder, an attorney may find it advantageous to develop a list of questions which he or she regularly asks during initial meetings with elders in order to better determine their mental capacity.¹¹ The NAELA Aspirational Standards recommend that an attorney "follow a consistent and deliberate process to preliminarily screen clients for capacity" and also recommend that an attorney "document the observations that support the attorney's conclusion that capacity is an issue".¹² Among the factors an attorney may wish to consider in making a determination concerning the mental capacity of an elder client are:

- i. The client's ability to articulate reasoning behind his or her decision;

¹¹ See NAELA Aspirational Standards, *supra* note 8, at Standard E-2 which states that the elder law attorney "[d]evelops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand".

¹² *Id.* at Standard E-2 cmt. See, e.g., Standard E-2, n.19 which identifies the ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) as a potential source of reference for the attorney in the context of potential issues associated with client incapacity.

- ii. The variability of the client's state of mind;
- iii. The client's ability to appreciate the consequences of his or her decision;
- iv. The irreversibility of any decision;
- v. The substantive fairness of any decision;
- vi. The consistency of any decision with lifetime commitments of the client.¹³

Attorneys should be aware that, depending upon the action to be taken by the elder, such as execution of a will versus execution of a contract, the level of requisite capacity varies, and thus attorneys should familiarize themselves with the requisite level of capacity necessary for an elder to consummate the contemplated action.¹⁴ The American Bar Association Commission on Law and Aging and the American Psychological Association have prepared a handbook for attorneys in connection with the assessment of client capacity.¹⁵ The handbook describes in detail a series of steps an attorney should follow in order to conduct a thorough analysis with regard to the capacity of a client, including:

- A. Observe and interpret signs of diminished capacity;
- B. Evaluate understanding in relation to the specific legal elements of capacity for the transaction at hand;
- C. Consider the degree of risk to the client and the ethical factors set out in the Comment to Rule 1.14;
- D. Complete the legal analysis;
- E. Document capacity observations; and

¹³ *Id.* at Standard E-2, n.20 (quoting *The Fordham Conference*, 62 Fordham L. Rev. 989 (March 1994)).

¹⁴ *Id.* at Standard E-2 cmt.

¹⁵ ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) (hereinafter *Handbook for Lawyers*).

F. Take appropriate actions in response. ¹⁶

The NAELA Aspirational Standards also set forth numerous means by which attorneys may attempt to maximize their professional relationship with an elderly client, such as the utilization of different interviewing techniques whereby the attorney schedules multiple conferences of shorter duration with the elderly client (versus fewer conferences of longer duration) and the implementation of visual aids to emphasize key points to the elderly client. ¹⁷ The ultimate goal of the attorney should be to maximize client understanding of the contemplated action and, in accordance with such goal, the attorney should be willing to consider different options which may prove useful in the pursuit to maximize client understanding. Attorneys should always remember that each elderly client is a unique individual, with his or her own personal characteristics and learning style, and, therefore, the attorney-client relationship will be most productive when the attorney maintains a malleable methodology capable of tailoring throughout the course of the representation in order to best coincide with the individual characteristics of each elderly client. ¹⁸

b. Physical Capacity Considerations

Should an attorney conclude that his or her client does not suffer from diminished capacity, the attorney must look elsewhere to determine the basis for the third party involvement in the elder's engagement with the attorney. The impetus driving third party involvement in a professional engagement may be based upon a lack of physical capacity of the elder, such that the elder relies upon the third party for assistance with travel to and from everyday appointments. If the involvement of the third party is solely based on a lack of physical capacity versus a lack of mental capacity, then the attorney may wish to strongly encourage the elderly client to meet independently with the attorney in order to

¹⁶ *Id.*

¹⁷ NAELA Aspirational Standards, *supra* note 8, at Standard E-3 cmt.

¹⁸ *See id* at Standard E-2 cmt. which states “[t]he intelligence, experience, mental condition, and age of the client affect the attorney’s responsibilities to the client”.

preserve client confidentiality and also to minimize the likelihood of undue influence by the third party on the interests of the elderly client. Attorneys should be sympathetic to the physical needs of their elderly clientele and strive to create a comfortable environment not only for their clients, but also for third parties who expend their time to enable the elder to attend the meeting and wait patiently in the reception area for the duration of such meeting rather than being present in the meeting.

c. Undue Influence Considerations

Attorneys should be aware that undue influence may be a significant factor in the relationship between an elder and a third party who is actively involved in an elder law engagement between the elder and his or her attorney. An attorney may wish to review estate planning documents previously executed by the elder in order to compare the wishes expressed in such previously executed documents with the presently expressed wishes of the elder. Regardless of whether an attorney has the opportunity to review estate planning documents previously executed by the elder, the attorney should make the effort to meet privately with his or her client in order to emphasize his or her desire to act in the client's best interests and also to determine whether the elderly client might have vocalized certain wishes to the attorney, in the presence of the third party, which wishes are founded on a basis of undue influence by the third party and are not an accurate reflection of the true wishes of the attorney's elderly client in connection with the estate planning engagement.¹⁹ In the event the elderly client insists upon the presence of the third party rather than meeting individually with the attorney, the attorney should emphasize the importance of an independent, private meeting between only the elderly client and the attorney. The attorney may also wish to express that such an independent, private meeting between the elderly client and the attorney is necessary since the scope of the attorney's representation is limited to the client and does not extend to the third party

¹⁹ See *id.* at Standard A-2.

and, in accordance with such, the attorney needs to understand the client's wishes "unencumbered and uninfluenced".²⁰

Although an unfortunate circumstance, attorneys should understand that family members who are actively involved in an estate planning engagement between an elderly relative and an attorney are not always interested in furthering the best interests of the elderly relative. Oftentimes, the active family member is driven more by his or her own self-interest. The family member may be capable of exerting his or her influence in the estate planning objectives of the elderly relative in such a manner that the elderly relative honestly believes the family member has the elderly relative's best interests in mind and is not attempting to further his or her own, independent interests.

The handbook prepared by the American Bar Association Commission on Law and Aging and the American Psychological Association discussed earlier also addresses the fundamental differences between an assessment of capacity versus an assessment of undue influence, stating "[c]apacity assessment focuses on the fit between the individual's cognitive, functional, and decisional abilities and the complexity and risk of the legal transaction at hand" whereas "undue influence refers to a dynamic between an individual and another person".²¹ The handbook also delineates certain factors which may evidence the existence of undue influence in a relationship, including "whether the elderly client appears fearful, isolated, overly dependent or vulnerable, or seems overwhelmed by or unaware of financial information"; the attorney may also find it beneficial to assess the type of relationship which exists between the elderly client and the third party as well as the duration of such relationship when the third party is a non-relative.²² Other factors to consider include "the content and tenor of comments, how

²⁰ *Id.* at Standard A-2 cmt.

²¹ *Handbook for Lawyers, supra* note 15, at 16.

²² *Id.*

supportive or dominating the family member may be, and how consistent or inconsistent the client's stated objectives are with prior wishes evidenced by estate planning documents or other expressions of intent".²³

Attorneys should always be cognizant of the ongoing interactions between elderly clients and actively involved third parties since the relationship between such parties may differ between the initial meeting in which the attorney gauged the likelihood of undue influence and any meeting thereafter in connection with the engagement. In order to best represent the interests of his or her elderly clients, attorneys should be wary if an elderly client continually represents to the attorney that he or she wishes to do whatever his or her children desire. In such a situation, the attorney should consider requesting a private meeting with the elderly client, notwithstanding the fact that the attorney may have already had one or more private meetings with such client, in order to reevaluate the likelihood that undue influence is a presenting factor and also to "determine the client's goals and priorities in contrast to the children's wishes".²⁴

d. Confidentiality Considerations

When a third party accompanies an elderly client to the initial conference with the attorney, or at any time thereafter, the attorney should discuss with the elderly client the potential implications associated with the presence of the third party in connection with attorney-client confidentiality. Attorneys should understand the implications associated with the presence of one or more third parties in a meeting between attorney and client, so far as such implications concern the confidentiality of client information. Attorneys should also take measures to inform their elderly clients of such potential implications so that their clients are equipped with the information necessary to make an informed decision as to whether they wish for a third party to remain present even if such a

²³ NAELA Aspirational Standards, *supra* note 8, at Standard A-2 cmt.

