

## FIDUCIARY DUTIES AND EXCULPATORY CLAUSES: CLASH OF THE TITANS OR COZY BEDFELLOWS?

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*Centuries ago, when land represented the majority of wealth, the trust was used primarily for holding and transferring real property. As the dominant form of wealth moved away from family land, the trust evolved into a device for managing financial assets. With this transformation came the use of exculpatory clauses by both amateur and professional trustees, providing an avenue for these fiduciaries to escape liability for designated acts. With the use of exculpatory provisions, discussion abounded about whether fiduciary duties were mandatory or subject to modification. The latter view eventually prevailed, with the majority of jurisdictions viewing fiduciary duties as default rules; that is, part of a private agreement around which the parties are free to contract. Contracting around fiduciary duties is of particular concern when a lawyer suggests himself for a fiduciary role and inserts an exculpatory clause into the governing instrument. Although the lawyer is subject to applicable legal ethics rules, such as those which govern communications and conflicts of interest, this contractarian view of the attorney-client relationship is less than ideal, especially when lawyers and non-lawyer professionals are involved in a reciprocal referral agreement. During the recent revisions to the UPC, mandates relating to the default nature of fiduciary duties were not addressed. Perhaps this was because the matter was outside the scope of the revisionists' review, or perhaps the drafters of the revisions were comfortable with the recent position the Uniform Trust Code and the Restatement of Trusts have taken on exculpatory clauses. However, the UPC revisions should have addressed this matter with specificity. Given public policy concerns, client protection, fiduciary responsibilities, and the professional responsibility of lawyers, it may be that the standard of prudence should not be abandoned so easily.*

### INTRODUCTION

The Uniform Probate Code calls for trustees to observe the standards in dealing with “trust assets that would be observed by a prudent man dealing with the property of another.”<sup>1</sup> It further notes that with respect to the probate of wills and administration of estates, the personal representative “is a fiduciary who shall observe the standard of care applicable to trustees as described by Section

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1. UNIF. PROBATE CODE § 7-302 (2011), 8 U.L.A. pt. I, at 507 (1998); *see infra* notes 73–79 and accompanying text (prudent investor rule has replaced prudent man rule in the United States).

7-302,”<sup>2</sup> and “is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust.”<sup>3</sup> There is, however, qualifying language attached to this standard of care: “[e]xcept as otherwise provided by the terms of the trust.”<sup>4</sup>

By calling for liability for breach of fiduciary duty to mirror that of a trustee of an express trust, the Uniform Probate Code incorporates common law concerning trustee liability, as well as statutory law. Of late, considerable attention has been devoted to the status of fiduciary duties and, in particular, whether these duties are mandatory or can be changed by agreement.<sup>5</sup> Part of this discussion concerns the genesis of trusts and whether trusts are grounded in contract law or property law.<sup>6</sup>

The first part of this Article will explore the evolution of the trust, and address the use of exculpation to modify the duties of trustees. Next, the Article will examine the default nature of fiduciary duties, and highlight the positions taken by the Uniform Trust Code and the Restatement of Trusts on exculpatory clauses. The second part of the Article will address standards of care associated with fiduciaries, focusing on the lawyer as fiduciary, and will discuss the propriety of using exculpatory clauses with professional trustees. Given the importance of this issue, the Article takes the position that the revisions to the Uniform Probate Code should have addressed exculpatory clauses rather than leaving the matter to other law.

## I. EVOLUTION OF TRUSTS

Centuries ago, when land represented the majority of wealth, the trust primarily was used for holding and transferring real

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2. UNIF. PROBATE CODE § 3-703(a) (2011), 8 U.L.A. pt. I, at 138 (1998).

3. § 3-712 8, 8 U.L.A. pt. I, at 160.

4. § 7-302, 8 U.L.A. pt. I, at 507.

5. Compare Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879 (1988) (fiduciary duties have a mandatory core), and Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995) (cognition justifies the imposition of certain mandatory fiduciary duties), with John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (the duty of loyalty is default law that yields to the terms of the trust deal), and Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004) (fiduciary rules imposed by trust law are majoritarian default rules).

