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Daniel R. Nappier
Washington and Lee University School of Law

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Blurred Lines: Analyzing an Attorney's Duties to a Fiduciary-Client's Beneficiaries

Daniel R. Nappier*

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* Candidate for J.D., Washington and Lee University School of Law, May 2015; B.B.A., Texas A&M University, 2011. I would like to thank my faculty Note advisor, Professor Brant Hellwig, my student Note advisor, Lara Gass, and the rest of the Washington and Lee Law Review Editorial Board for their invaluable guidance in the development of this Note. Finally, thank you to my family for their love and support in all of my endeavors.

I. Introduction

Legal scholarship commonly expresses that attorneys must provide zealous advocacy and diligent representation to their clients.[1] What happens, however, when an attorney's client owes a similar duty to give priority to and protect the interests of third parties?[2] In cases in which an attorney represents a fiduciary, the attorney must consider what duties, if any, he owes to third-party beneficiaries.[3] The issue of what "special obligations" an attorney

1. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2012) ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

2. *See* Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 890 (1994) (questioning the duties owed amongst parties "when the lawyer is not the only fiduciary in the attorney–client relationship").

3. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 11 ("Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."); ABA Special Study Comm. on Prof'l Responsibility, *Report of the Special Study Committee on Professional Responsibility: Counseling the Fiduciary*, 28 REAL PROP. PROB. & TR. J. 825, 827 (1994) (noting that often an attorney "must consider what duties, if any, he or she may owe to beneficiaries and others"); Tuttle, *supra* note 2, at 889 ("Although the attorney's fiduciary duty of loyalty to the client is well established in the law, a gap exists when that client is a fiduciary of a third party.").

may owe beneficiaries arises most commonly when an attorney represents a trustee or personal representative of an estate, which is the focus of this Note.[4]

It is imperative that an attorney hired to represent a trustee or estate representative understand whom he represents and to whom he owes duties.[5] This is often unclear because of the various individuals involved in handling trust and estate matters, each having distinct interests.[6] Fiduciaries' attorneys should beware of the potential liability that exists if they fail to exercise care and loyalty towards beneficiaries' interests.[7]

Current authorities acknowledge that confusion riddles this subject.[8] The Model Rules of Professional Responsibility comment that "in estate administration the identity of the client may be unclear under the law of a particular jurisdiction."[9] Rules of professional responsibility and existing case law can be contradictory.[10] In describing the relationship between an

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4. *See* Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469, 469 (2011) (explaining that these issues, arising in the context of "a trustee or personal representative, are likely the most common").

5. *See* Todd A. Fuller, *Attorney Liability to Estate Beneficiaries: The Privity Passes Through*, 100 DICK. L. REV. 29, 29 (1995) (noting that the issue is complex because "traditional notions of liability do not easily apply to the relationship between an estate attorney and beneficiaries of the estate").

6. *See* Eric. D. Correira, *Establishing and Protecting the Attorney–Client Relationship in Trust Matters*, 61 R.I. BAR J. 9, 9 (2012) ("Many times, the lines of client representation are blurred because the various individuals/entities involved, each with distinct legal interests, appear (at least for the moment) to be coexisting in harmony.").

7. *See* Robert S. Held, *A Trust Counsel's Duty to Beneficiaries*, 92 ILL. B.J. 636, 636 (2004) (emphasizing that a fiduciary's attorney "should beware the potential for liability if they fail to act with due care to protect beneficiaries' interests").

8. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27 (2012) ("Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries."); ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 828 ("[S]ome courts and commentators have suggested that the lawyer for the fiduciary may owe some derivative duties to the beneficiaries served by that fiduciary.").

9. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27.

10. *See* Correira, *supra* note 6, at 9 ("There is no set guidance for the trust attorney to follow, instead he or she must rely on the applicable Rules of Professional Responsibility and relevant case law, which, in a given circumstance, can be either vague or contradictory.").

attorney and beneficiaries, courts and ethics committees sometimes create uncertainty over whether and to what extent an attorney owes any duty to beneficiaries.[11] In jurisdictions recognizing that an attorney owes fiduciary duties to beneficiaries, it is not clear if the duties differ from those the attorney owes the client.[12] When hiring an attorney, is the fiduciary also an agent contracting on behalf of the beneficiaries? Alternatively, are the fiduciary and beneficiaries joint-clients of the attorney? The current confusion surrounding this issue can result in an attorney's misunderstanding of to whom he owes duties, which may create potential liability.[13]

Legal authority in this setting is scant. The authority that exists tends to focus on fee disputes, evidentiary privileges, and malpractice issues raising the question of whether beneficiaries have the right to sue an attorney.[14] This Note will focus on the latter issue of whether beneficiaries have the right to bring claims against the fiduciary's attorney for breach of fiduciary duty or professional negligence. This Note analyzes the issue assuming that the attorney and fiduciary have not entered into an agreement regarding an attorney's duties to beneficiaries.[15]

Part II of this Note examines the scope of duties an attorney owes a client. It distinguishes an attorney's duty of care and

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11. *See* Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 FORDHAM L. REV. 1319, 1325 (1994) (discussing how "ethics committees describe the relationship with the fiduciary, . . . the beneficiaries, and . . . the entity itself differs rather dramatically, generating uncertainty and confusion that prevents any real understanding of the attorney's role . . . [where] the identity of the client is relevant").

12. *See id.* at 1322 (explaining that, in cases determining an attorney owes fiduciary duties to beneficiaries, "it is not clear whether fiduciary duties to the fiduciary that run to the beneficiaries differ from fiduciary duties to the beneficiaries directly"); Held, *supra* note 7, at 636 ("The case law in this area is uneven and unsettled.").

13. *See* Correira, *supra* note 6, at 9 (emphasizing that the misunderstanding surrounding this issue, "if acted upon, can result in potential liability").

14. *See* Pennell, *supra* note 11, at 1321 (highlighting the typical issues the reported cases involve, such as "fee disputes, evidentiary privileges, and legal malpractice claims").

15. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (suggesting that an attorney may enter an agreement with all the parties to represent the fiduciary and the beneficiaries); Tuttle, *supra* note 2, at 891 ("The law must supply a default rule in the absence of a specific agreement between the parties.").

fiduciary duties, and addresses the blurred distinctions between these duties. Part III of this Note explores state court decisions and other authorities determining that an attorney owes some duties to a fiduciary-client's beneficiaries. Part IV introduces the traditional approach, under which courts have held that an attorney owes no duties to any beneficiary of the fiduciary-client. Part V highlights the advantages and disadvantages of both approaches. It explores the questions raised if an attorney owes duties to the fiduciary-client's beneficiaries: What happens if the fiduciary and beneficiaries' interests become adverse? If an attorney does not owe any special duty to beneficiaries, what protections exist for beneficiaries upon breach of the fiduciary-client's duties? Part VI recommends that the traditional approach is the best resolution to this issue. It explains that the traditional approach has greater advantages than the other approaches (discussed in Part IV) and addresses perceived disadvantages. Part VII concludes this Note and summarizes the recommendation and rationale supporting it.

II. The Range of Duties and Liability Exposure

Identifying what duties a trustee's or estate representative's attorney owes to beneficiaries can easily confuse the fiduciary duties that the fiduciary-client owes to beneficiaries with the professional duties an attorney owes to a client. A separate explanation of these duties and the range of liabilities a breach of these duties imposes gives context to the different approaches adopted by various jurisdictions.

A. Attorney's Liability Exposure to Fiduciary-Client

The creation of an attorney–client relationship imputes the attorney with an extensive list of duties owed to the client by virtue of this professional relationship.[16] Specifically, an attorney

16. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3–1.4, 1.6 (2012) (explaining an attorney's duty to act with diligence, to communicate with the client, and to keep the client's confidences); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000) (listing duties an attorney owes the client "consistent with the lawyer's other legal duties and subject to other provisions of [the]

has a duty to represent clients in a manner "reasonably calculated to advance a client's lawful objectives."[17] An attorney must also act with reasonable competence and diligence,[18] reasonably communicate with clients about the status of a matter, and fulfill reasonable requests for information.[19] An attorney must fulfill any contractual obligations to the client as well.[20] Differing methods exist to enforce these duties, such as disciplinary proceedings as well as client suits against the attorney for damages, restitution, injunction, or other judicial remedy.[21]

1. Attorney's Duty of Care and Professional Negligence

In representing clients, attorneys owe a broad duty to exercise reasonable care in representing and pursuing the client's lawful interests, which captures many of the duties listed above.[22] Under the duty of care concept, an attorney must exercise the competence and diligence normally exercised by attorneys in the same or similar circumstances.[23] Attorneys owe a duty of care in pursuing the client's objectives and in carrying out the fiduciary duties owed to the client.[24] An attorney's duty of care creates the

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Restatement").

17. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000).

18. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2012) (stating that a lawyer shall "provide competent representation to a client" and shall also "act with reasonable diligence and promptness").

19. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2012) ("(a) A lawyer shall . . . (3) keep the client reasonably informed about the status of the matter; [and] (4) comply promptly with reasonable requests for information . . . .").

20. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 (2000) ("[A] lawyer must . . . fulfill valid contractual obligations to the client.").

21. *See id.* § 16 cmt. a (describing the various methods available to enforce the duties listed against attorneys); *id.* § 6 (listing judicial remedies available against an attorney in breach of a duty owed to a client or nonclient).

22. *See id.* § 50 (describing an attorney's duty of care to the client); *id.* § 16 cmt. d (using the duties of competence and diligence to describe an attorney's broader duty of care).

23. *See id.* § 52 (defining the standard of care to which an attorney is held for purposes of liability).

24. *See id*. § 52 cmt. a (highlighting the way in which an attorney must carry out the duty of care).

potential liability for professional negligence.[25] Thus, if an attorney fails to fulfill any of the duties listed above, there may be a breach of the duty of care, and the attorney may be subject to claims of professional negligence brought by the client.[26]

An attorney is subject to liability for professional negligence if a party—client or nonclient—can prove that an attorney breached a duty of care owed to that party, and the breach caused the claimant injury.[27] The cause of action for legal malpractice based on professional negligence discourages a lawyer's improper conduct or inaction and compensates plaintiffs for injury caused by such negligence.[28] If a plaintiff can prove that an attorney did not exercise the competence and diligence that a reasonable attorney under similar circumstances would have exercised, the plaintiff may recover compensatory damages.[29] Courts may also grant other remedies such as rescission, injunctions, declaratory relief, or restitution.[30]

2. Attorneys' Fiduciary Duties to Clients

An attorney is a fiduciary, which means the attorney is someone to whom another person entrusts with his affairs under circumstances that may make it difficult or unfavorable for that other person to closely oversee the attorney's performance.[31] The nature of this relationship provides a client with another cause of

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25. *See id.* § 48 (outlining the elements of professional negligence, beginning with attorney's potential liability to those whom a duty of care is owed).

26. *See id.* (noting that an attorney is civilly liable "for professional negligence to a person to whom the lawyer owes a duty of care").

27. *See id.* (explaining a negligence standard of professional misconduct requiring a duty of care, breached by the attorney, which is the legal cause of the claimant's injury). A claim of professional negligence is a form of legal malpractice, and the terms are often used synonymously. *See id.* § 48 cmt. a (emphasizing the similar nature of the terms "professional negligence" and "legal malpractice").

28. *See id.* § 48 cmt. b (discussing how professional negligence and malpractice applies to attorneys).

29. *See id.* (discussing plaintiff's burden of proof).

30. *See id.* (noting courts' powers to supply various remedies).

31. *See id.* § 16 cmt. b (explaining the attorney's role as a fiduciary).

action to recover damages—a claim of breach of fiduciary duty.[32] Although specific definitions of fiduciary duties vary depending on the context,[33] the Restatement (Third) of the Law Governing Lawyers explains that an attorney must "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client–lawyer relationship in a manner adverse to the client."[34] Under the Restatement, if an attorney breaches these duties causing injury to the client, the attorney is liable for breach of fiduciary duty.[35] Through a breach of fiduciary duty claim, clients may seek either damages or other remedies.[36]

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32. *See id.* § 49 cmt. b (commenting that "[a] lawyer owes a client the fiduciary duties specified in § 16(3)").

33. *See* 2 TAMAR FRANKEL, THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 127–28 (Peter Newman ed. 1998) (acknowledging the many contexts in which fiduciary relationships are created). Most American jurisdictions have included at least two fiduciary duties: the duty of undivided loyalty and the duty of confidence. 2 LEGAL MALPRACTICE § 15:1 (2013). "The attorney is under a duty to represent the client with undivided loyalty, to preserve the client's confidences and to disclose any material matters infringing upon these obligations." *Id.* Fiduciary duties describe the trust, loyalty, and confidence that one party owes to another in many contexts. FRANKEL, *supra*, at 127. Although specific definitions may vary, the significance of fiduciary duties in the various fiduciary relationships cannot be understated. *Id.* In an often-cited and widely recognized partnership law case, Judge Benjamin Cardozo expresses this importance:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the *punctilio of an honor the most sensitive*, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.

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

34. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000).

35. *See id.* § 49 (giving the elements for a breach of fiduciary duty cause of action).