²⁴ *Id.*

presence negates any confidentiality privileges which may have otherwise attached to communications between the attorney and his or her client.

III. Scenario Three: Concurrent, Yet Separate, Representation of Family Members

Scenario One above discussed the hypothetical husband and wife who wish to engage an attorney for a similar purpose and the factors for consideration when an attorney must make a decision whether to jointly represent the husband and wife or recommend concurrent, yet separate, representation of the husband and wife. Even though attorneys often decide to jointly represent a husband and wife in connection with an estate planning engagement, is it acceptable for an attorney to utilize joint representation in the context of other familial relationships? The NAELA Aspirational Standards recognize generally that the utilization of a joint representation relationship may “further shared goals, common interests, family harmony, economic efficiency, consistency of action, and enhanced likelihood of serving the best interests of the clients”;²⁵ however, the NAELA Aspirational Standards do not endorse the idea of an attorney representing a family as an entity.²⁶ In contrast to the concept of representation of a family as an entity, an attorney may choose to represent multiple family members in a combination of separate and joint representations, *i.e.*, the attorney jointly represents a husband and wife in connection with their estate planning objectives and, in connection with a separate engagement, the attorney also jointly represents a child of husband and wife and the spouse of the child in connection with their estate planning objectives. In

²⁵ *Id.* at Standard B.

²⁶ *Id.* at Standard B-1, n.3. See also Rebecca C. Morgan, *Who is the Client? Ethical Issues in an Elder Law Practice*, 16 J. Am. Acad. Matrimonial Law. 463, 478 (2000) which states with regard to the Model Rules of Professional Conduct, such rules “are designed to protect individuals and utilize the concept of family as the client undermines the provided protections”.

her article with regard to the ethics of intergenerational representation in the context of elder law prepared in response to the Fordham Conference held in March, 1994, Teresa Stanton Collett highlights the advantages associated with separate representation, “[t]hrough individual representation, the lawyer offers clients a refuge from the pressures that other family members exert and the opportunity to be represented by someone who has no higher duty than to serve the individual client”, versus the advantages associated with joint representation, “[i]n joint representation, clients may present a united front to those outside the family, whether friend or foe”.²⁷ Regardless of whether an attorney decides to represent one or more related clients separately or jointly, or in a combination thereof, attorneys should take care to define the scope of each representation through the preparation of an engagement letter. Attorneys should also take the necessary measures to ensure that clients fully understand the scope of their respective engagements, including any limitations associated therewith.

Attorneys must comply with all applicable rules of professional conduct associated with conflict of interest concerns, including, in Virginia, Rule 1.7 of the Virginia Rules of Professional Conduct, which rule was discussed earlier in connection with the attorney who is considering joint representation of a husband and wife.²⁸ In addition, attorneys must not only define who are the clients when representing multiple family members in a combination of joint and concurrent separate engagements and clearly relate the scope and definition of such relationships to the clients while complying with all applicable rules of professional conduct, but the attorney must also take the necessary precautions to preserve client confidences in order to fulfill the attorney’s duty of loyalty to each of his or her clients.

²⁷ Teresa Stanton Collett, *Response to the Conference: The Ethics of Intergenerational Representation*, 62 Fordham L. Rev. 1453, 1500-01 (March 1994).

²⁸ Virginia Rules of Prof’l Conduct Rule 1.7 (Virginia State Bar 2005-2006).

IV. Scenario Four: Third Party Intends to Pay Attorney's Fees on Behalf of Elderly Client

Another way in which a third party may be intimately involved in the professional relationship between an elder and his or her attorney is through a more “behind the scenes” fashion as the party responsible for payment of any attorney’s fees incurred on behalf of the elderly client in connection with an estate planning engagement. Although such a relationship among an elderly client, third party payor, and attorney is not strictly prohibited, certain considerations must be addressed prior to an attorney’s agreement for a third party to bear the responsibility for the professional fees incurred in connection with the attorney’s representation of the elderly client.

Assume that an elderly parent and adult child arrange an appointment to meet with an attorney in order to discuss the potential representation by the attorney of the elderly parent in connection with an estate planning engagement in which the adult child would be the primary beneficiary of the estate of the elderly parent. The adult child explains that although he does not wish to be actively involved in the professional relationship between his elderly parent and the attorney, the adult child does wish to bear responsibility for all attorney’s fees incurred in connection with the anticipated engagement.

Rule 1.8(f) of the Virginia Rules of Professional Conduct states:

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and (3) information

relating to representation of a client is protected as required by Rule 1.6.²⁹ Comment 4 of Rule 1.8 of the Virginia Rules of Professional Conduct states, that in addition to compliance with the requirements set forth in Rule 1.6³⁰ with regard to confidentiality of information, in order for an attorney to accept payment from a third party payor the attorney must also comply with Rule 1.7³¹ with regard to conflicts of interest and Rule 5.4(c)³² with regard to the professional independence of an attorney.³³

NAELA Aspirational Standard A-4, which discusses the circumstances in which an attorney may accept third party payment for professional fees incurred by a client, closely mirrors Rule 1.8 of the Virginia Rules of Professional Conduct and highlights the “ethical ground rules” in connection with third party payment of fees, their being “non-interference by the payer, independence of judgment by the attorney on behalf of the client, and confidentiality”.³⁴ The NAELA Aspirational Standards emphasize the

²⁹ Virginia Rules of Prof'l Conduct R. 1.8(f) (Virginia State Bar 2005-2006). *See also* Virginia Rules of Prof'l Conduct R. 1.7 cmt. 15 (Virginia State Bar 2005-2006) which states “[a] lawyer may be paid from a source other than the client if the client is informed of that fact and consents and the arrangement does not compromise the lawyer’s duty of loyalty to the client”.

³⁰ Virginia Rules of Prof'l Conduct R. 1.6 (Virginia State Bar 2005-2006) states, in part, “[a] lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c)”.

³¹ Virginia Rules of Prof'l Conduct R. 1.7 (Virginia State Bar 2005-2006).

³² Virginia Rules of Prof'l Conduct R. 5.4 (c) (Virginia State Bar 2005-2006) states “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services”.

³³ Virginia Rules of Prof'l Conduct R. 1.8 cmt. 4 (Virginia State Bar 2005-2006).

³⁴ NAELA Aspirational Standards, *supra* note 8, at Standard B-4.

importance of communication between both the attorney and his or her elderly client and the attorney and third party payor concerning the ethical obligations which arise in connection with such a scenario and even recommend that an attorney prepare a document for signature by the elderly client authorizing such third party payment. ³⁵

The NAELA Aspirational Standards also emphasize the importance of the attorney communicating to the third party payor that the attorney's representation is solely of the elder and, since such representation does not extend to include the third party payor, the privilege of confidentiality of information exists only between the attorney and his or her elderly client and does not extend to the third party payor. ³⁶ In the event an elderly client wishes for his or her attorney to share with the third party payor details of the representation, the attorney should explain to the elderly client the implications associated with the disclosure to a third party of confidential communications between an attorney and client. The attorney should also require the informed consent of the elderly client to such disclosure prior to the attorney disclosing any information in connection with the representation to the third party payor.

In the event an attorney agrees to allow a third party to bear responsibility for the professional fees incurred in connection with the attorney's representation of an elderly client, the attorney must consider the manner in which he or she may evidence the amount of, and basis for, such fees to the third party payor. When the client bears responsibility for professional fees incurred, an attorney will often provide the client with a detailed statement for services rendered which sets forth the nature of the services performed by the attorney and/or his legal staff during the applicable billing cycle. For example, an attorney may prepare a statement for services rendered in connection with an elder law engagement in accordance with the following format:

³⁵ *Id.* at Standard B-4 cmt.