6. See Langbein, *supra* note 5, at 628.

property within families.<sup>7</sup> Trustees were usually family members or friends of the settlor who served gratuitously.<sup>8</sup> Typically, the settlor conveyed land to the trustee, who held the land for the settlor during his life, and upon the settlor's death, conveyed it to selected family members as remainder beneficiaries.<sup>9</sup> The trust was "primarily a branch of the law of conveyancing" and "[w]as a means of transferring and holding title to real estate."<sup>10</sup>

Over time, as the dominant form of wealth moved away from family real estate, the trust evolved from a conveyance device to "a management device for holding financial assets."<sup>11</sup> These financial assets were often complex, requiring "active and specialized management, in contrast to the conveyance trust that merely held ancestral land."<sup>12</sup> With this shift in trust property came a different type of trustee. Although "unpaid amateurs" were still around, "the fee-paid professional" became the prototypical trustee.<sup>13</sup>

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7. See John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 940 (2005).

8. See *id.* at 939. Trustees served gratuitously in England, for "a conflict of duty" would arise "if the trustee were allowed to perform the duties of the office and to claim remuneration for his services," because the trustee's "interest would be opposed to his duty to" the beneficiaries." *Id.* at 939-40 (quoting JOHN MOWBRAY ET AL., LEWIN ON TRUSTS § 20-132, at 503 (17th ed. 2000)). According to Langbein, Chantal Stebbings believes that "the use of lawyer-trustees increased in late Victorian times and . . . they began inserting compensation clauses into the trust instruments they drafted." Langbein, *supra* note 7, at 940 n.43 (citing CHANTAL STEBBINGS, THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND 34-36 (2002)).

9. See Langbein, *supra* note 5, at 633. Hansmann & Mattei have described a "prototypical Anglo-American trust":

[T]hree parties are involved: the "settlor" transfers property to the "trustee," who is charged with the duty to administer the property for the benefit of the "beneficiary." Any of these three roles may be played by more than one person. Also, the same person may play more than one of the three roles. In particular, the settlor and the beneficiary may be the same person.

Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 438 (1998).

10. See Langbein, *supra* note 5, at 633.

11. *Id.* at 637. "As Langbein and others have demonstrated, the private trust has evolved from a vehicle for conveying and preserving ancestral land into an organizing device that allows owners of property to ensure the ongoing and intergenerational professional management of their wealth." Sitkoff, *supra* note 5, at 633. Typically, the modern trust holds a portfolio of "complex financial assets, which are contract rights against the issuers." See Langbein, *supra* note 5, at 638. Examples of these would be "stocks, bonds, mutual fund shares, insurance and annuity contracts, pension plans, and bank deposits." See *id.*

12. See Langbein, *supra* note 5, at 638.

13. See *id.* When trust property became "a portfolio of financial assets, the advantages of using skilled professionals came to outweigh the disadvantages of having to compensate them." Langbein, *supra* note 7, at 941. This new trustee was seen by some as "a service provider for hire, hardly different in function from the professionals who contract to supply

### A. Duties of the Trustee

It is elementary trust law that a trustee must have duties to perform.<sup>14</sup> Without enforceable duties, the beneficiary has no enforceable interest, which makes the trust illusory.<sup>15</sup> The standard of care initially applied to the professional trustee was the standard of the reasonable professional.<sup>16</sup> It came to be recognized that “[a] trustee who has special skills or expertise, or is named trustee in reliance upon the trustee’s representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.”<sup>17</sup>

The core fiduciary duties generally recognized with trusts are those of loyalty, impartiality, and the duty of prudence in the conduct of trust administration. The duty of loyalty—to administer the trust solely in the beneficiaries’ interest<sup>18</sup>—has been described as the “most fundamental duty owed by the trustee to the beneficiaries.”<sup>19</sup> The duty of impartiality requires the trustee to give due regard to the interests of all the beneficiaries of a trust.<sup>20</sup> The duty of prudence in the conduct of trust administration requires the exercise of reasonable care, skill, and caution.<sup>21</sup>

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services in industry, commerce, finance, law, accounting and so forth.” Langbein, *supra* note 5, at 644.

14. UNIF. TRUST CODE § 402(a)(4) (2010). When condemning a trust term that shielded trustee decisions from court review, the Delaware Supreme Court noted that “[a] trust in which there is no legally binding obligation on a trustee is a trust in name only and more in the nature of an absolute estate or fee simple grant of property.” *McNeil v. McNeil*, 798 A.2d 503, 509 (Del. 2002).