36. *See id.* § 49 cmt. d (emphasizing that an attorney who "has acted with reasonable care is not liable in damages for breach of fiduciary duty, but other remedies such as disqualification, restitution, and injunctive or declaratory

3. Blurred Distinctions Between the Duty of Care and Fiduciary Duties

An attorney's professional duty of care and fiduciary duties often overlap. For example, an attorney may fail to exercise the competence and diligence ordinarily exercised by other attorneys in like circumstances—a breach of the duty of care—by failing to reasonably inform and communicate with the client—a breach of fiduciary duty.[37] When an attorney's competence and diligence are important to carrying out the fiduciary duty in question, the duty of care standard applies.[38] Thus, one can reasonably classify many claims against an attorney as professional negligence (breach of the duty of care) *or* a breach of fiduciary duty.[39] Similarly, legal authorities often classify the duty of care as a fiduciary duty owed to clients.[40] Therefore, claimants usually add a breach of fiduciary duty claim to a negligence claim for "rhetoric or completeness."[41] Classifying a claim as a breach of fiduciary duty may affect the applicable limitations period, depending on the language and policies of a jurisdiction's statute of limitations.[42] Regardless of whether a claim is styled as professional negligence or breach of fiduciary duty, the client may

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relief may be available").

37. *See id.* § 20 (explaining an attorney's duty to keep the client reasonably informed and to consult with the client); *id.* § 49 cmt. b (listing an attorney's fiduciary duties to clients as including those duties addressed in § 20).

38. *See id.* § 49 cmt. d ("When the fiduciary duty in question is that of competence or diligence or of proceeding in a manner reasonably calculated to advance the client's lawful objectives, the standard of § 52(1) . . . controls."); *id.* § 52 (defining the standard of care for purposes of civil liability for professional negligence).

39. *See id.* § 49 cmt. c (explaining a variety of claims that are characterized as professional negligence or misconduct); *id.* § 49 cmt. d (noting that the standard of care used in a professional negligence action is sometimes used as the standard for a breach of fiduciary duty claim).

40. *See id.* (clarifying that "the duty of care enforced in a negligence action is also a fiduciary duty" under § 16(2)); *see also id.* § 16(2) (including in its description of duties owed to clients a duty to exercise the diligence and competence of a reasonable attorney in like circumstances).

41. *Id.* § 49 cmt. c.

42. *See id.* (offering a reason for why classifying a claim as a breach of fiduciary duty may make a difference to the outcome of the action).

be entitled to a damages award, which is ultimately what injured plaintiffs desire.[43]

Separate from an attorney's duties to a client are any duties a client may owe to third parties. When the client is a fiduciary, the client owes fiduciary duties wholly distinct from those fiduciary duties an attorney owes a client. Such duties are discussed below.

B. Fiduciary-Client's Liability Exposure to Beneficiaries

Article 8 of the Uniform Trust Code outlines the duties a trustee owes to beneficiaries of the trust.[44] A breach of trust occurs when a trustee fails to comply with any of these duties owed to beneficiaries.[45] A breach of trust is synonymous with a breach of fiduciary duty because both arise upon a trustee's failure to exercise duties owed to the trust beneficiaries.[46] In fact, the Restatement (Third) of Trusts describes any duty a trustee owes, as trustee, to the beneficiaries as a trustee's fiduciary duties.[47] A breach of fiduciary duty may occur by a

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43. *See id.* § 49 cmt. d (noting under what circumstances an attorney may be liable for damages to the client in a breach of fiduciary duty action); *id.* § 48 cmt. a (explaining that plaintiffs in a professional negligence action may seek compensatory damages).

44. *See* UNIFORM TRUST CODE ART. 8 (2010) (outlining the general duties and powers of trustees).

45. *See id.* § 1001 (defining breach of trust and discussing remedies available for a breach of trust); RESTATEMENT (THIRD) OF TRUSTS § 93 (2002) ("A breach of trust is a failure by the trustee to comply with any duty that the trustee owes, as trustee, to the beneficiaries, or to further the charitable purpose, of the trust.").

46. *See* RESTATEMENT (THIRD) OF TRUSTS § 93 cmt. b (2002) (describing a breach of trust as a failure to exercise any of the trustee's fiduciary duties). This Note refers to a breach of trust as a breach of fiduciary duty because in cases where beneficiaries sue the trustee, the claim is usually styled as a breach of fiduciary duty. *See, e.g.*, Goldberg v. Frye, 217 Cal. App. 3d 1258, 1263 (1990) (describing the legatee-plaintiff's claims against the trustee (and his attorney) as, among other things, breach of fiduciary duty for acting imprudently in negotiating on behalf of the trust); Spinner v. Nutt, 417 Mass. 549, 552 (1994) (explaining plaintiff-beneficiaries' claim that the trustee breached his fiduciary duty).

47. *See* RESTATEMENT (THIRD) OF TRUSTS § 93 cmt. b (2003) (explaining fiduciary duties to be any duty owed, as trustee, to beneficiaries or to further the charitable purposes).

trustee's action, inaction, intentional conduct, or negligent conduct.[48]

Perhaps the most important obligation of a trustee is the duty of loyalty.[49] This duty prevents a trustee from putting the interests of others above the interests of the beneficiaries.[50] The duty of loyalty also prevents a trustee from engaging in conduct that creates a conflict between the trustee's personal and fiduciary interests.[51] An extension of a trustee's duty of loyalty is the duty of impartiality.[52] The duty of impartiality requires a trustee, when representing multiple beneficiaries, to act impartially in investing, managing, and distributing trust property while keeping in mind the beneficiaries' respective interests.[53] Trustees also have a duty to administer the trust "in good faith" and in accordance with its terms, the beneficiaries' interests, and applicable law.[54] Additionally, a trustee has a duty to administer the trust as a prudent person would in light of the

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48. *See id.* (detailing the various situations in which a trustee may breach fiduciary duties).

49. *See* UNIFORM TRUST CODE § 802 cmt. (2010) (explaining the trustee's duty of loyalty as "perhaps the most fundamental duty of the trustee").

50. *See id.* ("A trustee shall administer the trust solely in the interests of the beneficiaries."); RESTATEMENT (THIRD) OF TRUSTS § 78(1) (2003) ("[A] trustee has a duty to administer the trust solely in the interests of the beneficiaries, or solely in furtherance of its charitable purposes.").

51. *See* UNIFORM TRUST CODE § 802(b)–(c) (2010) (establishing that certain trustee's transactions are presumed to create a conflict of personal and fiduciary interests and any such transaction that creates a conflict of interests is voidable by affected beneficiaries); RESTATEMENT (THIRD) OF TRUSTS § 78(2) (2003) (noting that the "trustee is strictly prohibited from engaging in transactions that involve self-dealing or otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests").

52. *See* RESTATEMENT (THIRD) OF TRUSTS § 79 cmt. b (2003) (describing the duty of impartiality as an "extension of the duty of loyalty to beneficiaries" but involving unavoidable and thus permissible conflicting duties to beneficiaries with their competing interests).

53. *See* UNIFORM TRUST CODE § 803 (2010) ("If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries respective interests."); RESTATEMENT (THIRD) OF TRUSTS § 79 (2003) (requiring a trustee to act impartially while managing a trust on behalf of multiple beneficiaries).

54. UNIFORM TRUST CODE § 801; *see also* RESTATEMENT (THIRD) OF TRUSTS § 76(1)–(2) (2003) (listing the trustee's responsibilities in administering the trust).

circumstances.[55] This essentially applies the duty of care standard[56] to a trustee in managing and administering the trust.[57] This is another example of the common conflation of fiduciary duty and the duty of care.[58] A trustee's other duties include the duty to take control of the trust property,[59] the duty of recordkeeping,[60] the duty to enforce claims of the trust,[61] and the duty to inform and report.[62] Acting or failing to act in a manner that does not conform to these duties exposes a trustee to liability for breach of fiduciary duty (or breach of trust), which may be remedied by monetary damages.[63]

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55. *See* UNIFORM TRUST CODE § 804 (2010) (explaining a trustee's duty of prudence in administering the trust); *see also* RESTATEMENT (THIRD) OF TRUSTS § 77 (2003) (describing a trustee's duty of prudence).

56. *Supra* Part II.A.1.

57. *See* RESTATEMENT (THIRD) OF TRUSTS § 77 cmt. b (2003) (explaining that the duty of prudence involves the duty to exercise reasonable care in managing and administering the trust).

58. *See id.* § 77 cmt. a (acknowledging that the duty of prudence requires the exercise of reasonable care while carrying out *other* fiduciary obligations). Therefore, a breach of the duty of prudence (or duty of care) can lead to a claim of breach of fiduciary duty. *Id.*

59. *See* UNIFORM TRUST CODE § 809 (2010) ("A trustee shall take reasonable steps to take control of and protect the trust property.").

60. *See id.* § 810 (noting that, among other things, a trustee must "keep adequate records of the administration of the trust" and "keep trust property separate from the trustee's own property"); RESTATEMENT (THIRD) OF TRUSTS § 83 (2003) (explaining a trustee's duty to "maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust").

61. *See* UNIFORM TRUST CODE § 811 (2010) ("A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.").

62. *See id.* § 813 (describing the situations in which a trustee must keep certain beneficiaries reasonably informed about the administration of the trust, and "[u]nless unreasonable under the circumstances," must furnish certain information upon request to beneficiaries); RESTATEMENT (THIRD) OF TRUSTS § 82 (2003) (explaining the "duty to furnish information to beneficiaries").

63. *See* UNIFORM TRUST CODE § 1001 (2010) (explaining that when a trustee violates a duty owed to beneficiaries, a breach of trust occurs, and among other things, may be remedied by compelling the trustee to pay money or restore property); RESTATEMENT (THIRD) OF TRUSTS § 100 (2003) (explaining that a trustee who commits a breach of fiduciary duty is chargeable with the amount required to restore the value to the trust or with the amount of any benefit derived by the trustee as a result of the breach).

III. One Approach: Attorney Owes Some Form of Duty to Fiduciary-Client's Beneficiaries

Determining what duty, if any, an attorney owes to the beneficiaries of a trust or estate necessitates an analysis of case decisions. Many of these cases have concluded that a fiduciary's attorney does owe duties to beneficiaries.[64] An attorney must grapple with these decisions before accepting representation of a trustee or estate representative to assess the range of possible liabilities to which the attorney may be exposed.[65]

A. Imposition on Attorneys of Duties Owed to Clients' Beneficiaries

Some courts have imposed duties on a fiduciary's attorney, which subjects the attorney to liability for breach of fiduciary duty, legal malpractice, or both. Attorneys for both trustees and estate representatives have frequently been subjected to such duties.[66]

One example of a court levying on an attorney a duty of care to beneficiaries is *American Kennel Club Museum of the Dog v. Edwards & Angell, LLP*.[67] In *American Kennel Club,* the Superior Court of Rhode Island found that a trustee's attorney owed a duty of care to the trust beneficiaries.[68] In 1976, Camilla Lyman established and funded the Camilla Lyman Unitrust (Unitrust) to provide annual distributions to herself during her lifetime.[69] She

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64. *See infra* note 100 and accompanying text (listing cases from various jurisdictions that have determined a fiduciary's attorney owes a duty to beneficiaries).

65. *See* Lee, *supra* note 4, at 469 (explaining that courts have not been uniform in opinions, offering little clarity or guidance on to whom the attorney owes duties when the client acts in a fiduciary capacity).

66. *See infra* note 100 and accompanying text (listing cases that have imposed duties on attorneys for trustees and estate representatives owed to beneficiaries).

67. *See* Am. Kennel Club Museum of the Dog v. Edwards & Angell, LLP, No. Civ.A. PB 00-2683, 2002 WL 1803923, at *9 (R.I. Super. Ct. July 26, 2002) (concluding that the Dog Museum, as the "ultimate beneficiary of the Lyman trust," had standing to bring claims for breach of fiduciary duty and legal malpractice).

68. *Id.*

69. *Id.* at *1.

named the Dog Museum of America as the sole remainder beneficiary of the Unitrust on her death.[70] The defendants, Edwards & Angell, LLP, and James Barnett, Esq., facilitated the appointment of Robert A. Ragosta and George T. O'Neil as co-trustees.[71]

Several months after Lyman established the Unitrust, she disappeared.[72] This case arose from Ragosta and O'Neil's management of the trust after Lyman's disappearance.[73] Ragosta and O'Neil undertook several transactions to preserve Lyman's assets, including the Unitrust, after her disappearance in case she returned.[74] While conducting these transactions, many of which generated losses to the Unitrust, they consulted the defendants.[75]

In 2000, the Dog Museum and Ragosta filed an action against the defendants for breach of fiduciary duty and legal malpractice.[76] The defendants filed a motion for summary judgment and advanced a number of arguments.[77] Significantly, they argued that the court should adopt the rule followed in many jurisdictions that "the attorney of a trustee owes no duty of care to the beneficiaries."[78] The defendants contended that establishing a duty of care between the trustee's attorney and the beneficiary exposes the attorney to possible or actual conflicts of

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70. *Id.*

71. *Id.*

72. *Id.* Strangely, Lyman was discovered some ten years later in the septic system of her home. *Id.*

73. *See id.* at *4 (noting that the Dog Museum brought claims for breach of fiduciary duties and legal malpractice).