³⁶ *Id.*

FEE FOR PROFESSIONAL SERVICES RENDERED on behalf of Sally Jones in connection with an elder law engagement for the period beginning January 1, 2006 and ending February 28, 2006, including, but not necessarily limited to, the following:

<u>Date</u>	<u>Description</u>	<u>Hours</u>
01/05/2006	ABC telephone with Sally Jones	0.1
01/12/2006	ABC review of previously executed Last Will and Testament of Sally Jones; conference with Robert Fields, Esquire	1.0
01/24/2006	ABC conference with Sally Jones with regard to potential gifts to family members	2.0
02/18/2006	ABC preparation of durable power of attorney document and the Sally Jones Revocable Trust	2.5
Total Hours (ABC at \$150.00 per hour)		5.6
TOTAL		<u>\$ 840.00</u>

Although it is acceptable and advisable for an attorney to prepare a detailed statement for services rendered for review by the client, an attorney must consider whether it is

permissible to also provide a third party payor with a copy of such detailed statement for services rendered. Virginia Legal Ethics Opinion #1645 addressed the obligation of an attorney to provide a third party payor with an itemized statement of fees due.³⁷ The Committee stated that an attorney is not ethically obligated “to provide an itemized accounting of his or her fees to persons other than the client, even though such third party may be responsible for the payment of such legal fees, incident to a contract between the client and such third party”.³⁸ In order to ensure the confidentiality of information between the attorney and his or her client, an attorney may wish to prepare a summarized version of the statement of services rendered which does not disclose confidential information related to the attorney’s representation of his or her client and which the attorney may then share with the third party payor for his or her review.

V. Scenario Five: The Power of Attorney Instrument

Power of attorney instruments may also present a question of who is the client. An attorney may be asked to prepare a power of attorney instrument on behalf of a client in connection with an estate planning engagement. Alternately, an attorney may be asked by an attorney-in-fact acting under a power of attorney to represent the attorney-in-fact in connection with the administration of his or her fiduciary obligations on behalf of the principal.

An individual retains an attorney to prepare various estate planning documents on his behalf, including the preparation of a power of attorney instrument which names such individual’s wife as the initial attorney-in-fact and such individual’s eldest daughter as the successor attorney-in-fact.

³⁷ Virginia State Bar Comm. on Legal Ethics, Informal Op. 1645 (1995).

³⁸ *Id.*

In the above scenario, the attorney clearly represents the client as principal in connection with an estate planning engagement which expressly included the attorney's preparation of a power of attorney instrument on behalf of the client. In accordance with the NAELA Aspirational Standards, an attorney should only prepare a power of attorney instrument on behalf of a client if such client will be named as the principal in connection with such instrument; further, an attorney is responsible for the proper execution of any such instrument prepared by the attorney on behalf of his or her client.³⁹ In its discussion of who is the client when an attorney-in-fact seeks an attorney's advice concerning administration of his or her fiduciary obligations under a power of attorney instrument, the Elder Law Answer Book reflects the NAELA Aspirational Standards and posits that, in the event the interests of the principal and attorney-in-fact diverge, the attorney's duty is to serve the interests of the principal.⁴⁰

An attorney-in-fact seeks the advice of an attorney concerning the fiduciary duties owed by him on behalf of a principal. The attorney did not prepare the power of attorney instrument on behalf of the principal and the attorney has not previously represented either the attorney-in-fact or the principal in connection with any legal matter.

In the above scenario, the attorney-in-fact clearly owes a fiduciary duty to the principal. However, to whom does the attorney owe a duty of loyalty – the attorney-in-fact as fiduciary, the principal, or both the attorney-in-fact and the principal? Based upon the fact pattern set forth in the foregoing scenario, the NAELA Aspirational Standards do

³⁹ NAELA Aspirational Standards, *supra* note 8, at Standard A-4 cmt.

⁴⁰ Robert B. Fleming, Elder Law Answer Book § 10:41 (Aspen Publishers, Inc. 2004).

not imply an attorney-client relationship between the principal and the attorney; however, the NAELA Aspirational Standards do recommend that an attorney take the necessary steps to ensure that his or her client, the attorney-in-fact, “understands that the duties of both the fiduciary and the attorney ultimately are governed by the known wishes and best interest of the principal”.⁴¹

In *Keatinge v. Biddle*, the Maine Supreme Judicial Court addressed the question of whether an attorney-client relationship may ever exist between an attorney and principal when an attorney-in-fact seeks the advice of the attorney concerning the administration of his or her fiduciary obligations under a power of attorney instrument.⁴² The court referred to a three-prong test for the determination of whether an attorney-client relationship exists: “(1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney’s professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance”.⁴³ The court answered the posited question in the affirmative finding that although “the mere fact that the person holding the power of attorney retains counsel does not create an attorney-client relationship between the attorney and the grantor . . . facts may develop in particular cases that could support a finding that such an attorney-client relationship between attorney and grantor has been created”.⁴⁴

In *Albright v. Burns*, the Superior Court of New Jersey, Appellate Division, also held that an attorney-client relationship may be inferred between an attorney and a principal when an attorney-in-fact seeks the legal advice of the attorney in connection

⁴¹ NAELA Aspirational Standards, *supra* note 8, Standard B-6.

⁴² *Estate of Keatinge v. Biddle*, 789 A.2d 1271 (Me. 2002), *aff’d*, 2002 CO1 384 (1st Cir. 2002).

⁴³ *Id.*

⁴⁴ *Id.*

with the administration of his or her fiduciary obligations under a power of attorney instrument. ⁴⁵ The superior court cited *In re Palmieri* ⁴⁶ for the propositions that (i) “an attorney’s acceptance of representation need not be articulated and may be inferred from the conduct of the parties” and (ii) “a member of the bar owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his professional capacity”. ⁴⁷ The superior court also enumerated factors to consider when making a determination as to whether a duty of the attorney extends to the third party principal, stating that such a determination:

[I]nvolves the balance of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm. ⁴⁸

The findings in both *Keatinge v. Biddle* and *Albright v. Burns* demonstrate that, even though an attorney may determine that the attorney-client relationship is limited to he or she and the attorney-in-fact as fiduciary under a power of attorney instrument, the attorney may still owe a fiduciary duty of loyalty to the principal.

An attorney may find it beneficial to prepare a detailed engagement letter which explicitly addresses the duty of loyalty which the attorney may owe to the principal even though the attorney only represents the attorney-in-fact as fiduciary under the power of attorney instrument. A detailed engagement letter may provide the clarity necessary to

⁴⁵ *Albright v. Burns*, 503 A.2d 386, 389 (N.J. Super. Ct. App. Div. 1986).

⁴⁶ *In re Palmieri*, 385 A.2d 856 (N.J. 1978).

⁴⁷ *Albright v. Burns*, 503 A.2d at 389.

⁴⁸ *Id.* at 390.

avoid confusion by the attorney-in-fact concerning the attorney's role in connection with his or her representation of the attorney-in-fact as fiduciary under the power of attorney instrument. In his discussion of Rule 1.2 of the Model Rules of Professional Conduct with regard to conflicts of interest, one author stated “[w]hile the major ethical difficulties when representing fiduciaries arise from potential conflicts of interest, such difficulties can be exacerbated, if not created, due to a lack of clarity between the lawyer and the fiduciary and other interested parties as to the scope and objectives of the lawyer’s representation”.⁴⁹

B. Duty of Loyalty

Once an attorney determines who is the client, the attorney will need to keep this knowledge a constant factor when proceeding forward with the engagement in order to avoid confusion as to whom he or she owes a duty of loyalty. A duty of loyalty is defined as “[a] person’s duty not to engage in self-dealing or otherwise use his or her position to further personal interests rather than those of the beneficiary”.⁵⁰ Comment 1 of Rule 1.7 of the Virginia Rules of Professional Conduct, which sets forth the general rule with regard to conflicts of interest, states, in part, that “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client”.⁵¹

The authors of the article entitled “Revisiting the Ethics of Medicaid Planning”, which appeared in the Summer 2004 issue of the NAELA Quarterly, define the attorney-client relationship as “a creature of contract” and state that, once the attorney-client

⁴⁹ Paul A. Sturgel, *Model Rule 1.2 - A Proposed NAELA Commentary*, NAELA Quarterly, Winter 2001, at 8.