15. See John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. REV. 1105, 1122 (2004).

16. See Langbein, *supra* note 5, at 639–40.

17. UNIF. PRUDENT INVESTOR ACT § 2(f) (1994), 7B U.L.A. 20 (2006) (derived from UNIF. PROBATE CODE § 7-302 (2011), 8 U.L.A. pt. 1, at 507 (1990)).

18. UNIF. TRUST CODE § 802(a) (2010). The duty of loyalty “consists of a straightforward promise on the part of the [trustee] not to engage in self-interested transactions involving the trust property.” Hansmann & Mattei, *supra* note 9, at 448.

19. 2A AUSTIN W. SCOTT & WILLIAM F. FRATCHER, *THE LAW OF TRUSTS* § 170, at 311 (4th ed. 1987). “[A] lawyer becomes a fiduciary once a representation begins,” and “the duty of loyalty exists only with respect to actions within the scope of the representation.” Lynn A. Baker & Charles Silver, *Fiduciaries and Fees: Preliminary Thoughts*, 79 FORDHAM L. REV. 1833, 1838–39 (2011).

20. See UNIF. TRUST CODE § 803 (2010). Some view the duty of impartiality as part of the duty of loyalty, rather than as a separate component of fiduciary law. See Langbein, *supra* note 5, at 656 n.162.

21. UNIF. TRUST CODE § 804 (2010). An objective standard of care puts the trustee “under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” RESTATEMENT (SECOND) OF TRUSTS § 174 (1959). The UTC “bases the standard on the purposes and other circumstances of the particular trust.” UNIF. TRUST CODE § 804 cmt. (2010). The prudence

Over time, as the trust evolved from a mechanism for holding real property to a device for managing assets, some trust instruments began to contain exculpatory clauses by which trustees could escape liability for certain acts. For instance, many trusts included provisions that “immunize[d] the trustee from liability to the beneficiaries absent something beyond ‘ordinary’ negligence or breach of fiduciary duty.”<sup>22</sup>

### *B. Enforceability of Exculpatory Provisions*

In the early twentieth century, it was unclear whether trustees could escape liability through the use of exculpatory provisions in trust instruments.<sup>23</sup> Some courts found trustees liable by construing these clauses narrowly.<sup>24</sup> Courts in other jurisdictions found such clauses to be “unenforceable as against public policy.”<sup>25</sup> Still other courts readily invoked exculpatory clauses, resulting in trustees being shielded from liability for negligent acts.<sup>26</sup>

For the amateur trustee, exculpatory clauses were used to protect the named friend or family member. Settlers often chose non-professional trustees because settlers placed high value “on qualities other than professional trust management, such as the trustee’s knowledge of family dynamics or the beneficiaries’ peculiarities.”<sup>27</sup> If such a trustee lacked expertise in financial matters, a settlor might want to absolve the trustee from investment decision

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standard for investing and managing assets is found in RESTATEMENT (THIRD) OF TRUSTS § 90 (2007).

22. Kevin J. Parker, *Trustee Defenses: Statute of Limitations, Laches, Self-Executing Accounting Release Provisions, and Exculpatory Clauses*, 23 PROB. & PROP., at 53, 53, 55 (2009).

23. See Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 75 n.43 (2006) (citing RESTATEMENT (SECOND) OF TRUSTS § 222 reporter notes (1959)).

24. *Id.*

25. Parker, *supra* note 22, at 55.

26. In *Warren v. Pazolt*, the testator’s will provided for trustee liability “only for his own ‘willful defaults’ and that they shall not ‘be answerable for any loss or damage which may happen to the trust property without their respective willful neglect or default.’” *Warren v. Pazolt*, 89 N.E. 381, 388, 390 (Mass. 1909). The Massachusetts Supreme Judicial Court explained that “[w]illful default means intentionally making away with the trust property and a willful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a willful violation of duty.” *Id.* at 388. When the trustees, in “error,” bought additional land and erected a building, rather than selling the existing land, they therefore were not guilty of “willful neglect or default.” *Id.* But see Leslie, *supra* note 23, at 74–75 (noting that some scholars assert that courts routinely enforce exculpatory clauses but suggesting that case law does not support this conclusion).