74. *Id.* Seeking to preserve Lyman's assets, Ragosta and O'Neil defended a lawsuit against Massachusetts Trustees that eventually settled, transferred Lyman's Hopkinton property into the Unitrust to generate income, used Unitrust assets to pay IRS deficiencies and liens, opposed an action by the Lyman family to have Lyman's date of death declared as of July 20, 1987, and sold Lyman's Hopkinton property with proceeds to go into the Unitrust. *See id.* (describing actions taken by Ragosta and O'Neil to preserve Lyman's assets and the results of the transactions).

75. *Id.*

76. *Id.*

77. *See id.* at *7 (listing the defendant's arguments against owing duties to beneficiaries, including the existence of "inherent conflicts of interest that prohibit the recognition of a duty of care").

78. *Id.* (citing Spinner v. Nutt, 631 N.E.2d 542, 544–45 (Mass. 1994)).

interest.[79] The defendants claimed that the co-trustees had an interest in continuing distributions from the Unitrust and using those distributions to maintain Lyman's property despite her disappearance.[80] The conflicting interest was that of the Dog Museum in ceasing distributions to Lyman to make distributions to it as the sole remainderman beneficiary of the Unitrust.[81]

After considering and rejecting cases from other jurisdictions[82] that determined "only the trustee, not the trust beneficiary, is the client of the attorney,"[83] the Superior Court of Rhode Island determined that "a trustee's attorney owes a duty of care to the trust beneficiaries."[84] Therefore, "the Dog Museum, as the ultimate beneficiary of the Lyman trust, ha[d] standing to bring suit against Defendants for legal malpractice and breach of fiduciary duty."[85] Importantly, the court acknowledged that the duty of care imposed on a trustee's attorney gave standing to a trust beneficiary to claim breach of fiduciary duty even though the court did not explicitly impose the full spectrum of fiduciary duties on the trustee's attorney.[86]

The *American Kennel Club* court analyzed several cases in which courts have similarly imposed duties on a fiduciary's attorney owed to beneficiaries. One such case was *Charleson v. Hardesty*,[87] in which attorney James Hardesty had prepared a

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79. *See id.* (explaining the defendants' fear of creating conflicts of interest in trustees' attorneys by establishing a duty of care owed by the attorneys to beneficiaries). The fear of exposing attorneys to potential or actual conflicts of interest is one of the primary arguments against imposing special duties to beneficiaries on a fiduciary's attorney. *Infra* notes 240–245.

80. *See* Am. Kennel Club Museum of the Dog v. Edwards & Angell, LLP, No. Civ.A. PB 00-2683, 2002 WL 1803923, at *7 (describing the defendants' explanation of the co-trustees interests).

81. *See id.* (explaining the Dog Museum's interests).

82. *See id.* at *9 (rejecting Wells Fargo Bank v. Super. Ct., 990 P.2d 591 (Cal. 2000), and Huie v. Deshazo, 922 S.W.2d 920 (Tex. 1996)).

83. *Id.* (quoting Huie v. Deshazo, 922 S.W.2d 920, 921 (Tex. 1996)).

84. *Id.*

85. *Id.*

86. *See id.* (noting the court's determination of standing). The court's determination that a breach of the duty of care gave standing for a breach of fiduciary duty claim is one illustration of courts commingling the duty of care and fiduciary duty. *Supra* notes 37–43 and accompanying text.

87. 839 P.2d 1303 (Nev. 1992).

trust agreement for Adele Kate Trelease.[88] The trust listed Ms. Trelease's son and grandson as the main beneficiaries and Abraham Lichowsky as successor trustee on Ms. Trelease's death.[89] This case, brought by Susan Charleson as guardian ad litem for beneficiary Richard Lee Trelease, Ms. Trelease's grandson, arose out of actions taken by Lichowsky and Hardesty after Ms. Trelease's death.[90] According to the plaintiffs, Lichowsky, as trustee, took actions that were detrimental to the trust and clear breaches of his fiduciary duties.[91] Among other things, plaintiffs asserted that Hardesty negligently failed to advise Lichowsky of his fiduciary duties as trustee and that Hardesty negligently drafted the trust instrument, which allowed Lichowsky to make unsecured loans.[92] Plaintiffs also claimed that Hardesty negligently failed to provide proper legal advice to Ms. Trelease to preserve her funds.[93]

Richard Robert Trelease, Ms. Trelease's son and beneficiary of the trust, and Charleson filed a complaint against Hardesty alleging, among other things, that Hardesty owed them "fiduciary and professional duties and that he had breached these duties."[94] On appeal from a district court judgment granting Hardesty's motion for summary judgment, the Treleases again asserted that Hardesty, as attorney for the trustee, owed them a duty to protect

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88. *Id*. at 1304.

89. *Id.*

90. *See id*. at 1305 (addressing actions taken by Lichowsky and Hardesty).

91. *Id.* According to the Treleases and Charleson, Lichowsky "sold the Nevada trust property and transferred the funds to Southern California." *Id.* at 1304. He then withdrew all of the trust funds for personal use without rendering an accounting of the trust assets to the Treleases. *Id.* Lichowsky promised to send an accounting of the trust property as directed by Hardesty but never sent it. *Id.* at 1305. Lichowsky later informed Hardesty that most of the trust assets had been removed from Nevada and invested in a Malibu ranch, the details of which were requested by Hardesty and not delivered to him. *Id.* Hardesty later discovered that Lichowsky had been writing bad checks. *Id.* Furthermore, Lichowsky admitted writing checks to himself from the trust. *Id.* Lichowsky filed for bankruptcy when no assets remained in the trust, which prompted Charleson's claim against Hardesty. *Id.*

92. *See id.* (outlining plaintiffs' complaints against Hardesty).

93. *See id.* (alleging that "Hardesty negligently failed to furnish Ms. Trelease with proper legal advice so that her funds would be preserved").

94. *Id.*

their interests.[95] The Supreme Court of Nevada determined that "when an attorney represents a trustee in his or her capacity as trustee, that attorney assumes a *duty of care and fiduciary duties* toward the beneficiaries as a matter of law."[96] The court remanded the case after finding questions of material fact regarding whether Hardesty represented Lichowsky as trustee and whether Hardesty breached his duties to the beneficiaries if he did represent Lichowsky.[97]

The courts in *American Kennel Club* and *Charleson* relied on the rationale from a California court in *Morales v. Field*,[98] which reasoned that

> in all matters connected with [the] trust a trustee is bound to act in the highest good faith toward all beneficiaries, and may not obtain any advantage over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind . . . . An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his [or her] obligations to all beneficiaries. It follows that *when an attorney undertakes a relationship as adviser to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary*.[99]

Many other courts have also determined that a fiduciary's attorney owes some form of duty to beneficiaries.[100] The Delaware

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95. *See id.* at 1306 (stating that the Treleases asserted the district court erred in granting summary judgment to Hardesty because Hardesty "owed them a duty to protect their interests").

96. *Id.* at 1306–07 (emphasis added).

97. *See id.* at 1308 (explaining the court's final conclusions).

98. 160 Cal. Rptr. 239 (Cal. Ct. App. 1979).

99. *Id.* at 244 (emphasis added). Later California courts have distinguished *Morales* by the fact that the attorneys made direct representations of care to beneficiaries or have simply held that "a fiduciary's attorney does not owe duties to the fiduciary's beneficiaries." *See* ALAN NEWMAN, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES § 962 (3d ed. 2010) (citing Johnson v. Super. Ct., 45 Cal. Rptr. 2d 312, 317 (Cal. Ct. App. 1995); Goldberg v. Frye, 266 Cal. Rptr. 483 (Cal. Ct. App.1990); Lasky, Haas, Cohler & Munter v. Super. Ct., 218 Cal. Rptr. 205 (Cal. Ct. App. 1985)).

100. *See, e.g.*, Schick v. Bach, 238 Cal. Rptr. 902, 908 (Cal. Ct. App. 1987) ("Similarly, an attorney representing a trustee also assumes a duty of care toward the beneficiaries."); Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713–14 (Del. Ch. 1976) (stating that because fiduciary obligations were owed by attorney for trustee to beneficiaries, effectively "the beneficiaries were the

Chancery Court notably stated in *Riggs National Bank v. Zimmer*[101] that the trustee, as a representative for the beneficiaries of the trust he administers, "is not the real client in the sense that [h]e is personally being served . . . . In effect, the beneficiaries were the clients . . . as much as the trustees were, and perhaps more so."[102] The Restatement (Third) of the Law Governing Lawyers agrees with these courts that an attorney owes a duty of care to nonclients and is therefore liable for professional negligence if the attorney's client is an executor, trustee, guardian, or fiduciary acting principally to perform similar functions for the nonclients.[103]

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clients [of the attorney] as much as the trustees were, and perhaps more so"); Gagliardo v. Caffrey, 800 N.E.2d 489, 496–97 (Ill. App. Ct. 2003) (describing situations under Illinois law in which an attorney may owe a duty of care to a third party such as a beneficiary of an estate); *In re* Halas, 512 N.E.2d 1276, 1280 (Ill. App. Ct. 1987) (finding that counsel for the executor "breached its own separate fiduciary duty to the beneficiaries"); Elam v. Hyatt Legal Servs., 541 N.E.2d 616, 618 (Ohio 1989) (determining that beneficiaries with vested interest in an estate are in privity—by way of a "pass through privity" theory—with executor of estate, and attorney for executor may be liable in negligence to such beneficiaries).

For more cases determining that attorneys owe a duty to their fiduciary-clients' beneficiaries, see NEWMAN, BOGERT, BOGERT & HESS, *supra* note 99, § 962 n.103 (citing *In re* Estate of Shano, 869 P.2d 1203 (Ariz. Ct. App. 1993); Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995); Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984); Leyba v. Whitley, 907 P.2d 172 (N.M. 1995); *In re* Clarkes Estate, 188 N.E.2d 128 (N.Y. 1962); *In re* Guardianship of Karan, 38 P.3d 396 (Wash. Ct. App. 2002)).

101. 355 A.2d 709 (Del. Ch. 1976).

102. *Id.* at 713–14; *see also* Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1989-4, 8 (1989) (acknowledging that an attorney's duties to the beneficiaries of an estate do "appear to exist" but do not rise to the level of implicating an attorney's duty of loyalty).

103. *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 51 (2000) (detailing circumstances under which an attorney owes a duty of care to nonclients for purposes of liability for professional negligence). The duty of care an attorney owes to nonclients when the client is a trustee, executor, guardian, or fiduciary is limited in several respects. *Id.* § 51 cmt. h. The duty of care should be recognized only when action by the lawyer would not violate applicable professional rules and the attorney's client is one of the specified types of fiduciaries. *Id.* An attorney who only represents the fiduciary may avoid liability to beneficiaries as clients by making clear to beneficiaries that the attorney represents the fiduciary only and not the beneficiaries. *Id.* Liability for professional negligence under the attorney's duty of care to nonclient-beneficiaries arises when the lawyer "knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's

Additionally, the American College of Trust and Estate Counsel's (ACTEC) commentaries on Model Rule of Professional Conduct 1.2 explain that an attorney representing the fiduciary in its fiduciary capacity owes some duties to beneficiaries despite the fact that an attorney does not represent them.[104] ACTEC describes these duties as "largely restrictive in nature," although it also notes that a fiduciary's attorney may at times be obligated to take affirmative action to protect the beneficiary's interests.[105] ACTEC appears to recognize more duties than the ABA Model Rules or the Restatement (Third) of the Law Governing Lawyers.[106] An example of this difference is ACTEC's acknowledgement that some jurisdictions consider beneficiaries secondary or derivative clients of the fiduciary's attorney.[107]

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fiduciary duty." *Id.* The stated duty applies only to breaches of fiduciary duty constituting crime or fraud, or to breaches in which the attorney knowingly is assisting or has assisted in perpetrating a crime or fraud. *Id.* Liability is not imposed when an attorney is subsequently consulted by a fiduciary to deal with the effects of a past breach committed before the consultation began, nor is an attorney in such a situation under a duty to inform beneficiaries of the breach or to attempt to rectify it. *Id.* Liability does not exist when nonclient-beneficiaries can reasonably protect their own rights. *Id.* Thus, no liability exists when a beneficiary of a family voting trust who is in business and has access to the relevant information has no need of protection by the trustee's attorney. *Id.* An attorney is not subject to liability to beneficiaries for failing to act in a manner the attorney reasonably believes would violate the professional rules, which may depend on the relevant jurisdiction's rules. *Id.* Finally, "[a]n attorney owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation." *Id.* Similarly an attorney is not liable to a beneficiary for representing the fiduciary in a dispute or negotiation with the beneficiary regarding any matter that may affect the beneficiaries' interests. *Id.*

104. *See* Am. Coll. of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct 36 (4th ed. 2006) (commenting that an attorney retained by a fiduciary may have restrictive duties, such as refraining from taking advantage of his position to the disadvantage of the fiduciary estate or beneficiaries).