⁵⁰ Black’s Law Dictionary 523 (7th ed. 1999). “Self-dealing” is defined as “[p]articipation in a transaction that benefits oneself instead of another who is owed a fiduciary duty”. *Id.* at 1364.

⁵¹ Virginia Rules of Prof’l Conduct R. 1.7 cmt. 1 (Virginia State Bar 2005-2006).

relationship is formed, “the attorney owes her client a duty of loyalty and diligence.”⁵² The authors support the idea of “principlism”, an idea which has been used in the realm of clinical medicine, as a “framework within which Elder Law Attorneys can resolve conflicts between the interests of the Elder and those who claim to speak for the Elder” by taking into account four principals: (i) autonomy, (ii) nonmaleficence, (iii) beneficence, and (iv) justice.⁵³ A summary of the central principals set forth in the preceding sentence is below:

- (i) Autonomy. “[T]he individuals freedom from controlling interference by others and from personal limitations that prevent meaningful choices, such as diminished mental capacity that affects understanding. Two conditions are essential for autonomy: liberty, which is the independence from controlling influences; and the individual’s capacity for intentional action”.⁵⁴
- (ii) Nonmaleficence. “[A]sserts an obligation not to inflict harm on the person to whom a duty of care is owed within a special relationship such as attorney-client ...”⁵⁵
- (iii) Beneficence. “[R]efers to actions performed that contribute to the welfare of the patient.”⁵⁶
- (iv) Justice. “[R]efers to fair, equitable and appropriate treatment in

⁵² Timothy L. Takacs & David L. McGuffey, *Revisiting the Ethics of Medicaid Planning*, NAELA Quarterly, Summer 2004, at 30.

⁵³ *Id.* at 31-32.

⁵⁴ *Id.* at 32.

⁵⁵ Takacs & McGuffey, *supra* note 52, at 32.

⁵⁶ *Id.*

light of what is due or owed to a person.”⁵⁷

The theory of principlism affords attorneys a series of ideologies by which to approach the attorney-client relationship by adapting a theory which is linked to the health care profession and molding such theory to apply within the realm of elder law. Even though scholars are able to create a framework by which to guide an attorney’s representation of his or her client under certain circumstances, as evidenced by the theory of principlism, attorneys should always remember their duty of loyalty and understand that the fulfillment of such duty may require the attorney to reach outside the bounds of theories defined by scholars. Each and every client engagement presents an attorney with a new, unique set of facts which must be carefully analyzed in order to ensure the attorney satisfies his or her duty of loyalty to the client.

I. Scenario One: Joint Representation of Husband and Wife

Recall the scenario set forth in the “Who is the Client” section in which husband and wife wished for the attorney to jointly represent them in connection with the preparation of various estate planning documents, including reciprocal wills, on their behalf. The facts of the scenario were then expanded as follows:

Several years have now passed since husband and wife executed their respective reciprocal estate planning documents prepared by the attorney in connection with the joint representation engagement, including a will in which husband and wife each named the other as the sole beneficiary, if he or she is living at the date of death of the other, and, if not, then in equal shares to each of their children. Attorney/drafter has not had contact with either husband or wife since the conference held for the purpose of execution of such documents by husband and wife. Husband now

⁵⁷ *Id.*

telephones attorney and explains that he would like to revoke his will (which refers to the will earlier drafted by such attorney) and would therefore like the attorney to prepare a new will which bequeaths his entire estate to his longtime, much younger mistress. However, husband cautions (as one might expect) that the attorney should not discuss this matter with husband's wife.

As stated in the last sentence of the above scenario, the husband is not willing to give the attorney permission to disclose to the husband's wife any details concerning the husband's wish to revise his previously executed will in order to change the beneficiary from the husband's wife to the husband's longtime, much younger mistress. Since the husband is unwilling to consent to the attorney's disclosure of such information to the husband's wife, the attorney should refer to the Virginia Rules of Professional Conduct in order to determine how best to proceed under the aforementioned circumstances. Rule 1.7, Conflict of Interest: General Rule, states:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; and
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) the consent from the client is memorialized in writing.⁵⁸

The attorney should have explained the implications of his or her joint representation of the husband and wife, as well as the advantages and risks associated with such joint representation, and considered the necessity of memorializing the consent of both the husband and wife prior to proceeding with the preparation of the requested estate planning documents on behalf of the husband and wife. Regardless of whether the attorney explained such implications and associated advantages and risks to the husband and wife at the onset of the engagement, the attorney is now faced with a conflict of interest in connection with his or her representation of the husband and wife which must be addressed. In order to proceed with his or her representation of the husband and prepare the requested revision to the husband's will, the attorney must determine whether he or she reasonably believes that he or she will be able to provide competent and diligent representation to the husband's wife and also whether it is permissible to disclose to the husband's wife that information which the attorney recently learned from the husband in order to obtain the informed consent of the wife.⁵⁹ Comment 10 of Rule 1.7 of the Virginia Rules of Professional Conduct states, in part:

⁵⁸ Virginia Rules of Prof'l Conduct R. 1.7 (Virginia State Bar 2005-2006).

⁵⁹ *Id.*

[T]here may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.⁶⁰ In accordance with the reasoning set forth in Comment 10 of Rule 1.7 of the Virginia Rules of Professional Conduct, since the husband refused to consent to the attorney's disclosure to the husband's wife of any information in connection with the husband's longtime, much younger mistress and the husband's wishes to amend his will, the attorney is not permitted to disclose to the husband's wife the information necessary for her to make an informed decision and thus the attorney cannot properly ask the wife to consent.

Professional Ethics Opinion 95-4 of the Florida Bar addressed facts similar to those set forth in the above scenario with the variations that (i) the husband has already executed a codicil (which codicil was prepared by another law firm) to his will in which he makes "substantial beneficial disposition to a woman with whom [h]usband has been having an extra-marital relationship" and (ii) the husband wishes for the attorney to "advise him regarding [w]ife's rights of election in the event she were to survive [h]usband".⁶¹ The Florida Ethics Opinion states, in part:

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to wife. The attorney must

⁶⁰ *Id.* at cmt. 10.

⁶¹ Florida State Bar, Formal Op. 95-4 (1997).

withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.⁶²

The Florida Ethics Opinion recognized an ethical duty of the attorney to maintain as confidential the information which the husband had not permitted the attorney to disclose and also recognized a duty of the attorney to "communicate to a client information that is relevant to the representation".⁶³ However, the Florida Ethics Opinion ultimately concluded that, under the presented fact pattern, the duty of the attorney to maintain the confidences of the husband "must take precedence"; the attorney does not have discretion to disclose information to the husband's wife, and, further, the attorney is prohibited from disclosing such information as a result of his "ethical obligation of confidentiality to [h]usband".⁶⁴ Similarly, Teresa Stanton Collett's article with regard to the Fordham Conference also discussed various ethical considerations in connection with an attorney's representation of an elderly client, stating "[a]voiding conflicts while maintaining confidences and independent professional judgment are the controlling ethical considerations in accepting representation of multiple family members in both the long-term and new client situations".⁶⁵

Should a husband and wife wish to engage an attorney for a related matter and also maintain independent confidences with such attorney, an attorney may wish to consider the permissibility and feasibility of concurrent, yet separate, representation of the husband and wife by attorney. For a more detailed discussion of concurrent, yet separate, representation of a husband and wife in connection with a related matter, refer to Scenario

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Collett, *supra* note 27, at 1457.