27. Leslie, *supra* note 23, at 101.

errors, hoping this protection might make the potential trustee more likely to serve.<sup>28</sup> For the family member or friend, there was a rational basis for an exculpatory clause that protected them from liability or induced them to take on a responsibility. Such a rational basis was less clear, however, when the trustees were professionals and hired for their professional expertise, for which compensation was received. Some felt that

[a] trust provision reducing fiduciary duties or exculpating the trustee is inconsistent with the essence of the relationship, which is the trustee's explicit or implicit promise to exercise the highest degree of care and skill, and to devote its energies to advancing zealously the beneficiaries' and not the trustee's interests.<sup>29</sup>

Nonetheless, exculpatory clauses were widely used in wills and trust instruments for both amateur and professional trustees.<sup>30</sup> Exculpatory clauses, in "countless cases," "relieved trustees of liability for conduct that would otherwise have given rise to surcharges."<sup>31</sup> Although exculpatory clauses were widely used, some scholars found there was little justification for allowing professional trustees to use broad exculpatory clauses for protection.<sup>32</sup> For instance, it was noted:

The ethics of the demand by corporate trustees for the insertion of an exculpatory clause seems dubious, to say the least. After advertising great skill and ability, and impliedly promising to use all that care and capacity in any trust where it is chosen trustee, the bank or trust company should not insist

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28. See *id.* ("Both settlor and trustee might want an exculpatory clause to give the trustee some room to maneuver without fear of liability.").

29. Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713, 2715 (2006) (footnote omitted). Professor Leslie advocates for different standards for the professional and non-professional trustee. See *id.* at 2720.

30. See 4 AUSTIN W. SCOTT, WILLIAM F. FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 24.27, at 1799 (5th ed. 2007).

31. *Id.* (footnote omitted).

32. Leslie, *supra* note 23, at 101. One commentator has asserted that "most well-established institutional trustees do not feel the need for broad clauses and do not insist on them." *Id.* The "increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in testamentary fiduciaries almost unlimited powers, with a minimum of obligations," however, led to a New York statute that invalidated exculpatory provisions on grounds of public policy. The statute released a fiduciary from liability for failure to exercise reasonable care, diligence, or prudence. Peter C. Valente & Joann T. Palumbo, *Exculpatory Provisions*, N.Y. L.J., Apr. 29, 1998, at 3 (quoting 4TH REP., TEMP. COMM'N ON ESTATES 499 (1965)).

that the [settlor] hold the trustee to a lower standard of performance.<sup>33</sup>

Some jurisdictions condemned the use of exculpatory clauses on policy grounds. For instance, in 1936, a New York statute provided that an attempted grant of immunity from liability to an executor or trustee for failure to exercise reasonable care, diligence, and prudence was contrary to public policy.<sup>34</sup> While settlors did not universally embrace exculpatory clauses, generally an exculpatory clause was considered “effective to limit the trustee’s liability,” and “not against public policy if it merely relieve[d] the trustee of liability for ordinary negligence.”<sup>35</sup>

### C. Fiduciary Duties: Default Provisions or Immutable Rules?

As scholars discussed whether fiduciary duties are mandatory, or if they are subject to modification, at issue was whether trusts are grounded in contract law or property law.<sup>36</sup> Those who viewed trusts as contracts posited that voluntary bargaining, including the ability to modify trustee duties, was part of trust formation.<sup>37</sup> In essence, fiduciary duties were default rules; that is, part of a private agreement that the parties were free to contract around.<sup>38</sup> Those who viewed trusts as based on property law considered fiduciary duties to be a defining aspect of trusts, and disapproved of attempts to waive or significantly modify their application.<sup>39</sup> This

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33. GEORGE T. BOGERT, TRUSTS 340 (6th ed. 1987).

34. Estate Powers and Trusts Law § 11-1.7 was renumbered and amended in 1967 to insert the word “testamentary” to modify the word “trustee.” N.Y. EST. POWERS & TRUSTS LAW § 11-1.7 historical & statutory notes (McKinney 2008). In the 2008 Surrogates Court, New York County, New York, this public policy mandate was found to apply equally to an inter vivos trust where, by its terms, no one was in a position to protect the beneficiaries from the actions of the trustee. *In re Shore*, 854 N.Y.S. 2d 293, 296 (2008).