105. *Id.*

106. *See* Thomas Spahn, Ethics Issues Facing Trust and Estate Lawyers: Hypotheticals and Analyses 485 (2012), https://www.vtbar.org/User Files/Files/EventAds/052412.pdf (discussing the ACTEC Commentaries and the duties imposed on fiduciaries' attorneys).

107. *See* Am. Coll. of Trust & Estate Counsel, *supra* note 104, at 36 ("Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary.").

B. Differing Duties an Attorney May Owe to Beneficiaries

The nature of the duty imposed on attorneys is important because it could determine what attorney actions will breach that duty and subject the attorney to liability to the beneficiaries. Although courts subject attorneys to similar liabilities by determining that a fiduciary's attorney owes some duties to beneficiaries, they are not necessarily imposing the same duties on attorneys.

For example, the court in *Morales* implied that an attorney owes the same fiduciary duties to beneficiaries that the fiduciary-client owes to beneficiaries.[108] Undertaking a relationship with beneficiaries "akin to that between the trustee and beneficiary" implies that the attorney would become a co-fiduciary with the attorney's fiduciary-client.[109] This suggests that the attorney must exercise the exact same loyalty and care owed in administering the trust or estate to beneficiaries,[110] which would significantly increase an attorney's liability exposure to the beneficiaries.[111] Because this would produce such a drastic result, it is likely that the *Morales* court actually intended to assert that the attorney owed fiduciary duties to the beneficiaries.[112] In fact, most commentators present *Morales* as a case in which the court simply determined that a fiduciary's attorney owed fiduciary duties to the beneficiaries.[113]

Most courts use more straightforward language to suggest that an attorney owes fiduciary duties to beneficiaries. The

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108. *See* Morales v. Fields, 160 Cal. Rptr. 239, 244 (Cal. Ct. App. 1979) (stating when an attorney advises a fiduciary, "he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary").

109. *Id.*

110. *See supra* Part II.B (outlining a fiduciary's duties to beneficiaries in administering a trust or estate).

111. *See supra* note 63 and accompanying text (explaining that a fiduciary is subject to liability for breaching any of the fiduciary duties described above).

112. *See* Pennell, *supra* note 11, at 1323 (noting the *Morales* court's language presumably "refers to the attorney's fiduciary duty to the beneficiaries").

113. *See, e.g.*, *id.* (describing *Morales* as imposing fiduciary duties on a fiduciary's attorney owed to beneficiaries); Tuttle, *supra* note 2, at 908–09 (describing *Morales* as restating the "basic obligations owed by a fiduciary to a beneficiary" and extending those obligations to the fiduciary's attorney).

Charleson court found that, as in *American Kennel Club*, an attorney for a trustee owes a duty of care to beneficiaries,[114] but unlike *American Kennel Club*, the *Charleson* court also found that an attorney for a trustee owed fiduciary duties to beneficiaries.[115] Regardless of this distinction in duties imposed on the attorney, in both cases the court subjected the attorney to the beneficiaries' claims for breach of fiduciary duty.[116] Similar to *Charleson*, the court in *In re Estate of Halas*[117] determined that counsel for an executor breached duties to the beneficiaries classified as "fiduciary duties."[118]

These cases exemplify the "joint-client" theory of fiduciary representation.[119] Under the joint-client theory, the attorney owes

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114. *See supra* notes 96–97 and accompanying text (explaining the *Charleson* court's conclusion that a trustee's attorney owes a duty of care to the beneficiaries).

115. *Compare* Am. Kennel Club Museum of the Dog v. Edward & Angell, LLP, No. Civ.A. PB 00-2683, 2002 WL 1803923, at *9 (R.I. Super. Ct. July 26, 2002) (attributing a duty of care on the attorney for the fiduciary), *with* Charleson v. Hardesty, 839 P.2d 1303, 1306–07 (Nev. 1992) (attributing both a duty of care *and* fiduciary duties on the fiduciary's attorney).

116. *See Am. Kennel Club*, 2002 WL 1803923, at *10 (concluding plaintiff-beneficiary had standing to bring claim of breach of fiduciary duty against the defendant); *Charleson* 839 P.2d at 1308 (same). This is an example of courts allowing beneficiaries to bring separate claims for legal malpractice and fiduciary duties, resulting in an attorney's possible liability for damages to beneficiaries. *Supra* notes 37–43 and accompanying text.

117. 512 N.E.2d 1276 (Ill. App. Ct. 1987).

118. *Id.* at 1280.

119. *See* Lee, *supra* note 4, at 477 (noting that some jurisdictions apply a "joint-client" approach, including the Supreme Court of Nevada in *Charleson*).

The joint-client theory is best illustrated by Professor Hazard's triangle metaphor for representing a fiduciary. *Id.* Leg one of the triangle is the attorney–client relationship. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 15–19 (1987). Leg two is the fiduciary–beneficiary relationship. *Id.* Leg three is the attorney–beneficiary relationship. *Id.* Professor Hazard argues that the beneficiaries and fiduciary have identical interests, therefore the attorney–client relationship should be treated as analogous to "joint representation in which a lawyer represents two or more closely connected parties, one of whom serves as spokesperson." *Id.* at 36. The triangle metaphor is illustrated in language from *In re Estate of Larson*, 694 P.2d 1051, 1054 (Wash. 1985). *See* Lee, *supra* note 4, at 478. In *Larson*, the court opined that "the fiduciary duties of the attorney run not only to the personal representative but also to the heirs." *Larson*, 694 P.2d at 1054.

the same duties to both beneficiaries and the fiduciary-client.[120] The joint-client theory usually acknowledges that there is a "primary client" and a "derivative client."[121] However, applications of the theory do not always agree on whether the fiduciary should be the primary or derivative client.[122] For example, the *Riggs* court implied that the beneficiary should be the primary client by announcing that the beneficiaries were the clients perhaps more so than the fiduciary.[123] Whereas the primary client is entitled to all of the duties a traditional client receives, under the joint-client theory, the derivative client also receives certain duties as a joint client.[124] Although the nature and extent of duties owed to the derivative client are unclear,[125] attorneys representing a fiduciary may still face potential conflicts of interest or potential liability for breaching these duties.[126] Even though courts use different language to impose a duty of care and fiduciary duties on a fiduciary's attorney, the result is the same in that a fiduciary's attorney may face liability for professional negligence or breach of fiduciary duties.[127]

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120. *See* Lee, *supra* note 4, at 477 (explaining that under the joint-client theory, "a beneficiary is entitled to essentially the same duties as the fiduciary is entitled, effectively making her a client of the attorney and thus a joint-client of the fiduciary").

121. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 2.7 (3d ed. 2011) (Supp. 2013) ("[I]t can be said that, while the fiduciary is the lawyer's 'primary' client, the beneficiary is a 'derivative' client and entitled to loyalty on a par, or almost on a par, with other clients.").

122. *See* Lee, *supra* note 4, at 478 (describing the disagreement of multiple courts as to who is the primary and who is the derivative client).

123. *See* Riggs Nat'l Bank v. Zimmer, 355 A.2d 709, 713–14 (Del. Ch. 1976) (describing beneficiaries as the clients of the fiduciary's attorney).

124. *See* Lee, *supra* note 4, at 478–79 (explaining duties owed to the primary client and derivative client are not entirely the same).

125. *See id.* at 478 ("It is unclear whether there is a duty of competence, a duty of diligence, a duty of communication, a duty of confidentiality, or a duty of loyalty to the derivative client.").

126. *See id.* (discussing the implications of violating duties to a derivative client and the possibility for conflicts of interest).

127. *See supra* note 43 and accompanying text (expressing the possibility for monetary damages awards rendered against attorneys). This is another example of the way courts conflate the duty of care and fiduciary duties, while inducing the same effect on the attorney's liability exposure. *See supra* Part II.A (acknowledging that, despite the distinction between a duty of care and fiduciary duties, a breach of either may result in a damages award).

IV. The Traditional Approach: Attorneys Owe No Duties to Beneficiaries

In contrast to the joint-client theory, a majority of jurisdictions follow the "traditional theory," which provides that an attorney for a fiduciary represents only the fiduciary and owes *no duties* to the fiduciary's beneficiaries.[128] Under this theory, the attorney's only obligations to a beneficiary are those "negative duties" an attorney owes to all third parties, such as the duty not to make false or misleading statements to a third party.[129] Many cases and state statutes, as well as the American Bar Association, also prefer the traditional approach.[130]

A. Cases Supporting the Traditional Approach

The traditional approach is best laid out in the often-cited *Goldberg v. Frye*[131] and *Spinner v. Nutt*,[132] although many other jurisdictions and cases apply some version of the traditional approach as well.[133]

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128. *See* Correira, *supra* note 6, at 9 ("The majority of states . . . have a straightforward rule that, in all respects, an attorney hired by a trustee owes a fiduciary duty to the trustee alone."); Lee, *supra* note 4, at 471 (describing the "traditional approach" as the "most prevalent" approach among states that has provided a clear ruling).

129. Lee, *supra* note 4, at 475.

130. *See infra* note 133 (listing cases that have determined an attorney owes no duties to the fiduciary-client's beneficiaries); *see also infra* Part IV (discussing ABA formal opinion 94-380 and various state statutes).

131. 217 Cal. App. 3d 1258 (1990). Most other jurisdictions that have adopted the traditional approach have relied on California's case law, particularly *Goldberg v. Frye*. Lee, *supra* note 4, at 472.

132. 417 Mass. 549 (1994).

133. *See* Firestone v. Galbreath, 976 F.2d 279, 286 (6th Cir. 1992) (affirming the lower court's ruling that, in Ohio, an attorney cannot be held liable by third parties as a result of services performed on behalf of a client unless the third party is in privity with the client, or the attorney acts with malice); Wells Fargo v. Super. Ct., 22 Cal. 4th 201, 212–13 (2000) (noting that no attorney–client relationship existed between beneficiaries and trustee's attorney, thus, no duties are imposed on the attorney); *In re* Estate of Brooks, 596 P.2d 1220, 1226 (1979) (emphasizing that trustee's attorney does not owe a duty to beneficiary unless he was involved in fraud); First Union Nat'l Bank of Fla. v. Whitener, 715 So. 2d 979, 982 (Fla. Dist. Ct. App. 1998) (determining that the trustee retained counsel for its own benefit and not for the benefit of beneficiaries, therefore, no

In *Goldberg*, the California Court of Appeals reviewed claims by legatees (beneficiaries) of an estate against the administrator of the estate and the administrator's attorney.[134] In 1958, Philip Hahn divorced his wife, Sadie, and executed a property settlement agreement that provided monthly payments to Sadie and required him to devise one-third of his estate to her on his death.[135] Philip later created a unitrust and a charitable foundation to which he transferred substantial assets over the years prior to his death in 1975.[136] His will provided for Sadie, his current wife Muriel, and created $5,000 legacies (devises of money) for his eight grandchildren.[137] It also provided for a $50,000 legacy for his longtime nurse, Linnea Rydberg Goldberg.[138]

Sadie filed suit against Philip's estate, the foundation, and the unitrust, claiming that Philip's *inter vivos* transfers to those

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duties are owed to beneficiaries by the attorney); Jewish Hosp. of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville, 633 N.E.2d 1267, 1277 (Ill. App. Ct. 1994) (finding estate attorney has no duty to beneficiary due to "potentially adversarial relationship" between estate's and beneficiary's interests); Neal v. Baker, 551 N.E.2d 704, 706 (Ill. App. Ct. 1990) (emphasizing the primary purpose of the attorney's relationship with the executor was to assist in the proper administration of the estate involving matters adversarial to the plaintiff–beneficiary); Fitzgerald v. Linnus, 765 A.2d 251, 258 (N.J. 2001) (noting that attorney for a fiduciary owes duties only to the fiduciary and not the estate or the beneficiaries except in "egregious circumstances such as fraud, collusion or malice, or where a separate duty to those beneficiaries has been undertaken" by the attorney); Roberts v. Fearey, 162 Or. App. 546, 548 (1999) (holding that defendant did not owe a duty to protect beneficiaries from economic loss and thus, was not liable for malpractice as a matter of law); Huie v. Deshazo, 922 S.W.2d 920, 922–23 (Tex. 1996) (applying attorney–client relationship to prevent beneficiary from compelling discovery of confidential materials from attorney for the trustee, while maintaining the rule that the trustee must disclose *material facts* to its representation of the trust to beneficiaries); Thomas v. Vinson & Elkins, 859 S.W.2d 617, 621–22, 624 (Tex. Ct. App. 1993) (noting that no fiduciary relationship exists between the trustee's attorney and beneficiary of the trust).

134. *See* Goldberg v. Frye, 217 Cal. App. 3d 1258, 1266 (1990) (discussing claims brought by legatees against attorney for estate representative Whelan).

135. *See id.* at 1261 (describing events that took place at the conclusion of the marriage).

136. *See id.* at 1261–62 (noting Philip's activities with his property prior to his death).

137. *Id.* at 1262.