One of the “Who is the Client” section which discusses the merits of, and ethical considerations in connection with, joint representation versus separate representation of a husband and wife under such circumstances.

II. Scenario Two: The Power of Attorney Instrument

As discussed earlier in “Who is the Client”, an attorney-in-fact acting under a power of attorney instrument owes a duty of loyalty to the principal. However, the scope of authority of the attorney-in-fact will vary depending upon the terms of the power of attorney instrument itself. A duty of loyalty may also be imposed upon an attorney who accepts a legal engagement to advise the attorney-in-fact in connection with his or her administration of the fiduciary duties owed to the principal. An attorney who represents an attorney-in-fact as fiduciary may also owe a duty of loyalty to the principal notwithstanding the fact that the attorney decided an attorney-client relationship exists only between the attorney and the attorney-in-fact. The NAELA Aspirational Standards state, with regard to the duty of an attorney-in-fact to act under a power of attorney in accordance with the best interests of the principal and the duty of the attorney to advise the attorney-in-fact in accordance with the best interests of the principal to whom the attorney-in-fact owes a fiduciary duty:

The fiduciary is bound by the principal’s wishes, values, and best interests. The attorney should ensure that the fiduciary understands that the attorney also is bound by the principal’s wishes, values and best interests. Hence, the attorney may assist the fiduciary to take only those actions consistent with those factors. Both the fiduciary and the attorney owe a duty to the principal. ⁶⁶

See also Comment 8 of Rule 1.2 of the Virginia Rules of Professional Conduct with regard to the scope of an attorney’s representation which states “[w]here the client is a

⁶⁶ NAELA Aspirational Standards, *supra* note 8, at Standard E-8 cmt.

fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary”.⁶⁷

If an attorney-in-fact requests that his or her attorney take any action which is contrary to the earlier expressed wishes of the principal and does not further an alternative interest of the principal, the attorney should refuse to take such nonconforming action and advise the attorney-in-fact of his or her fiduciary obligations.⁶⁸ The guidance of the NAELA Aspirational Standards related to the manner in which an attorney should proceed in such a situation are matter of fact and provide little leeway for variation at the discretion of the attorney.⁶⁹ The NAELA Aspirational Standards advise that an attorney faced with such a predicament take steps aimed at the protection of the interests of the principal, even if such steps include the disclosure of confidential information.⁷⁰ The NAELA Aspirational Standards cite § 51 of the Restatement (Third) of the Law Governing Lawyers as authority for the imposition of a duty upon an attorney to take affirmative action to protect the interests of the principal in the event the attorney-in-fact refuses to adhere to the advice of the attorney concerning the fiduciary obligations of the attorney-in-fact.⁷¹ Such section states with regard to an attorney’s duty of care to certain non-clients, in part:

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

- (4) to a non-client when and to the extent that:
 - (a) the lawyer’s client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for

⁶⁷ Virginia Rules of Prof’l Conduct R. 1.2 cmt. 8 (Virginia State Bar 2005-2006).

⁶⁸ NAELA Aspirational Standards, *supra* note 8, at Standard E-8 cmt.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

- the nonclient;
- (b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;
 - (c) the nonclient is not reasonably able to protect its rights; and
 - (d) such a duty would not significantly impair the performance of the lawyer's obligations to the client. ⁷²

An attorney may wish to address with the attorney-in-fact at the onset of the representation how the attorney intends to proceed should the attorney-in-fact request that the attorney take action which is contrary to the earlier expressed wishes of the principal and does not further an alternative interest of the principal. The attorney may ask the attorney-in-fact to agree, that in the event the attorney-in-fact breaches his or her fiduciary duty owed to the principal, the attorney may disclose information pertinent to such breach of fiduciary duty to the principal and/or the appropriate court. ⁷³

In *Schock v. Nash*, the Supreme Court of Delaware addressed the question of whether the principal intended for the durable power of attorney instrument which she

⁷² Restatement (Third) of the Law Governing Lawyers § 51 (2000-2006).

⁷³ ACTEC Commentaries, *supra* note 5, at Model R. 1.7. *See also* Engagement Letters: A Guide for Practitioners, *supra*, note 9 for its sample estate administration engagement letter which states, in part, “[a]s a condition of this representation, I require that, notwithstanding normal rules of confidentiality, you authorize me to notify the probate court and creditors and beneficiaries of the estate, as the case may be, of any actions or omissions on your part that have a material effect on their interests in the estate, including acts or omissions that may constitute negligence, bad faith, or breach of your fiduciary duties”.

executed to authorize the attorney-in-fact to make gratuitous transfers of the principal's property in favor of the attorney-in-fact herself as well as family members of the attorney-in-fact. ⁷⁴ In such case, the attorney-in-fact and the family of the attorney-in-fact befriended the principal, who was a single elderly woman, and assisted her in connection with everyday matters, such as shopping and home repairs, as well as the management of her financial affairs. ⁷⁵ The principal, Ms. Dever, later executed a durable power of attorney instrument naming her friend, Irma Schock, as attorney-in-fact and authorizing the Wilmington Trust Company (which Company prepared the pre-printed form used by Ms. Dever in order to complete her durable power of attorney instrument) to permit the attorney named therein "to deal with, control, transfer to the name of said Attorney, or to the name of others, appropriate to his or her own use or to the use of others, and dispose of" various assets owned by Ms. Dever. ⁷⁶ Since "[t]he creation of a power of attorney imposes the fiduciary duty of loyalty on the attorney-in-fact", the court was presented with the issue on appeal of whether the "agent's fiduciary duty of loyalty was waived so as to have permitted her to self-deal or make gratuitous transfers to herself". ⁷⁷ With regard to an attorney-in-fact's duty of loyalty owed to the principal, the court stated:

The common law fiduciary relationship created by a durable power of attorney is like the relationship created by a trust. The fiduciary duty principles of trust law must, therefore, be applied to the relationship between a principal and her attorney-in-fact. An attorney-in-fact, under the duty of loyalty, always has the obligation to act in the best interest of the principal unless the principal voluntarily consents to the attorney-in-

⁷⁴ Schock v. Nash, 732 A.2d 217, 220 (Del. 1999).

⁷⁵ *Id.*

⁷⁶ *Id.* at 227.

⁷⁷ *Id.* at 224-25.

fact engaging in an interested transaction after full disclosure.⁷⁸

The Supreme Court of Delaware agreed with the trial court's interpretation of the power of attorney instrument that the language used therein was to protect Wilmington Trust Company against claims from the principal alleging that the Wilmington Trust Company had permitted action by the attorney-in-fact which exceeded the power granted by the others terms of the durable power of attorney instrument.⁷⁹ The court stated:

A power of attorney is strictly construed and broad all-embracing expressions are discounted or discarded. Any admissible extrinsic evidence must be carefully considered by the trial court so that it may determine that it was indeed the intent of the principal to make a gift or consent to a strictly enumerated act of self-dealing after receiving a full disclosure of all the facts.⁸⁰

The court affirmed the decision of the Court of Chancery which held that Ms. Schock, acting as attorney-in-fact under the power of attorney instrument, had breached her fiduciary duty of loyalty to Ms. Dever since the evidence was insufficient to support a finding that Ms. Dever had intended for the durable power of attorney instrument to permit Ms. Schock to make gifts of the principal's property to herself and members of her family.⁸¹

Section 11-9.5 of the Code of Virginia, 1950, as amended, addresses the question of gift giving authority of an attorney-in-fact under a power of attorney instrument in the Commonwealth of Virginia:

A. If any power of attorney or other writing (i) authorizes an attorney-in-

⁷⁸ Schock v. Nash, 732 A.2d at 225.

⁷⁹ *Id.* at 227.

⁸⁰ *Id.* at 229-30.