35. See SCOTT, FRATCHER & ASHER, *supra* note 30, at 1799–1801 (footnotes omitted). Exculpatory clauses may fail to limit the trustee’s liability “either (1) because the trustee commits a breach of trust that does not fall within the scope of the provision; (2) because the provision is against public policy; or (3) because the provision was improperly included in the trust instrument.” *Id.* at 1799.

36. See Langbein, *supra* note 5, at 628.

37. See *id.* at 657–61.

38. See *infra* notes 47–49 and accompanying text.

39. See Bogert, *supra* note 33, at 340. Exculpatory provisions must be distinguished from clauses that expand a fiduciary’s powers. For instance, a provision stating a trustee is not liable for breach of fiduciary duty because of investment decisions is different from a provision authorizing a trustee to make improper investments. See Valente & Palumbo, *supra* note 32, at 3.

century-old argument of whether trusts are based on contract law or property law has resurfaced of late.<sup>40</sup> Some say “the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract.”<sup>41</sup> Others, while recognizing that the transaction between a settlor and trustee is contract-based, note that it is “the property-like aspects of the trust that are the principal contribution of trust law.”<sup>42</sup> Still others view the law in this area as “organizational law,” because it “blends features familiar from both property and contract law” that are the proprietary ingredients of identified property (the trust res) and the in personam contractarian elements.<sup>43</sup> An underlying component of the contractarian analysis, however, is the assumption “that the parties to the deal have full information and equal bargaining power.”<sup>44</sup> Even those who embrace trusts as grounded in contract law and view fiduciary duties as waivable recognize there are limits on this practice.<sup>45</sup> For instance, John Langbein, who views fiduciary duties as default rules, recognizes there are some duties that cannot be waived. He posits that inclusion of terms that would waive the duty of loyalty or a trustee’s duty to act in good faith would indicate the settlor did not understand the instrument, because no informed settlor would knowingly agree to such provisions.<sup>46</sup>

Mandatory rules, often referred to as “immutable rules,” are distinguished from default rules in contractarian economics.<sup>47</sup> According to contract theorists, default rules promote efficiency by minimizing transaction costs.<sup>48</sup> Theorists recognize that

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40. See *supra* note 5.

41. Langbein, *supra* note 5, at 627.

42. Hansmann & Mattei, *supra* note 9, at 469.

43. Sitkoff, *supra* note 5, at 627. “The trust is more than a simple contract between private parties. It is an organizational form with in rem as well as in personam dimensions.” *Id.* at 638.

44. Leslie, *supra* note 23, at 81 (footnote omitted).

45. See Leslie, *supra* note 29, at 2742. The Uniform Trust Code provides that “[e]ven if the terms of the trust attempt to completely exculpate a trustee for the trustee’s acts, the trustee must always comply with a certain minimum standard.” UNIF. TRUST CODE § 1008 cmt. (2010).

46. See Langbein, *supra* note 15, at 1124. As with trust law, in some areas of corporate law, “ex-ante contracts have been allowed to trump fiduciary duty.” Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 291 (2000). Also, as with trust law, to this “there are limits.” *Id.*

47. See *id.* at 289.

48. See Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1037 (2005). But “[i]t is a credo of estate planning that a well-drafted will should anticipate contingencies and never rely on default rules.” *Id.* at 1039 (footnote omitted).



an *immutable rule* is a rule that *cannot* be changed by a contractual agreement. A *majoritarian immutable rule* is suitable for most parties in most situations, whereas a *tailored immutable rule* is designed for a specific subset of parties. A *default rule*, unlike an immutable rule, *can* be changed by a contractual arrangement.<sup>49</sup>

The Uniform Trust Code views fiduciary duties as both default rules and as immutable rules that are majoritarian.<sup>50</sup>

#### *D. Position of the Uniform Trust Code on Exculpatory Clauses*

The Uniform Trust Code (UTC) is part of a coordinated law revision project put forth in 2000, described as “the first comprehensive national codification of the American law of trusts.”<sup>51</sup> The UTC essentially provides that trust law is default law, except for specifically scheduled mandatory rules.<sup>52</sup> Among the mandatory rules is “the duty of a trustee to act in good faith and in accordance with the *terms and purposes* of the trust.”<sup>53</sup> The mandatory rules provide further that “a trust and its terms be for the benefit of its beneficiaries.”<sup>54</sup> Interestingly, the core duties of