138. *Id.*

entities violated their marital settlement agreement.[139] The parties reached a settlement agreement obligating jointly the foundation, the Estate of Hahn, and Muriel to make installment payments to Sadie after replacing Muriel Hahn with Vincent Whelan as administrator.[140] When the estate was unable to make timely payments, the probate court authorized Whelan to enter into a reimbursement agreement in which the foundation advanced funds to Sadie that the estate would reimburse.[141] The legatees, Goldberg and Philip's grandchildren, challenged later accountings by Whelan after indication that reimbursing the foundation for funds paid to Sadie would make it impossible to pay the devises to the legatees.[142] After obtaining counsel in 1985, the legatees objected to Whelan's fifth and sixth accounts at hearings, and the court denied their request for distribution from the estate.[143]

The legatees then filed complaints against Whelan and his attorney, Frank A. Frye III, in 1987, alleging breach of fiduciary duty, legal malpractice, extrinsic fraud, and negligence.[144] The legatees claimed that the defendants acted imprudently in negotiating the settlement and reimbursement agreements.[145] They also asserted that they did not challenge the action taken in 1980 because they had not received proper notice of the likely effect of these agreements on their estate payout expectancies.[146] The trial court, ruling in favor of the defendants, noted that Frye "served only as attorney for the administrator, and owing no duty to the legatees could not be liable to them in negligence."[147]

The California Court of Appeals clarified that the legatees' claim against Frye was that he negligently failed to notify them

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139. *See id.* (addressing claims brought against Frye and Whelan).

140. *See id.* (explaining the resolution of Sadie's first claim).

141. *See id.* (detailing the reimbursement agreement reached by the estate and the foundation).

142. *See id.* at 1263 (noting an initial controversy between the legatees' interests and Whelan's interests).

143. *See id.* (addressing challenges to the fifth and sixth accountings but not to any prior accountings).

144. *See id.* (noting claims brought by plaintiffs).

145. *See id.* (explaining legatees' arguments).

146. *Id.*

147. *Id.*

of the significance of the 1980 hearings, specifically, that he failed to exercise reasonable care in the performance of services for the estate beneficiaries.[148] The court found that an attorney for the administrator of an estate represents the administrator and not the estate.[149] Thus, by taking on duties to the administrator, the attorney "undertakes to perform services which may benefit legatees of the estate, but he has no contractual privity with the beneficiaries of the estate" and cannot be held liable to them for malpractice.[150]

The court determined that the plaintiffs would need to base a claim for malpractice on principles from which a duty may arise absent privity of contract and not on the attorney–client relationship.[151] It emphasized that the most important inquiry is whether the primary purpose of hiring the attorney is for the benefit of the plaintiff.[152] In this case, the court concluded that Whelan and Frye did not enter into the attorney's contract for the principal purpose of benefitting the legatees.[153] The fact that Frye's services benefitted or damaged third parties did not give rise to a claim of malpractice based on Frye's negligence because no duty existed.[154] Finally, the court acknowledged that a fiduciary's attorney represents only one party: the fiduciary.[155] It

148. *See id.* (explaining plaintiffs' claim that Frye breached a duty of care owed to beneficiaries).

149. *See id.* (determining that the attorney's client is the estate representative only).

150. *Id.*

151. *See id.* at 1268 (citing 1 MALLEN & SMITH, LEGAL MALPRACTICE § 7.11 (3d ed. 1989) for principles that may give rise to a duty absent privity of contract).

152. *See id.* ("The predominant inquiry . . . is whether the principal purpose of the attorney's retention is to provide legal services for the benefit of the plaintiff.").

153. *See id.* ("We find nothing to indicate that this attorney's retention was in any respect different from the typical retention of counsel by the fiduciary of a decedent's estate.").

154. *See id.* (noting that when benefitting beneficiaries is not the principal purpose of an attorney's contract with a fiduciary, if the beneficiaries are in fact benefitted then they are "incidental beneficiaries," which is not enough to impose a duty upon the attorney (citing 1 MALLEN & SMITH, LEGAL MALPRACTICE § 7.11 (3d ed. 1989); Mason v. Levy & Van Bourg, 77 Cal. App. 3d 60, 67–68 (Cal. Ct. App. 1978))).

155. *See id.* at 1269 (emphasizing the primary importance of this case).

noted the dangers of concluding that the attorney, through performing services for the administrator and by communicating with the estate beneficiaries, subjects himself to negligence claims from beneficiaries.[156] Beneficiaries are entitled to fair administration by the fiduciary but "are not owed a duty directly by the fiduciary's attorney."[157] Therefore, the court upheld summary judgment in favor of Frye (and in favor of Whelan).[158]

In *Spinner*, four of sixty-eight income and remainder beneficiaries of a testamentary trust established under the will of Damon Lyons (Damon trust) asserted that the trustees' attorneys owed them a duty of care.[159] The defendants were the attorneys for the two trustees of the Damon trust.[160] They claimed that they owed duties only to their clients, the trustees, and not to the beneficiaries.[161]

More than 90% of the Damon trust was comprised of stock in the Salem News Publishing Company.[162] In 1987 and 1988, the trustees received offers to purchase the stock.[163] The trustees could not come to an agreement on whether to accept the offer, and in the interim, the value of the publishing company declined substantially.[164] In bringing claims against the trustees' attorneys, the plaintiffs claimed, among other things, breach of contract because they were intended beneficiaries of the contracts between the trustees and the attorneys.[165] They also made

156. *See id.* ("Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries.").

157. *Id.*; *see also* NEWMAN, BOGERT, BOGERT & HESS, *supra* note 99, § 962 n.103 (noting California cases that followed with the traditional no duty approach stated in *Goldberg*).

158. *See* Goldberg v. Frye, 217 Cal. App. 3d 1258, 1269 (1990) (stating the court's final disposition).

159. *See* Spinner v. Nutt, 417 Mass. 549, 550–51 (1994) (describing plaintiffs' claim against attorneys for trustees of the Damon trust).

160. *Id.* at 551.

161. *See id.* (explaining the foundation of the attorney's main argument).

162. *Id.*

163. *Id.*

164. *See id.* (noting the primary cause of the plaintiffs' claims).

165. *See id.* at 552 (specifying the claims brought against attorneys).

negligence claims stating that they foreseeably relied on the attorneys.[166]

The Massachusetts Supreme Court acknowledged that to sustain the negligence claims, plaintiffs must show that defendants owed them a duty of care, such as that which arises from an attorney–client relationship.[167] It was undisputed that no direct attorney–client relationship existed between the plaintiff-beneficiaries and the defendant-attorneys.[168] The plaintiffs asserted that a duty existed because the defendants should have foreseen that the plaintiffs would rely on the defendants' advice to protect their interests.[169] The court found that, although an attorney may owe a duty to nonclients who the attorney knows will rely on services rendered,[170] it is "less likely to impose a duty to nonclients" where an attorney is also "under an independent and potentially conflicting duty to a client."[171]

The court explained that a trustee may be required to make difficult decisions in administering the trust regarding duties to the beneficiaries, and the attorney's job is to guide the trustee in making these decisions.[172] Focusing on the *potential* conflict of interests,[173] the court concluded:

> That the interests of the trustee and the interests of the beneficiaries may at times conflict cannot seriously be disputed. Should we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries,

166. *See id.* at 551 (stating other claims made).

167. *See id.* at 552 (noting the importance of an attorney–client relationship for purposes of the duty of care).

168. *See id.* (noting a brief court clarification on the contested facts of the case).

169. *See id.* ("The plaintiffs claim that . . . defendants owed them a duty because it was foreseeable that the plaintiffs would rely on the defendants' advice to protect their interests.").

170. *Id.* (citing Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 524 (1989)).

171. *Id.* (quoting Page v. Frazier, 388 Mass. 55, 63 (1983)).

172. *See id.* at 552–53 (noting a trustee must make difficult decisions and "a trustee's attorney guides the trustee in this decision-making process").

173. *Id.* at 554 (citing DeRoza v. Arter, 416 Mass. 377, 383–84 (1993); Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 524 (1989); Page v. Frazier, 388 Mass. 55, 63 (1983)).

> conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee. This we refuse to do.[174]

The court also noted that imposing duties on a trustee's attorney to beneficiaries might create situations antithetical to the Massachusetts disciplinary rule that requires an attorney to preserve the confidences of his client in these circumstances.[175]

Referencing *Goldberg*, the Massachusetts Supreme Court also found that the plaintiffs were not intended third-party beneficiaries.[176] The plaintiffs did not allege that the parties intended to confer the benefit of legal counsel on them and thus could not rely solely on their status as trust beneficiaries for this

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174. *See id.* at 553 (addressing the current case as it applies to Massachusetts disciplinary rules).

175. *See id.* at 554 (explaining that "the disciplinary rules which govern attorney conduct in Massachusetts require in the circumstances of this case that an attorney preserve the secrets and confidences gained in the course of representing a client").

176. *See id.* at 555 (emphasizing that the fact that a beneficiary was benefitted or harmed does not, without more, make any beneficiary an intended third-party beneficiary of the attorney–client contract). The doctrine of intended third-party beneficiaries comes from contract law. Fuller, *supra* note 5, at 50. In a legal malpractice context, the intended third-party beneficiary approach recognizes that an attorney and client, as promisor and promisee, may create rights in an estate beneficiary. *Id.* at 51. Therefore, when circumstances indicate that the agreement was made for the beneficiary's benefit, an attorney owes a duty to beneficiaries. *Id.*

Traditional barriers remain in force in situations where adversarial relations may arise. *Id.* The Illinois Supreme Court explained the rationale for these barriers in *Pelham v. Griesheimer*, stating specifically, "In the area of legal malpractice, the attorney's obligations to his client must remain paramount." 440 N.E.2d 96, 99 (Ill. 1982). Realizing the many scenarios in which the parties' interests may collide, the court refused to "create such a wide range of potential conflicts by imposing such duties upon an attorney in favor of a non-client, unless the intent to benefit the third party is clearly evident." *Id.* at 100. The Illinois Supreme Court relied on *Pelham* in *Neal v. Baker*, 194 Ill. App. 3d 485 (1990), in which it held that a named beneficiary of a testator's estate could not bring a malpractice action against the estate representative's attorney, hired to assist in administering the estate, without showing that the attorney–client contract was entered into with the specific intent to directly benefit the plaintiff as a third party beneficiary. *Id.* at 487–88.

claim.[177] Such a position would be contrary to what would traditionally be expected of trustees seeking legal counsel.[178]

Finally, the court stated that the beneficiaries in *Spinner* did have some opportunity for recourse.[179] The beneficiaries could bring actions against the individual trustees if the plaintiffs could prove a breach of fiduciary duties owed to them.[180] The trustees could then bring claims against their attorneys.[181] Indeed, the trial judge took judicial notice of pending matters against the trustees.[182]

B. State Statutes and ABA Formal Opinion 94-380

Many states have statutes that follow the traditional theory in identifying the attorney's client when the attorney represents a fiduciary.[183] Settling the question of whom the attorney represents alleviates an attorney's liability for claims brought by a nonclient-plaintiff based on breach of duty within an attorney–client relationship.[184] If an attorney represents a third party and thus owes duties to the third party, the third party may have

177. *See* Spinner v. Nutt, 417 Mass. 549, 554 (1994) (acknowledging the invalidity of beneficiaries' argument for why fiduciary's attorney owed them a duty).

178. *See id.* at 555–56 (noting that a plaintiff-beneficiary must normally show that the parties entered into a contract primarily for the beneficiary's benefit).

179. *See id.* at 556 ("It bears repeating that this result does not leave the beneficiaries without recourse; they can pursue an action directly against the trustees if they can show a breach of their fiduciary duties.").

180. *See id.* at 557 ("[T]his result does not leave the beneficiaries without recourse; they can pursue an action directly against the trustees if they can show a breach of their fiduciary duties."); Correira, *supra* note 6, at 12 (detailing the facts of *Spinner* and emphasizing the beneficiaries' options as explained by the court).

181. *See Spinner*, 417 Mass. at 555; Correira, *supra* note 6, at 12 (noting the trustees' options after beneficiaries bring a claim against it).

182. *See Spinner*, 417 Mass. at 555 (highlighting legal actions pending against the trustees in the matter).

183. *See* Lee, *supra* note 4, at 472 (commenting on state legislation and policy regarding an attorney's representation of a fiduciary).

184. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. a (2000) (discussing duties owed to clients and the client's ability to enforce such duties by legal claims against the attorney).

standing to bring claims against the attorney for breaching those duties.[185] State statutes express a state's attempt at clarifying who an attorney represents and, therefore, to whom an attorney owes duties as a result of the attorney–client relationship.[186]

In South Carolina, an attorney whose client is a fiduciary owes no duties to any beneficiary or other party interested in the trust, estate, or fiduciary property unless specifically stated in the attorney's contract.[187] Similarly, an Ohio statute says that, absent an express agreement to the contrary, a fiduciary's attorney has no obligation or duties in tort, contract, or otherwise to any third party to whom the fiduciary owes fiduciary duties.[188] It goes on to state that the term "fiduciary," as used in Title LVIII labeled "Trusts," means a "trustee of an express trust or an executor or administrator of a decedent's estate."[189] A Florida statute provides that "the personal representative is the client rather than the estate or the beneficiaries."[190] Michigan's Probate Court rules declare that an attorney "filing an appearance on behalf of a fiduciary shall represent the fiduciary"[191] and not the beneficiary or the estate.[192] Finally, although not a statute, a Kentucky Bar Association ethics opinion expressed its favor for the position that an attorney for a fiduciary represents only the

185. *See id.* § 51 cmt. a (clarifying that an attorney is liable to nonclients when he violates a duty to such nonclients in the rare circumstances such duties may be imposed).