⁸¹ *Id.* at 220.

fact or other agent to do, execute, or perform any act that the principal might or could do or (ii) evidences the principal's intent to give the attorney-in-fact or agent full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact or agent shall have the power and authority to make gifts in any amount of any of the principal's property to any individuals or to organizations described in §§ 170(c) and 2522 (a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. ⁸²

In accordance with § 11-9.5 of the Code of Virginia, 1950, as amended, the inclusion of certain language in a power of attorney instrument may create a valid power of the attorney-in-fact acting under such instrument to make gifts of the principal's property.

C. Fiduciary Responsibility

I. Defining a Fiduciary Relationship

Fiduciary obligations exist in connection with various relationships, including the attorney-client relationship, wherein the fiduciary is subject to a heightened standard of performance and his or her actions must be in compliance with such governing standard of care. A fiduciary is defined as both (i) “[o]ne who owes to another the duties of good faith, trust, confidence, and candor” and (ii) “[o]ne who must exercise a high standard of care in managing another's money or property”, ⁸³ while a fiduciary duty is defined as “[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary to the beneficiary; a duty to act with the highest degree of honesty and loyalty toward another

⁸² Va. Code § 11-9.5 (2006).

⁸³ Black's Law Dictionary 640 (7th ed. 1999).

person and in the best interests of the other person”.⁸⁴

A fiduciary obligation encompasses varying duties, including the duty of loyalty and the duty of care, the former of which was discussed in greater detail in the preceding section entitled “Duty of Loyalty.” The attorney’s duty of care refers to the standard of care to which the attorney is bound as a result of his or her fiduciary relationship with another, the violation of which may subject the attorney to liability.⁸⁵ According to Robert Cooter and Bradley J. Freedman in their article with regard to the fiduciary relationship, the existence of a fiduciary relationship creates the potential for two types of wrongdoing at the detriment of the beneficiary/principal: “first, the fiduciary may misappropriate the principal’s asset or some of its value (an act of malfeasance); and second, the fiduciary may neglect the asset’s management (an act of nonfeasance)”.⁸⁶ Each wrongdoing is compensated for by the imposition of a corresponding legal duty upon the fiduciary: the duty of loyalty governs misappropriation and the duty of care governs negligent mismanagement.⁸⁷ In essence, the obligations associated with a fiduciary’s duty of loyalty “restrict the permissible scope of a fiduciary’s behavior whenever possible conflicts of interest arise between the principal and the fiduciary”⁸⁸ and the duty of care “imposes an obligation on the fiduciary to avoid unnecessary risk”.⁸⁹

II. Attorney as Fiduciary

a. General Considerations

May an attorney appropriately accept a request to serve as a fiduciary on behalf of

⁸⁴ *Id.* at 523 (parentheticals omitted).

⁸⁵ *Id.* at 523.

⁸⁶ Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. Rev. 1045, 1047 (1991).

⁸⁷ *Id.*

⁸⁸ *Id.* at 1053-54.

⁸⁹ *Id.* at 1062.

a client, whether as trustee, executor, or attorney-in-fact? Standard B-5 of the NAELA Aspirational Standards states an attorney “[m]ay also serve as a fiduciary for the client, if it is in the client’s best interest and if the client gives informed consent after full disclosure”.⁹⁰ Although the NAELA Aspirational Standards state it is permissible for an attorney to serve as a fiduciary on behalf of his or her client as long as the requirements set forth in the preceding sentence are satisfied, the Comment to Standard B-5 does recommend that an attorney not promote the attorney being named as a fiduciary on behalf of his or her client.⁹¹ The NAELA Aspirational Standards also express the importance of the attorney justifying that his or her appointment “furthers the client’s best interest”, which justification entails “explaining to the client the fiduciary role, any conflicts of interest, the options to the use of the attorney as fiduciary, and the pros and cons of alternatives before obtaining client consent”.⁹² For an example of a letter nominating an attorney as executor and a letter accepting nomination of an attorney as trustee, refer to *Engagement Letters: A Guide for Practitioners*.⁹³

b. Attorney/Drafter as Fiduciary

Prior to an attorney’s agreement to serve as a fiduciary on behalf of an already existing client when the attorney also prepared the instrument necessitating the creation of a fiduciary relationship, the attorney should consider various factors which may impact the attorney’s decision of whether to serve in such fiduciary capacity on behalf of his or her client. Virginia Legal Ethics Opinion #1515 addressed the question of whether there must be a pre-existing attorney-client relationship prior to the attorney’s preparation of such an instrument in order for the attorney to serve as the fiduciary under such

⁹⁰ NAELA Aspirational Standards, *supra* note 8, at Standard B-5.

⁹¹ *Id.* at Standard B-5 cmt.

⁹² *Id.*

⁹³ *Engagement Letters: A Guide for Practitioners, supra, note 9.*

instrument. ⁹⁴ Even though the Committee did not find that a pre-existing attorney-client relationship was requisite to the attorney/drafter also serving as fiduciary, the Committee did state its belief that:

[A] significant factor concerning the appropriateness of an attorney being named as executor or trustee in a document drafted by the attorney is whether the attorney draftsman took advantage of his role as draftsman to secure such nomination for the attorney or another member of the attorney's firm. The naming of the executor or trustee must be an informed and fully volitional act of the client. ⁹⁵

The Committee also addressed the potential question of undue influence in such situation, which question requires a factual determination, and opined that the lack of a pre-existing attorney-client relationship "greatly enhances the potential for a finding of undue influence" and supported its opinion by its statement that "[t]he existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs". ⁹⁶

American Bar Association Formal Opinion 02-426 discussed the feasibility of an attorney serving as fiduciary on behalf of a client in connection with the administration of an estate or trust. ⁹⁷ Although the Committee approved an attorney serving as a fiduciary on behalf of a client for whom the attorney also prepared the will or trust which designates the attorney as fiduciary, the Committee commented that the attorney must comply with Rule 1.4(b) of the Model Rules of Professional Conduct, ⁹⁸ which rule

⁹⁴ Virginia State Bar Comm. on Legal Ethics, Informal Op. 1515 (1994).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-426 (2002).

⁹⁸ *Id.*

corresponds with Rule 1.4(b) of the Virginia Rules of Professional Conduct which states with regard to communication:

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.⁹⁹

In accordance with Rule 1.4(b) of the Model Rules of Professional Conduct, the Committee implied a duty of the attorney to “discuss frankly with the client her options in selecting an individual to serve as fiduciary”, which discussion should touch on an array of considerations in connection with fiduciaries generally, including “information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary” as well as “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”.¹⁰⁰

In addition to the question of whether an attorney/drafter may serve as a fiduciary on behalf of a client when there is no pre-existing attorney-client relationship, Virginia Legal Ethics Opinion 1515 also addressed the propriety of an attorney’s recommendation that he or she serve as fiduciary on behalf of a client.¹⁰¹ The Committee referred to Disciplinary Rule 2-103(A) of the Virginia Code of Professional Responsibility¹⁰² which corresponds with Rule 7.3 of the Virginia Rules of Professional Conduct which states with regard to a recommendation of professional employment:

(a) A lawyer shall not, by in-person communication, solicit employment as a private practitioner for the lawyer, a partner, or

⁹⁹ Virginia Rules of Prof’l Conduct R. 1.4(b) (Virginia State Bar 2005-2006).

¹⁰⁰ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 02-426 (2002).

¹⁰¹ Virginia State Bar Comm. on Legal Ethics, Informal Op. 1515 (1994).

¹⁰² *Id.*

associate or any other lawyer affiliated with the lawyer or the firm from a non-lawyer who has not sought advice regarding employment of a lawyer if: . . .

- (2) such communication has a substantial potential for or involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, over persuasion, overreaching, or vexatious or harassing conduct, taking into account the sophistication regarding legal matters, the physical, emotional or mental state of the person to whom the communication is directed and the circumstances in which the communication is made. ¹⁰³

According to the Committee, a suggestion by an attorney of his or her willingness to serve as a fiduciary on behalf of the client “constitutes solicitation for future employment” ¹⁰⁴ and, in accordance with such, an attorney should review Rule 7.3 of the Virginia Rules of Professional Conduct prior to his or her informing a client of such willingness to serve as a fiduciary on behalf of the client.