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49. Painter, *supra* note 46, at 289–90 (footnote omitted). Majoritarian default rules, tailored default rules, and penalty default rules are the three primary types of default rules:

A *majoritarian default rule* is a rule that most contracting parties prefer. Other parties bargain around the default or, if bargaining costs are too high, live with the default rule even though for them it is suboptimal. Majoritarian rules save transaction costs because most parties have no incentive to contract around the default. *Tailored default rules* are majoritarian default rules that are designed for specific subgroups of contracting parties. A *penalty default rule* is a rule most parties would *not* prefer, but which is imposed to induce parties to contract for their own tailored rule.

*Id.* at 290 (footnote omitted).

50. See *infra* note 54.

51. Langbein, *supra* note 15, at 1106. The UTC was prepared in coordination with the Restatement (Third) of Trusts, which was published in part in final form in 2003. *Id.* at 1106–07. Section 27 of the Restatement requires that “a private trust, its terms, and its administration must be for the benefit of its beneficiaries.” RESTATEMENT (THIRD) OF TRUSTS § 27 (2003).

52. Section 105(a) of the UTC provides that all trust law is default law except for the mandatory rules specifically stated in Section 105(b). See UNIF. TRUST CODE § 105(a)–(b) (2010).

53. § 105(b)(2) (emphasis added).

54. § 105(b)(3). Section 105 of the UTC, entitled “Default and Mandatory Rules,” provides:

loyalty, impartiality, and prudence are not on the UTC's list of mandatory rules.<sup>55</sup> This has led to the interpretation that "[t]rust law allows the settlor to conclude that particular fiduciary rules would overprotect or otherwise complicate the particular trust and its purposes, hence, the beneficiaries would be better served by abridging them."<sup>56</sup>

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- (a) Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.
  - (b) The terms of a trust prevail over any provision of this [Code] except:
    - (1) the requirements for creating a trust;
    - (2) the duty of a trustee to act in good faith and in accordance with the *terms and* purposes of the trust *and the interest of the beneficiaries*;
    - (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
    - (4) the power of the court to modify or terminate a trust under Sections 410 through 416;
    - (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in [Article] 5;
    - (6) the power of the court under Section 702 to require, dispense with, or modify or terminate a bond;
    - (7) the power of the court under Section 708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
    - (8) the duty under Section 813(b)(2) and (3) to notify the qualified beneficiaries of an irrevocable trust who have attained 25 years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;
    - (9) the duty under Section 813(a) to respond to the request of a [*qualified*] beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of the trust;
    - (10) the effect of an exculpatory term under Section 1008;
    - (11) the rights under Section 1010 through 1013 of a person other than a trustee or beneficiary;
    - (12) periods of limitation for commencing a judicial proceeding; [and]
    - (13) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; [and]
    - (14) the subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 203 and 204].

§ 105(a)–(b) (emphasis added) (alterations in original).

55. See § 105(b).

56. Langbein, *supra* note 15, at 1122.

The UTC recognizes exculpatory clauses as generally enforceable. However, there are substantive limitations to using exculpatory clause in that a trustee cannot be relieved from bad faith, intentional misconduct, or reckless indifference. The UTC provides:

- (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:
  - (1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or
  - (2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.
- (b) An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.<sup>57</sup>

Kevin Parker notes that this UTC section “would allow a trustee to retain a profit that the trustee made from the trust even though the profit was derived from a breach of trust, as long as such breach did not arise to the level of one of the exceptions (bad faith or reckless indifference).”<sup>58</sup> And commentary to the UTC states that the trustee’s burden with respect to fairness and communication is satisfied if independent counsel represented the settlor.<sup>59</sup> This is the case even if the settlor’s attorney uses the trustee’s form.<sup>60</sup>

#### *E. Position of the Restatement of Trusts on Exculpatory Clauses*

The Restatement of Trusts (Restatement) also addresses the matter of exculpatory clauses and is similar to the UTC provisions,

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57. UNIF. TRUST CODE § 1008 (2010).