186. *See* Lee, *supra* note 4, at 472 (explaining state statutes and their clarification on who the attorney represents in each state).

187. *See* S.C. CODE ANN. § 62-1-09 (2011) (stating that a fiduciary's attorney owes no duties to beneficiaries absent language in a contract, which is intended to be "declaratory of the common law" and governs relationships between attorneys and persons serving as fiduciaries).

188. *See* OHIO REV. CODE ANN. § 5815.16(A) (2007) (explaining the fiduciary duties of attorney or fiduciary).

189. *Id.* § 5815.16(B).

190. FLA. STAT. ANN. Bar Rule 4-1.7 cmt. (2013).

191. MICH. COMP. LAWS. ANN. Rule 5.117(A) (2012).

192. *See id.* Rule 5.117(A) cmt. (clarifying that the attorney does not represent the estate, thereby representing beneficiaries, but only represents the fiduciary or trustee); Lee, *supra* note 4, at 472, 486 (detailing Michigan Probate Court Rule 5.117(A) and its comment, which state that an attorney does *not* represent the beneficiary).

fiduciary and owes no excess duties to beneficiaries outside of those owed to all other third parties.[193]

In ABA Formal Opinion 94-380, the ABA expressed its favor for a version of the traditional approach.[194] It states that simply because a fiduciary-client has duties to beneficiaries "does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct."[195] Although the opinion does not specifically say that an attorney represents only the fiduciary-client, it implies this idea by explaining that the attorney can voluntarily "undertake" to represent a fiduciary only.[196] The ABA takes the position that an attorney may choose to represent the beneficiaries or the estate, but he may also only represent the fiduciary.[197] It does not address the issue of potential conflicts of interest that may arise by representing multiple clients.[198] It does, however, suggest that the law does not force an attorney into representation of the beneficiaries by nature of his representation of the fiduciary.[199] The ABA emphasizes this idea in its report of the Special Study Committee on Professional Responsibility.[200] The report states that an attorney's only client is the fiduciary unless the lawyer chooses to represent the estate

193. *See* Ky. Bar Ass'n, Ethics Op. KBA E-401 4–5 (1997) (adopting various views expressed in ABA Formal Opinion 94-380 and ACTEC's commentaries on the Model Rules of Professional Conduct as advisory to Kentucky courts).

194. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) (recognizing that the Model Rules reflect the majority view of jurisdictions, which holds that an attorney who represents a fiduciary does not also represent the beneficiaries).

195. *Id.*

196. *Id*.

197. *See id.* (explaining that this opinion addresses only those circumstances where an attorney "undertakes" to represent only the fiduciary and not beneficiaries or the estate as an entity).

198. *See id.* ("We do not . . . deal with the conflict of interest issues that may arise when a lawyer undertakes simultaneously to represent both fiduciary and beneficiary with regard to the same subject matter.").

199. *See id.* (insinuating that the lawyer may choose to represent only the fiduciary or the fiduciary and beneficiaries).

200. *See* ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 831 (addressing the issue of who is the attorney's client if attorney is asked by the fiduciary to advise it as an executor or trustee and the attorney has not represented any of the beneficiaries).

or trust as an entity and reaches an express agreement with the fiduciary to that effect.[201] The attorney's client is the "fiduciary *qua fiduciary*," or in the fiduciary capacity of executor or trustee as opposed to an entity capacity or individual capacity.[202]

The ABA holds all attorneys as bound by the Model Rules of Professional Conduct (Model Rules) with no exception for attorneys representing fiduciaries.[203] The fact that the fiduciary-client has obligations to beneficiaries of a trust or estate does not "expand or limit the lawyer's obligations to the fiduciary client under the Model Rules."[204] Similarly, an attorney is not obliged to satisfy the duties imposed under the Model Rules regarding beneficiaries.[205] The ABA does not impose on the lawyer any additional obligations towards the beneficiaries that the lawyer would not owe to all third parties.[206] It specifically proclaims that, although the attorney is prohibited from "actively participating in criminal or fraudulent activity or active concealment of a client's wrongdoing," the attorney's duty of confidentiality is not mitigated simply because the client is a fiduciary.[207] This approach essentially puts beneficiaries on an equal playing field

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201. *See id.* (explaining that an attorney may elect to represent an estate or trust as an entity, otherwise, by default, the attorney represents only the fiduciary).

202. *Id.*

203. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) (applying the strictures of the Model Rules of Professional Conduct universally to all attorneys); *id.* at n.6 (detailing the many limitations the Model Rules place on attorneys representing fiduciaries).

204. *Id.*

205. *See id.* (noting that an attorney, with scope of representation and duties defined under Model Rule 1.2, having a duty to "diligently represent the fiduciary" under Model Rule 1.3, and to preserve in confidence communications between attorney and fiduciary under Model Rule 1.6, does not owe parallel duties to beneficiaries); Tuttle, *supra* note 2, at 904–05 (discussing ABA 94-380 and noting that under the Model Rules, an attorney's duties of loyalty and care "run only to the fiduciary").

206. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) (noting specifically that the obligation to keep a client's confidences under Model Rule 1.6 is not altered by the client being a fiduciary); Tuttle, *supra* note 2, at 905 ("[T]he lawyer has no greater duty to protect the beneficiary from fiduciary overreaching than she has to protect any other third party . . . . [T]he lawyer's duty of loyalty extends only to her client; the client's beneficiary stands outside the protective sphere.").

207. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380.

with other third parties regarding duties owed by the fiduciary's attorney.[208] The difference between beneficiaries and other third parties arises in duties owed by the fiduciary itself.[209] Similarly, the mandatory and optional withdrawal rules in Model Rule 1.16 will not apply to beneficiaries' criminal or fraudulent conduct to force attorney withdrawal because the ABA determines the attorney not to represent the beneficiaries unless he chooses to do so.[210]

C. Attorney's Duties to Third Parties Generally

As noted in ABA Formal Opinion 94-380, an attorney owes no additional duties to beneficiaries that he would not owe to other third parties.[211] Although the ABA specified that attorneys for fiduciaries owe the same duties to all third parties, whether or not they are beneficiaries, courts holding that an attorney owes no duty to beneficiaries imply the same.[212] In a sense, these courts determine that an attorney owes no special duty to beneficiaries outside of those duties owed to all third parties.[213] It would be ludicrous, after all, to presume that these courts have stripped attorneys of duties owed to all third parties merely by determining that an attorney does not owe special duties to his fiduciary-client's beneficiaries. This presents the question: what

208. *See id.* (emphasizing that an attorney owes beneficiaries no different duties than or additional duties to those owed to every third party to the attorney–client relationship).

209. *See id.* (noting that a fiduciary owes duties to beneficiaries only, and not to any other third party).

210. *See id.* (discussing how the operation of Model Rule 1.16 does not depend on the client's status as a fiduciary, and an attorney's duties to clients under the Model Rules are not applied to third parties).

211. *See id.* (equating duties an attorney owes to beneficiaries and other third parties).

212. *See* Spinner v. Nutt, 417 Mass. 549, 552 (1994) (explaining that a trustee's attorney does not owe a duty to beneficiaries giving rise to a claim for professional negligence, but recognizing that an attorney is not "absolutely insulated from liability to nonclients").

213. *See* ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 834–35 (discussing that some courts have found attorneys owe some duty to beneficiaries, which serves to bar certain conduct, not "impose affirmative duties"). Similarly, an attorney's duties to all third parties serve to bar conduct, hence the term "negative duties." *Infra* notes 214–217.

duties does an attorney owe beneficiaries by virtue of being third parties?

Although some courts classify the duties an attorney owes to a fiduciary-client's beneficiaries as exceptions to the traditional theory, these exceptions are nothing more than violations of the "negative duties" that an attorney owes all third parties.[214] These negative duties owed to all third parties include: (1) the duty not to "embarrass, harass, or violate the legal rights of a third party"; (2) the duty to avoid making false or misleading statements to third parties; (3) the duty to not advise a client to commit or assist a client in committing a fraudulent or criminal act against a third party; and (4) the duty to notify third parties who believe they are clients of the attorney that they are not represented and are not in an attorney–client relationship with the attorney.[215] These are essentially prohibitions against certain kinds of attorney conduct,[216] not impositions of affirmative duties.[217]

When representing a fiduciary, the two most commonly violated negative duties are the duty to not make false or misleading statements to third parties and the duty to not assist or advise a client to commit a crime or fraud against a third party.[218] An attorney may violate the duty to not make false or misleading statements to a third party when an attorney makes "affirmative representations of care" to beneficiaries or other third parties.[219] Any statement of assurance may mislead third parties to assume that their interests are being protected and will likely result in the creation of a new fiduciary relationship

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214. *See* Lee, *supra* note 4, at 475 (discussing the negative duties of an attorney).

215. *Id.*

216. *See* ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 834 ("[T]he duties that the lawyer for the fiduciary owes to a beneficiary who is not a client consist of prohibitions against certain types of conduct by the lawyer.").

217. *See id.* at 834–35 (explaining that duties a fiduciary's attorney may owe to beneficiaries act "to bar certain conduct by the lawyer, not to impose affirmative duties to advocate or otherwise to represent actively the interests of the beneficiaries").

218. *See* Lee, *supra* note 4, at 475 (explaining the most violated negative duties).

219. *Id.*

between the attorney and the third party.[220] Furthermore, an attorney may violate this duty by actively concealing or assisting in the concealment of a client's breach of fiduciary duty owed to beneficiaries.[221]

When an attorney participates in a breach of a client's fiduciary duty, it is a violation of the negative duty to not assist or counsel a client to engage in criminal or fraudulent activity against a third party.[222] An attorney does not breach this duty when merely giving legal advice to a fiduciary.[223] The attorney must "actively [collude] with the trustee in breaching the trustee's fiduciary duties."[224] An attorney is generally not required to disclose the breach to the beneficiary or prevent the breach from happening.[225] Therefore, mere knowledge of the fiduciary-client's breach does not subject the attorney to liability for active participation.[226]

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220. *See id.* (exemplifying ways in which the duty to not make false or misleading statements may be violated).

221. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2012) (stating a lawyer shall not knowingly make a false statement of material fact to a third person or fail to disclose a material fact to a third person when disclosure is necessary to prevent committing or assisting to commit a crime or fraud on the person); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) (emphasizing, in footnote 6, that an attorney may not conceal, or actively assist in concealing, a client's breach of fiduciary duty); ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 837 (noting that an attorney cannot cover up or assist in a cover-up of breaches of a client's fiduciary duty).

222. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (stating a lawyer shall not counsel or assist a client to engage in activity the lawyer knows is criminal or fraudulent); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) (emphasizing, in footnote 6, that an attorney may not participate in a client's breach of fiduciary duty); ABA Special Study Comm. on Prof'l Responsibility, *supra* note 3, at 836 (noting that an attorney cannot participate in "noncriminal, nonfraudulent breaches" of a client's fiduciary duty); Lee, *supra* note 4, at 476 (discussing violations of the duty to not assist a client to commit fraud or crime).

223. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 9 (noting the "critical distinction" between presenting the client with analysis of the legal aspects of certain conduct); Lee, *supra* note 4, at 476 (highlighting that it is insufficient for an attorney to breach this duty by merely giving legal advice to a fiduciary).

224. Lee, *supra* note 4, at 476.

225. *See id.* ("There is no requirement that the attorney must prevent the breach or inform the beneficiary of the breach.").

226. *See id.* (detailing that the law does not prohibit nondisclosure of a client's breach of fiduciary duty "although nondisclosure may be morally questionable"); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-

Although this Note discusses the negative duties outlined above in their relation to fiduciaries' attorneys and beneficiaries, remember that they apply equally in different circumstances to all other third-party–attorney interactions.[227]

V. Advantages and Disadvantages of Each Approach

A. Advantages of Imposing Duties

Courts impose duties on a fiduciary's attorney because courts recognize that the available remedies to injured third parties may be inadequate.[228] The duties are imposed with the goal of deterring attorneys' negligent conduct.[229] Subjecting an attorney to the possibility of liability for claims of breach of fiduciary duty or professional negligence promotes the social policy of "compensating innocent victims and preventing lack of care in attorney actions"[230] and forces them to absorb the costs of their negligence.[231] Similarly, it promotes the economic policies of "efficiency and risk allocation," which decreases injury to third-party beneficiaries.[232]

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380 (1994) (explaining that under Model Rule 1.6, an attorney may not disclose a client's breach of fiduciary duty—although some jurisdictions are lessening the standard to allow this disclosure, it is still not required).

227. *See* Lee, *supra* note 4, at 475 (acknowledging that these negative duties are owed to all third parties); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-380 (1994) ("These rules apply to a lawyer with a fiduciary client to the same extent as, but no farther than, they apply in any other lawyer/tribunal/third party scenario.").