III. Standard of Care Associated with a Fiduciary Duty

Once a determination is made that a fiduciary duty is owed to someone as a result of such person placing another individual in a position of power, whether limited or expansive, the fiduciary must determine the minimum level of care which he or she must exert in the carrying out of his or her fiduciary duties on behalf of the principal. This section will discuss the differing standards which may apply to a fiduciary in the performance of his or her duties, whether the lesser, prudent person standard, or the more advanced standard which may arise not only as a result of explicit representations, but

¹⁰³ Virginia Rules of Prof'l Conduct R. 7.3 (Virginia State Bar 2005-2006).

¹⁰⁴ Virginia State Bar Comm. on Legal Ethics, Informal Op. 1515 (1994).

also from implicit client understandings.

The fiduciary relationship involves an interplay of power and dependency for the achievement of certain ends. While the person who entrusts power (or “trusting person”) remains dependent on the fiduciary during the course of their relationship, the trusting person nonetheless has (or should have) the authority to define the limits of the relationship. Within the confines of the relationship, the fiduciary is independent to act as she sees fit, so long as she acts in the interest of the trusting person who depends on her. The relationship may vary in intimacy, intensity, temporal duration, and legal potential.¹⁰⁵

Notwithstanding the differing requirements associated with the prudent person standard and the more advanced standard, a fiduciary always has a duty to perform in the best interests of the principal in the administration of his or her power on behalf of such principal. In accordance with such duty, a fiduciary should always take the appropriate measures to ensure he or she exerts the highest duty of care expected in connection with such fiduciary relationship, however formed. The failure of a fiduciary to comply with his or her duties in accordance with the requisite standard of care may subject the fiduciary to liability for such failure.¹⁰⁶

In order to determine whether a fiduciary has performed in such a manner that satisfies the required skill level, one must consider the facts as they appeared at the time of the action of the fiduciary and not the facts as they exist subsequent to the performance of the questioned action of the fiduciary.¹⁰⁷ Immediately upon acceptance of a fiduciary

¹⁰⁵ Edward D. Spurgeon & Mary Jane Ciccarello, *Proceeding of the Conference on Ethical Issue in Representing Older Client: The Lawyer in Other Fiduciary Rules: Policy and Ethical Considerations*, 62 Fordham L. Rev. 1357, 1360-61 (March 1994).

¹⁰⁶ Restatement (Second) of Trusts § 174 cmt. a (1959).

¹⁰⁷ *Id.* § 174 cmt. b.

position, the fiduciary should review the corresponding documentation which sets forth the obligations and powers of the fiduciary to ensure the fiduciary fully understands the intent of the grantor/testator/principal in order to best serve the interests of such individual to whom a fiduciary duty is owed. A fiduciary should maintain extensive records in connection with all actions which the fiduciary takes on behalf of the grantor/testator/principal so that, in the event a question later arises with regard to the conduct of the fiduciary, the fiduciary can present evidence concerning the basis for, and the details related to, his or her action(s) at the time in question. The Florida Bar recommends that, in addition to the maintenance of detailed, written records, an attorney-in-fact serving under a power of attorney should maintain all receipts and a copy of all items of correspondence and consider the potential benefits associated with the maintenance of a telephone log.¹⁰⁸ Even if no question is ever asked concerning the actions of the fiduciary, accurate, written record-keeping will help ensure the fiduciary complies with the requisite standard of care in the administration of his or her fiduciary duties.

a. Prudent Person Standard

An individual may also grant a fiduciary certain powers in connection with a will or trust instrument by reference to § 64.1-57 of the Code of Virginia, 1950, as amended, which section enumerates certain powers which may be incorporated into a will or trust instrument, including powers related to investments and real estate.¹⁰⁹ Section 26-45.3 of the Code of Virginia, 1950, as amended, sets forth the prudent investor rule, which rule imposes a duty upon trustees to comply with the standards set forth therein and which rule is generally applicable to the actions of a trustee in connection with investments and

¹⁰⁸ *Florida Power of Attorney* (The Florida Bar 2004), <http://www.elderlawanswers.com/resources/article.asp?id=2281>.

¹⁰⁹ Va. Code § 64.1-57 (2006).

the management of trust assets. ¹¹⁰

Based in trust law, the basic measure of a fiduciary's duty is that the fiduciary/trustee is required to exercise only the skill and prudence that an ordinarily capable and careful person would use in the conduct of his or her own business of a like character and with objectives similar to those of the trust. ¹¹¹

However, should a grantor wish, he or she may specify language in the trust instrument in order to expand, restrict, eliminate, or otherwise alter the applicability of the prudent investor rule to the trustee's investment and asset management strategies. ¹¹² For a more detailed discussion of the specific laws governing fiduciaries in the Commonwealth of Virginia, refer to Title 26 of the Code of Virginia, 1950, as amended, which addresses fiduciaries generally. ¹¹³

Assuming the grantor has not explicitly limited or eliminated the applicability of the prudent person standard to the performance of a fiduciary, the fiduciary must understand that the prudent person standard is based upon what would be expected of an "ordinarily capable and careful person", which, in certain circumstances, may create a higher requisite standard of care than the fiduciary himself or herself is able to independently achieve.

b. Advanced Standard

Depending upon how an attorney presents himself or herself to a client in connection with the attorney's acceptance of a fiduciary position on behalf of such client, an attorney may owe an even greater duty of care to the client as a result of the attorney's

¹¹⁰ Va. Code § 26-45.3 (2006).

¹¹¹ Spurgeon & Ciccarello, *supra* note 105, at 1362.

¹¹² Va. Code § 26-45.3 (2006).

¹¹³ Va. Code § 26 (2006).

knowledge and/or skill level with regard to matters often associated with fiduciary relationships, including, but not limited to, the attorney's knowledge and/or skill level with regard to investments and other related money matters. This exception to the general prudent investor rule, which rule creates a standard gauged by the expected skill level and knowledge of an ordinary person in similar circumstances may be characterized as follows:

When a trustee accepts a trust, after having emphasized . . . its extraordinary abilities, or with knowledge that the settlor knows of the trustee's extraordinary capacity, the trustee should be deemed to know that the settlor will rely on the trustee's stated or actual abilities, and the trustee should be held impliedly to have promised the settlor that it could and would use its powers to the maximum. ¹¹⁴

An attorney should be aware of the image of knowledge and skill level that he or she is portraying to clients and also take into consideration the possibility that a client may imply a certain advanced knowledge and skill level of the attorney as a fiduciary, especially when an attorney's law practice primarily focuses on areas such as wills, trusts, or elder law. Such areas of the law oftentimes involve a fiduciary relationship, whether executor/testator, trustee/beneficiary, attorney-in-fact/principal, or otherwise.

Although a client may wish to name his or her attorney as a fiduciary based on an implicit understanding of the attorney's knowledge and skill level with regard to matters of a fiduciary nature, a client may also wish to name his or her attorney as fiduciary since the client understands, that in addition to the general obligations by which all fiduciaries must comply in the exercise of their duties, an attorney is also bound by the ethical rules adopted by the state in which he or she is licensed to practice law.

¹¹⁴ George Gleason Bogert et al., *Bogert's Trusts and Trustees* § 541 (Rev. 2d ed. 2005).