228. *See* Fuller, *supra* note 5, at 43 (asserting that many courts loosen the privity requirement in finding attorneys owe a duty of care to beneficiaries because beneficiaries have little remedy if legally injured in the trusts and estates context).

229. *See id.* (explaining the theories of attorney liability to third parties and reasons why this liability exists).

230. *Id.* at 49. These policies are promoted because attorneys have the ability to take out insurance policies making them better able than third parties to insulate themselves from serious losses. *Id.* at n.115. Additionally, attorneys are more equipped to assess the risks due to their knowledge and skill. *Id.*

231. *See id.* at 58 (explaining that an attorney is forced to bear the cost of his own negligence, which "[deters] legal malpractice in general," by providing remedies to beneficiaries as innocent victims of negligent attorneys).

232. *Id.* at 49. The economic policies justify imposing duties on an attorney because "attorneys are better able to insulate themselves from heavy losses than

Additionally, the theory that injured beneficiaries are in direct privity with attorneys by way of an attorney–client relationship (a joint-client theory)[233]—and the similar "pass through privity" theory[234]—"[acknowledge] the scope of a fiduciary relationship and an attorney's proper role without painting it too broadly."[235] Establishing that attorneys owe a duty of care under these approaches has the added benefit of providing a degree of certainty for attorneys because they only owe a duty to those involved in a fiduciary relationship with the hiring client.[236]

Finally, some scholars assert that because an attorney would disclose relevant information about the administration of the estate to all parties involved, these theories alleviate the

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are innocent third parties due to attorneys' ability to procure insurance, and because attorneys' skill and knowledge puts them in a better position to assess risk." *Id.* at n.115.

233. *See supra* notes 119–126 (outlining the joint-client theory).

234. *See* Fuller, *supra* note 5, at 59 (discussing the advantages of finding an attorney owes a duty to beneficiaries under "pass through" privity). The pass through privity theory provides that an attorney hired by a personal representative "owes a duty to the beneficiary vis-à-vis the attorney's duty to the personal representative and the personal representative's duty to the beneficiary." *Id.* This is the approach taken in *Elam v. Hyatt Legal Services* as another case where the court found an estate representative's attorney to owe a duty to estate beneficiaries. *See supra* note 100 (citing Elam v. Hyatt Legal Servs., 541 N.E.2d 616, 618 (Ohio 1989)). Essentially, under the pass through privity theory, the duty created by the attorney–client relationship between an attorney and the fiduciary-client is deemed to extend in full to the beneficiaries of the estate. Fuller, *supra* note 5, at 61. The estate representative's relationship to the beneficiaries "provides the requisite element of privity to establish a duty" owed by the attorney to beneficiaries. Fuller, *supra* note 5, at 61–62. Whether a court says that an attorney is in direct privity with beneficiaries or applies the pass through privity theory, the effect is that an attorney is liable to beneficiaries for damages arising from the attorney's negligent conduct. Fuller, *supra* note 5, at 59.

235. Fuller, *supra* note 5, at 60–61. This idea is also explained by acknowledging the joint interests of the trustee or estate representative and the beneficiaries. Lee, *supra* note 4, at 479. Some argue that because the beneficiary's interests "seem to flow to and become the interests of the fiduciary," counsel for the fiduciary-client "must recognize this relationship and also adopt the beneficiary as a joint-client." *Id.*

236. *See* Fuller, *supra* note 5, at 62 ("Thus, all of the individuals to whom the attorney might potentially be liable are immediately identifiable as individuals to whom the personal representative owes a duty, thereby providing the attorney with a degree of certainty in performing her duties.").

potential adversity between beneficiaries and estate representatives.[237] Indeed, when the fiduciary and the beneficiaries are joint-clients of an attorney, all parties are included in the "circle of confidences" surrounding the attorney–client relationship.[238] If the lawyer discovered that the trustee or estate representative was in breach of fiduciary duties, the lawyer would have an ethical obligation to inform the beneficiaries of the breach due to the duty of loyalty owed to beneficiaries.[239]

B. Disadvantages of Imposing Duties

One of the most significant disadvantages of imposing duties on an attorney is the possibility of creating conflicting interests.[240] Many courts fear that imposing a duty of care to promote the beneficiaries' interests—whether as joint-clients or otherwise—will conflict with an attorney's interests in representing the fiduciary-client.[241] Such conflicts of interest are

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237. *See id.* (explaining that the attorney is able to provide advice to both estate representatives and beneficiaries, which "alleviates, rather than exacerbates, potential adversity between the personal representative and the beneficiaries").

238. Tuttle, *supra* note 2, at 911.

239. *See id.* (noting that "the lawyer would have no ethical barrier to disclosing the breach to the beneficiary" because all material information disclosed to the attorney by the fiduciary would have to be disclosed to the beneficiaries).

240. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 27 (2012) (explaining that "conflict questions may arise in estate planning and estate administration"); Fuller, *supra* note 5, at 54 ("[T]he primary concern of courts that adopt this approach seems to center around the potential adversarial relationship between the personal representative and the beneficiaries."); Lee, *supra* note 4, at 470 ("One of the most difficult issues an attorney may face in the representation of a fiduciary relates to conflict of interest."). *But see* Pennell, *supra* note 11, at 1319 (noting that an inquiry into whom the attorney owes fiduciary duties "is of academic interest only, because the potential for a real conflict among the fiduciary, beneficiaries, and claimants such as creditors or disappointed heirs never ripens into a real controversy").

241. *See, e.g.*, Spinner v. Nutt, 631 N.E.2d 542, 544–45 (Mass. 1994) (acknowledging that when an attorney represents a fiduciary, the attorney should not owe duties to a beneficiary because "conflicting loyalties could impermissibly interfere with the attorney's task of advising the trustee"); Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994) (refusing to hold that an attorney for an estate representative owes duties to the beneficiaries because "the

often impermissible, as they impinge on an attorney's ability to adequately represent the fiduciary-client.[242] Indeed, an *actual* conflict of interest does not have to arise: under the Model Rules, a concurrent conflict of interest exists if a relationship creates a "significant risk" of conflicting responsibilities.[243] Thus, the attorney "would be prohibited from continuing this type of relationship unless each party gives informed consent to the representation despite the conflicting interests."[244] The fiduciary effectively would be unable to obtain legal counsel if even one beneficiary refused to consent to the conflict.[245] The likelihood of this problem increases with each additional beneficiary involved in the fiduciary relationship.[246] This problem is evidence that imposing duties on a fiduciary's attorney could prevent an attorney from fulfilling his ethical obligations to the fiduciary-client.[247]

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unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs *unduly burdens the legal profession*" (emphasis added)); Lee, *supra* note 4, at 481 ("[C]ourts have explained that this type of representation is not proper, as it would hinder the ability of the attorney to act in the best of both clients.").

242. *See* Fuller, *supra* note 5, at 54 (recognizing courts' fear that finding an attorney owes a duty to both personal representative and beneficiaries creates an "untenable conflict of interest for attorneys and hampers their ability to represent their clients").

243. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2012).

244. Lee, *supra* note 4, at 481; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(4) (allowing representation to continue despite a conflict of interest if, among other things, "each affected client gives informed consent, confirmed in writing").

245. Lee, *supra* note 4, at 481 (explaining how a conflict of interest would affect an attorney's representation of a fiduciary and multiple beneficiaries).

246. *See id.* (describing the enhancement of the problem with more beneficiaries); Tuttle, *supra* note 2, at 912 (acknowledging the unity of fiduciary and beneficiary interests "may hold true where there is only one beneficiary but seems less likely in those fiduciary relationships which involve multiple beneficiaries, who may have conflicting interests").

An example of such conflicting interests would be those of income beneficiaries and remaindermen beneficiaries, who have "structurally different economic interests." Tuttle, *supra* note 2, at 912. Income beneficiaries prefer investments that will create more income today while remaindermen prefer investments with long-term appreciation potential without depletion by income beneficiaries. *Id.*

247. *See* Fuller, *supra* note 5, at 54 ("Presumably, the fear is that attorneys' ethical obligations to clients are undermined if they are held to owe a duty to non-client beneficiaries.").

Finally, imposing a duty on attorneys to beneficiaries undermines the goals of legal malpractice for professional negligence.[248] Recall that the duty of care is a duty to "exercise the competence and diligence normally exercised by lawyers in similar circumstances."[249] This is the standard that some courts are applying to attorneys in relation to beneficiaries, discussed above,[250] whether called a fiduciary duty or a duty of care.[251] Recall also that the goals of legal malpractice for professional negligence are to discourage a lawyer's improper conduct or inaction and to compensate plaintiffs for injury caused by such negligence.[252] However, allowing third-party beneficiaries to bring professional negligence claims significantly increases an attorney's possible liability, which may have detrimental effects on the fiduciary relationship.[253] The goals of attorney liability for professional negligence are undermined by attorneys increasing the price of legal representation to cover the risks of liability or by creating pressure on attorneys to "slight the proper concerns of clients in order to avoid liability to nonclients."[254] As the lawyer's

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248. *See infra* notes 252–258 and accompanying text (explaining ways in which imposing duties on attorneys frustrates the objectives of professional negligence).

249. RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 52 (2000).

250. *See supra* notes 84–96 and accompanying text (detailing court opinions applying the duty of care standard to attorneys in relation to beneficiaries).

251. *See supra* Part II.A.3 (analyzing the common conflation of the duty of care and fiduciary duties).

252. *See* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS § 48 cmt. b (discussing how professional negligence and malpractice are applied to attorneys).

253. *See* Alan F. Streisand, *Malpractice Melee: Fending Off the Disgruntled and Disappointed, an Estate Planner's Field Guide*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 241, 262 (2011) ("Relaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability." (quoting Estate of Schneider v. Finman, 15 N.Y.3d 306, 310 (2010))); Tuttle, *supra* note 2, at 892 (emphasizing that imposing duties on attorneys owed to beneficiaries "exposes lawyers to significantly increased malpractice liability with potentially damaging consequences for the fiduciary relationship itself").

254. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 cmt. b; *see also* Fuller, *supra* note 5, at 42 ("[A] duty owed by an attorney to the general public imposes potentially huge liability on attorneys in general."); Tuttle, *supra* note 2, at 943 (explaining that "a legal duty to protect the beneficiary creates significant potential liability for the attorney").

malpractice exposure and time required for fiduciary oversight increase, the lawyer's costs increase.[255] Often, these costs prevent fiduciaries from obtaining counsel or are spread to the beneficiaries.[256] Conflicting concerns exist, however, because it can be difficult to distinguish harm caused by inappropriate lawyer conduct from harm to nonclients resulting from a lawyer vigorously representing a client.[257] Therefore, holding an attorney liable to nonclients could discourage attorneys from such vigorous representation of clients.[258]

C. Advantages of Applying the Traditional Approach

Most notably, the traditional approach avoids the conflicts of interest problem discussed above.[259] By holding that a fiduciary's attorney owes no duties to the beneficiaries (other than those duties owed to all nonclients), an attorney's only concern is for the interests of the fiduciary-client.[260] Thus, if the interests of the fiduciary-client and a beneficiary become adverse, it is clear that the attorney's loyalties lie only with the fiduciary-client and that no concurrent conflict of interest exists.[261]

The traditional approach also encourages the fiduciary-client to "communicate fully and frankly with the lawyer even as to

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255. *See* Tuttle, *supra* note 2, at 943 (noting the potential for an attorney to increase the cost of representing a fiduciary if the attorney is determined to owe some form of duty to beneficiaries as well).

256. *See id.* (recognizing that the lawyer's costs "and thus, ultimately, the beneficiary's costs" will increase as a result of the added attorney duty to beneficiaries).

257. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) cmt. b (addressing the duty of care as applied to nonclients).

258. *See id.* (acknowledging a concern with holding attorneys liable to nonclients).

259. *See* Lee, *supra* note 4, at 474 ("One of the benefits of the traditional theory is that attorneys are provided sufficient guidance when faced with a conflict of interest question."); Tuttle, *supra* note 2, at 905 (noting that the approach applying no duties to beneficiaries on a fiduciary's attorney "avoids the conflicts of interest that are endemic to any theory of joint or entity representation").

260. *See* Tuttle, *supra* note 2, at 905 (explaining that the conflicts of interest issue is avoided by "restricting the lawyer's loyalties to the fiduciary–client").

261. *See* Lee, *supra* note 4, at 474 ("If the attorney owes no duties to the beneficiary, there can be no concurrent conflict of interest.").

embarrassing and legally damaging subject matter."[262] It achieves this by stressing the "inviolable nature of the fiduciary's confidences."[263] The fiduciary-client is encouraged to communicate openly with the attorney, which allows the attorney to give the best representation and advice.[264] Open communication between the fiduciary and the attorney permits the fiduciary to fulfill his fiduciary duties more properly and to administer the trust or estate without suffering from being poorly informed.[265] A properly advised trustee is better for beneficiaries because the trustee is more capable of looking after the beneficiaries' interests.[266]

D. Disadvantages of Applying the Traditional Approach

Most opponents of the traditional theory are concerned that it does not provide adequate protection to beneficiaries.[267] For example, "[o]pponents of the traditional theory claim that justice would not be served if the attorney were permitted to simply withdraw from representation or withhold information while the beneficiary's interests are injured."[268] Arguably, requiring an attorney to disclose to beneficiaries any breach of the fiduciary-

262. *See id*. (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2012)).

263. *Id*.

264. *See* Renee Newman Knake, *Attorney Advice and the First Amendment*, 68 WASH. & LEE L. REV. 639, 642 (2011) ("Without the ability to render independent and candid legal advice, attorneys and, importantly, their clients have nothing."); Lee, *supra* note 4, at 491 ("By clarifying where the attorney's loyalties rest, the fiduciary is able to openly communicate with the attorney in order to receive the best advice and representation."); Tuttle, *supra* note 2, at 938 ("When a client feels free to disclose all information to his attorney, without fear that the attorney will disclose the information to others, the attorney is better able to both represent the client (promoting justice) and to dissuade the client from undertaking wrongful acts (promoting social utility).").

265. *See* Lee, *supra* note 4, at 491 (noting the benefits of open communication between attorney and fiduciary when the attorney does not owe a duty to the beneficiaries).

266. *See id.* (explaining that "the fiduciary will not suffer from being ill-informed and will be more capable of fulfilling his fiduciary duties and properly administering the trust or estate, which will benefit the beneficiary").

267. *See id.* at 489 ("Opponents of the traditional theory demand that more protection be provided for a beneficiary.").

268. *Id.* at 491.

client's duties is the only way to adequately protect the beneficiaries' interests.[269] Opponents also fear that beneficiaries will have no redress when an attorney has acted negligently but the fiduciary has not breached any duty.[270]

The second argument against the traditional theory focuses on the nature of the fiduciary relationship between trustee or estate representative and beneficiary. Opponents argue that "the fiduciary's agency is inseparable from his fidelity to the beneficiary."[271] Because the fiduciary's identity is "fundamentally relational,"[272] the attorney's relationship to the fiduciary should reflect the fiduciary's loyalty to the beneficiaries.[273] Opponents argue that the fiduciary's attorney should not treat beneficiaries as "[strangers], a potential foe."[274] The traditional approach disregards the nature of the fiduciary's function and relationship with the beneficiaries by allowing an attorney to represent a fiduciary while disregarding the beneficiaries' interests.[275] Thus, the structure of the fiduciary relationship itself calls for a "more nuanced understanding of the lawyer's duties toward the client's beneficiary," such as one in which an attorney owes some duty to the client's beneficiaries.[276]

VI. Recommendation

Whether classified as a fiduciary duty or a duty of care, theories imposing duties on a fiduciary's attorney create more

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269. *See id.* (arguing that in order to protect the interests of beneficiaries, the attorney should disclose fiduciary breaches).

270. *See id.* at 489 (noting the fear of protection for beneficiaries).

271. Tuttle, *supra* note 2, at 906.

272. *Id.* at 920.

273. *See id.* at 906 ("How can that duty of loyalty not affect the core of the lawyer's relationship with the fiduciary?").

274. *Id.* at 906.

275. *See* Lee, *supra* note 4, at 479 (explaining that the fiduciary's interests and the beneficiaries' interests are aligned; therefore, the attorney must recognize this relationship and adopt the beneficiary as a joint-client); Tuttle, *supra* note 2, at 892 (noting that the traditional approach "ignores the peculiar nature of the fiduciary's role and relationship with the beneficiaries").

276. Tuttle, *supra* note 2, at 906.

problems than benefits.[277] In contrast, the traditional approach is clear and, by definition, avoids the problems created by holding that attorneys owe a duty to beneficiaries, such as conflicts of interest[278] and increased attorney costs for greater professional negligence liability.[279] It avoids the concerns about fiduciaries' incapability to obtain counsel[280] while protecting beneficiaries by encouraging open communication between attorney and fiduciary.[281] Therefore, states should adopt the traditional approach, which provides as follows:

1. The fiduciary is the attorney's only client;
2. The attorney owes fiduciary duties only to the fiduciary-client; and
3. The attorney owes no other special duties to beneficiaries outside of the duties owed to all third parties.[282]

In adopting the traditional approach, states should recognize that the intended third-party beneficiary doctrine still applies so long as the specific intent to benefit third-party beneficiaries is clearly evident.[283]

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277. *See* Lee, *supra* note 4, at 480 (noting that the problems posed by the joint-client theory outweigh its benefits); Tuttle, *supra* note 2, at 943 ("Adding an additional right to sue the fiduciary's attorney imposes additional costs on the trust administration, raises serious conflict of interest problems for the attorney, and also requires the attorney to act against a central tenet of the lawyer's duty to her client—the duty of confidentiality.").

278. *See supra* notes 240–247 and accompanying text (explaining the concern that imposing duties on a fiduciary's attorney may require an attorney to represent the potentially conflicting interests of beneficiaries and the fiduciary).

279. *See supra* notes 254–256 and accompanying text (discussing the fear that attorneys will charge more for representation to cover the increased risk of professional malpractice liability).

280. *See supra* notes 245, 256 (fearing fiduciaries will be unable to obtain counsel due to either conflicts of interest or the increased price for an attorney resulting from an attorney owing duties to the beneficiaries).

281. *See supra* notes 262–266 (explaining that open communication between attorneys and fiduciaries promotes proper administration of the estate or trust, which benefits the beneficiaries).

282. *See* Lee, *supra* note 4, at 491 (summarizing the tenets of the traditional approach).

283. *See supra* note 176 (addressing the intended third-party beneficiary theory); Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982) ("[T]o establish a

Contrary to opposing arguments,[284] the traditional approach provides adequate protection to beneficiaries because they have methods of redress upon occurrence of misconduct by the fiduciary or attorney.[285] If malpractice by the fiduciary's attorney harms the estate or trust, the trustee or estate representative may bring a malpractice action against the attorney.[286] Indeed, it is the fiduciary's *duty* to bring such a malpractice action.[287] If misconduct of the fiduciary causes a loss to the estate, the beneficiaries have an actionable claim against the fiduciary for breach of fiduciary duty.[288]

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duty owed by the defendant attorney to the nonclient the nonclient must allege and prove that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the transaction or relationship."); Neal v. Baker, 194 Ill. App. 3d 485, 487–88 (1990) (applying the *Pelham* court's "intent to directly benefit" test); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000) (describing an attorney's duty to nonclients whom the attorney has invited "to rely on the lawyer's opinion or provision of legal services, and the nonclient so relies").

However, it is unlikely that a beneficiary will succeed in a malpractice action against an attorney under this approach. Lee, *supra* note 4, at 473. This is because, although a beneficiary is almost always specifically benefitted from the fiduciary's attorney–client relationship, it is extremely difficult to conclude that the parties to the attorney's contract entered into it "for the principal purpose of providing benefit to the [beneficiaries]." Goldberg v. Frye, 217 Cal. App. 1258, 1268 (1990).

284. *Supra* notes 267–270 and accompanying text.

285. *See* Correira, *supra* note 6, at 12 (noting that when an attorney owes a duty to the trustee–client alone, the beneficiaries are not left without recourse); Lee, *supra* note 4, at 491 ("The traditional theory permits a beneficiary to seek a remedy for misconduct by bringing a claim against the fiduciary.").

286. *See* Allen v. Stoker, 61 P.3d 622, 624 (Idaho Ct. App. 2002) (noting that beneficiaries still have protection through the fiduciary's ability to bring malpractice claims against the fiduciary's attorney); Lee, *supra* note 4, at 491 (explaining that the fiduciary may bring claims against the attorney for malpractice that harms the estate).

287. *See supra* note 61 and accompanying text (discussing the fiduciary's duty to enforce claims on behalf of the trust).

288. *See Allen*, 61 P.3d at 624 (emphasizing the ability of beneficiaries to bring claims against the fiduciary for breach of fiduciary duty); Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994) ("[A] duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries . . . [because] the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty."); Correira, *supra* note 6, at 12 (explaining that beneficiaries "can pursue an action directly against the trustees if they can show a breach of their fiduciary duties" (quoting Spinner v. Nutt, 631 N.E.2d 542, 547 (1994))); Lee, *supra* note 4, at 491

Many also argue that, due to beneficiaries' vulnerable position, an attorney should have the discretion to disclose breaches of the fiduciary-client's duties to beneficiaries.[289] Allowing discretionary disclosure, however, threatens complete and honest communication between attorney and fiduciary.[290] Thus, although an attorney's discretionary disclosure is touted as a protection for beneficiaries, it actually imposes a detriment.[291]

In addition, the traditional approach continues to prevent attorneys from aiding in or counseling the fiduciary-client to commit a breach of fiduciary duty in most circumstances.[292] If an attorney *knowingly* aids the fiduciary in a breach of fiduciary duty, then the attorney is liable to the beneficiaries.[293] If,

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(emphasizing beneficiaries' ability to sue the fiduciary (quoting *Allen*)); Tuttle, *supra* note 2, at 943 ("Finally, beneficiaries already have a right of redress for fiduciary misconduct: they can assert claims against the fiduciary.").

289. *See* Fuller, *supra* note 5, at 64 (advocating for a pass through privity approach to apply duties to a fiduciary's attorney owed to beneficiaries, which would require disclosure of "all information pertaining to the estate administration"); Lee, *supra* note 4, at 489 ("Advocates of modification claim that there are circumstances in which an attorney should be permitted to inform the beneficiary of a fiduciary's misconduct."); *id.* (arguing that states should "amend their rules to permit [disclosures]" of "fraudulent activity or another activity that may result in a substantial loss to the beneficiary"); Tuttle, *supra* note 2, at 954 ("Model Rule 1.6 should be changed to permit the lawyer discretion to disclose a fiduciary's breach of duty.").

290. *See supra* notes 262–266 (detailing the benefits of open and honest attorney–client disclosure).

291. *See supra* note 266 and accompanying text (explaining that beneficiaries' interests receive greater protection when the fiduciary is encouraged to communicate fully and honestly with the attorney).

292. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012) (clarifying that an attorney may be liable for counseling a client to breach or assisting in a client's breaching of a fiduciary duty if the breach is fraudulent or criminal); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. h (2000) (explaining that "[a] lawyer who assists a client to violate the client's fiduciary duties is civilly liable").

293. *See* RESTATEMENT (THIRD) OF TRUSTS § 108 cmt. b (2012) (noting that a third party is not liable to the trust for claims brought by beneficiaries if he unknowingly aided the trustee in breach of fiduciary duty); RESTATEMENT (SECOND) OF TORTS §§ 874, 876 (1979) (explaining that a fiduciary is subject to liability "for harm resulting from a breach of duty" and a third party is also liable for such breach if the third party knows the fiduciary is breaching a duty and "gives substantial assistance or encouragement"); Tuttle, *supra* note 2, at 901 ("Although the third party owes no fiduciary duties to the beneficiary, she may be liable to the beneficiary if she knowingly participates in the fiduciary's breach or gives substantial assistance or encouragement to the fiduciary in

however, an attorney assists in a breach of fiduciary duty *unknowingly*, then the attorney is not liable for such breach.[294] These principles reflect the prevailing legal standards of torts and trusts, which are undisturbed by an application of the traditional approach.[295]

Under the traditional approach, the fiduciary's attorney also must not make affirmative representations that he is representing or protecting the beneficiaries' interests.[296] Therefore, an attorney may still be liable to beneficiaries if the attorney has made representations that he is protecting the beneficiaries' interests and, in reliance on those representations, the beneficiaries are injured by the attorney's negligence.[297]

VII. Conclusion

The costs of imposing a duty on a fiduciary's attorney owed to beneficiaries may have some benefits that are not integrated into the traditional approach, but those benefits do not outweigh the costs.[298] The traditional approach provides significant advantages while simultaneously protecting beneficiaries' interests and providing adequate remedies for any breach of duties owed to them.[299] The lack of uniformity across states concerning this issue creates the possibility for substantial liability that attorneys are

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breaching his duty.").

294. *See* RESTATEMENT (THIRD) OF TRUSTS § 108 ("A third party is protected from liability in dealing with or assisting a trustee who is committing a breach of trust if the third party does so without knowledge or reason to know that the trustee is acting improperly.").

295. *See supra* notes 292–294 (describing how tort law and trusts law work together to impose liability for breach of fiduciary duty on a third party, including an attorney, who knowingly assists in such breach).

296. *See supra* notes 218–220 and accompanying text (explaining that making "affirmative representations of care" may violate the attorney's duty to avoid making misleading or false statements to any nonclient).

297. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. e ("Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient.").

298. *See supra* notes 228–258 and accompanying text (outlining the costs and benefits of imposing duties on a fiduciary's attorney owed to beneficiaries).

299. *See supra* Part V.C (noting the benefits of the traditional approach and its protections afforded to beneficiaries).

often unaware exists. The traditional approach offers the benefit of clarity of an attorney's obligations. That clarity serves not only the attorney but also the fiduciary-client and the beneficiaries of the trust or estate, allowing a wider availability of legal services in this setting at lower costs. To ensure clarity in state trusts and estates law and adequate protection to all parties involved, state legislators should begin drafting legislation implementing the traditional approach before more attorneys enter the race of fiduciary representation with unsettled law blurring the lines.