Lawyers are particularly well suited to serve in fiduciary roles because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. Furthermore, lawyers are bound by both the ethical rules of professional conduct and state laws governing malpractice liability. Lawyers serving as fiduciaries may also be subject to the ethical and legal rules that govern fiduciaries.¹¹⁵

The Preamble of the Virginia Rules of Professional Conduct states that “[i]n all professional functions a lawyer should be competent, prompt and diligent”.¹¹⁶ Rule 1.1 of the Virginia Rules of Professional Conduct states, with regard to the competence of an attorney, “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”,¹¹⁷ while Rule 1.3 of the Virginia Rules of Professional Conduct states, with regard to the diligence of an attorney, “[a] lawyer shall act with reasonable diligence and promptness in representing a client”.¹¹⁸ Comment 1 of Rule 1.1 of the Virginia Rules of Professional Conduct states:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required

¹¹⁵ Spurgeon & Ciccarello, *supra* note 105, at 1358.

¹¹⁶ Virginia Rules of Prof’l Conduct Preamble (Virginia State Bar 2005-2006).

¹¹⁷ Virginia Rules of Prof’l Conduct R. 1.1 (Virginia State Bar 2005-2006).

¹¹⁸ Virginia Rules of Prof’l Conduct R. 1.3 (Virginia State Bar 2005-2006).

proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.¹¹⁹

When an attorney agrees to serve as a fiduciary on behalf of a client, whether in connection with a will, trust, power of attorney instrument, or other similar instrument, the attorney should keep in mind that his or her actions may be subject to more than one standard of care. An attorney as fiduciary is subject to the prudent person standard (assuming the instrument does not contain language which minimizes or eliminates the applicability of such standard) as well as the standards set forth in the governing state's rules of professional conduct. And, depending upon the client's expectations of his or her attorney as a fiduciary, regardless of whether such expectations are founded upon the express representations of the attorney or merely upon the client's implied understanding of the attorney's knowledge and skill level, the attorney may also be subject to an even higher standard of care. In Virginia Legal Ethics Opinion #1325, the Committee opined "that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility".¹²⁰

IV. To Whom the Fiduciary Duty is Owed

Upon acceptance of a client's request to serve in a fiduciary capacity on behalf of such client, an attorney must familiarize himself or herself with the applicable duties associated with such fiduciary relationship and the attorney must also remember who the client is and therefore to whom such fiduciary duties are owed.¹²¹ This distinction may

¹¹⁹ Virginia Rule of Prof'l Conduct R. 1.1 cmt. 1 (Virginia State Bar 2005-2006).

¹²⁰ Virginia State Bar Comm. on Legal Ethics, Informal Op. 1325 (1990).

¹²¹ *See generally* Virginia State Bar Comm. on Legal Ethics, Informal Op. 1452 (1992) for an example of who is the client when an executor retains the services of an attorney to assist in the settlement of an estate. The Committee stated that "since the

become especially cumbersome in the area of elder law since elderly clients are often accompanied by an active third party. No matter how involved one or more non-client third parties are in the attorney's representation of the elderly client, and notwithstanding any permission the elderly client may give the attorney to share information relevant to such representation with third parties, the attorney must always recall who is the client so that the attorney may ensure he or she is performing his or her fiduciary obligations on behalf of the appropriate party, the client.

In her article addressing the ethics of intergenerational representation, Teresa Stanton Collett explained a variation on the status of each among the attorney, client, and third party in connection with a legal engagement as an "us" versus "them" mentality, stating: "The 'us' are lawyers and their clients. The 'them' are everyone else".¹²² The author expounded upon the "us" versus "them" mentality in reliance on the words of another as follows:

Lord Brougham eloquently expressed this perspective in his famous statement while defending Queen Caroline:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he

personal representative assumes the legal status as the agent of the decedent and is the only available conduit of information between the entity and the attorney, the committee opines that the attorney/client relationship arises between the attorney and the personal representative, albeit for the ultimate benefit of the estate" and further that "[a]lthough the attorney, in providing those services, may benefit the beneficiaries of the estate, the committee is of the further opinion that there is no contractual privity with the beneficiaries which can give rise to an attorney-client relationship with those beneficiaries". *Id.*

¹²² Collett, *supra* note 27, at 1462.

must not regard the alarm, the torments, the destruction which he may bring upon others. ¹²³

As exemplified by the preceding quote, client identification is an absolute necessity to satisfactory representation of a client, since without an understanding of who is the client, an attorney is unable to exert all of his or her energies to the deserving recipient, the client. An attorney must always be cognizant of who his or her client is in order to ensure the attorney performs his or her fiduciary duties in the best interests of his or her client, even if to do so is to the detriment of one or more third party non-clients. However, attorneys should also understand that a focused approach to performing only in the best interests of his or her client does not necessarily preclude the attorney from incorporating the elder client's wishes to keep one or more non-client third parties informed concerning the details of the engagement. So long as an attorney takes the required measures to ensure his or her client understands the implications of the attorney sharing confidential information with one or more non-client third parties and the attorney is acting in accordance with the wishes of his or her client, the involvement of such third parties in the professional relationship between attorney and elder may actually facilitate such relationship. Third party involvement may create a level of comfort for the elder client and encourage a harmonious relationship between the elderly client and the non-client third parties.

V. What Triggers the Onset of a Fiduciary Obligation

Once someone accepts a request to serve as a fiduciary on behalf of another, does such acceptance, coupled with subsequent execution of the appropriate documentation by the requesting individual, trigger the onset of the fiduciary relationship and the corresponding duties associated therewith? The time at which someone has the authority to act on behalf of another in a fiduciary capacity, such as attorney-in-fact under a power

¹²³ *Id.*

of attorney instrument, does not necessarily coincide with the time at which the corresponding instrument was executed by the principal. Even though a power of attorney instrument may be effective immediately upon its execution, a principal may wish to insert language into the power of attorney instrument in order to create a springing power of the attorney-in-fact so that he or she is only authorized to act on behalf of the principal upon the occurrence of certain enumerated events.

What happens in the event a principal executes a presently effective power of attorney instrument in favor of an attorney-in-fact but the attorney-in-fact never affirmatively acts in accordance with the power granted by such instrument? According to Elder Law Answers, based on the findings in the Texas case *Vogt v. Warnock*, “[a]n individual named as attorney-in-fact who never acted under that authority is nevertheless the principal[’]s fiduciary and bears the burden of establishing the fairness of transactions between herself and the principal”.¹²⁴ In *Vogt v. Warnock*, the principal, Dr. Barton Warnock, named his much younger fiancée, Rebecca Vogt, as his attorney-in-fact under a statutory durable power of attorney, which instrument contained the following provision: “THE ATTORNEY IN FACT OR AGENT, BY ACCEPTING OR ACTING UNDER THIS APPOINTMENT, ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT”.¹²⁵ Although Ms. Vogt never acted under such statutory durable power of attorney, she was aware of the existence of such instrument as well as the fact that it named her as attorney-in-fact on behalf of Dr. Warnock.¹²⁶ The principal issue in *Vogt v. Warnock* was whether the mere execution of a power of attorney instrument establishes a fiduciary relationship as a matter of law between an attorney-in-fact and a principal even if the attorney-in-fact never acted under the authority associated

¹²⁴ *Attorney-in-fact Who Never Acted Under POA Is Still Fiduciary* (The Florida Bar 2003), <http://www.elderlawanswers.com/resources/article.asp?id=2571>.

¹²⁵ *Vogt v. Warnock*, 107 S.W. 3d 778, 780 (Tex. Ct. App. 2003).

¹²⁶ *Id.*

therewith. ¹²⁷ The court in *Vogt v. Warnock* noted that “a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law” and held that a fiduciary relationship did exist between Ms. Vogt, as attorney-in-fact, and Dr. Warnock, as principal, stating “we think public policy mandates a finding that Vogt was Warnock’s fiduciary. Once a fiduciary relationship is established, we believe the courts are well advised to hesitate in finding exceptions to that high standard of fair dealing and mutual trust it imposes”. ¹²⁸ The court further stated “[t]he less opportunity the law provides for a ‘sharp bargain’ by a fiduciary, the more secure a vulnerable principal will be, and this is the very essence of fiduciary law”. ¹²⁹

¹²⁷ *Id* at 779.

¹²⁸ *Id* at 784.

¹²⁹ *Id.*