58. Parker, *supra* note 22, at 57.

59. UNIF. TRUST CODE § 1008 cmt. (2010). Commentary to section 1008 specifically rejects the position taken by the court in *Marsman v. Nasca*, 573 N.E.2d 1025 (Mass. App. Ct. 1991), which placed the burden on the beneficiary to prove an exculpatory clause was inserted as a result of an abuse of a fiduciary relationship. *See id.*

60. *Id.*

although there are differences. Both the UTC and the Restatement provide that exculpatory clauses generally are enforceable.<sup>61</sup> Both state that such clauses are unenforceable if inserting the clause into the instrument was itself a breach of fiduciary duty.<sup>62</sup> And both also provide that exculpatory clauses are to be strictly construed and establish substantive limitations precluding protection from bad faith, intentional misconduct, or reckless indifference.<sup>63</sup> Interestingly, the 2009 Tentative Draft to the Restatement (Third) of Trusts, which has been approved and is scheduled to be incorporated in the Restatement (Third)'s fourth volume expected in 2012, would remove the word "reckless" and broaden unenforceability to "indifference to the fiduciary duties of the trustee, the terms and purposes of the trust, or the interest of the beneficiaries."<sup>64</sup> Another difference is that under the Restatement, in contrast to the UTC, a trustee who is relieved of liability for breach of trust by virtue of exculpatory clause protection must disgorge profits derived from the breach of trust.<sup>65</sup> Both the Restatement and UTC

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61. Section 222(1) of the Restatement (Second) of Trusts provides that "[e]xcept as stated in Subsections (2) and (3), the trustee, by provisions in the terms of the trust, can be relieved of liability for breach of trust." RESTATEMENT (SECOND) OF TRUSTS § 222(1) (1959).

62. *See id.* Section 222(3) provides:

To the extent to which a provision relieving the trustee of liability from breaches of trust is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor, such provision is ineffective.

RESTATEMENT (SECOND) OF TRUSTS § 222(3). The Tentative Draft No. 5 of the Restatement (Third) of Trusts § 96(1) provides:

A provision in the terms of a trust that relieves a trustee of liability for breach of trust, and that was not included in the instrument as a result of the trustee's abuse of a fiduciary or confidential relationship, is enforceable except to the extent that it purports to relieve the trustee

- (a) of liability for a breach of trust committed in bad faith or with indifference to the fiduciary duties of the trustee, the terms or purposes of the trust, or the interests of the beneficiaries, or
- (b) of accountability for profits derived from a breach of trust.

RESTATEMENT (THIRD) OF TRUSTS § 96(1) (Tentative Draft No. 5, 2009).

63. RESTATEMENT (SECOND) OF TRUSTS § 222(2).

64. RESTATEMENT (THIRD) OF TRUSTS § 96(1)(a) (Tentative Draft No. 5, 2009).

65. RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. g. Section 243 comment g provides:

*Exculpatory provisions.* A trustee may be denied compensation, wholly or partially, on account of a breach of trust committed by him, even though he does not incur a liability for the breach of trust because of an exculpatory provision in the trust instrument.

have similar clauses regarding the insertion of an exculpatory clause as a result of abuse by the trustee of a fiduciary or confidential relationship. But only the UTC places the burden on the trustee who drafted the clause, or caused the clause to be drafted, to prove the clause is fair and was adequately communicated to the settlor.<sup>66</sup> It should be noted that the 2009 Tentative Draft would also place the burden on the trustee to prove such a clause is fair and adequately communicated or understood by the settlor,<sup>67</sup> although there is no indication in the Restatement whether this burden is satisfied if the settlor is represented by independent counsel.

To determine when an exculpatory clause is included in an instrument as a result of an abuse of a fiduciary or confidential relationship, one may consider, among other factors:

whether the instrument was drawn by the trustee or another acting wholly or in part on behalf of the trustee; whether the trustee prior to or at the time of the trust's creation had been in a fiduciary relationship to the settlor, such as by serving as the settlor's conservator or as the settlor's lawyer in providing the trust instrument or relevant part(s) of it; whether the settlor received competent, independent advice regarding the provisions of the instrument; whether the settlor was made aware of the exculpatory provision and was, with whatever guidance may have been provided, able to understand and

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RESTATEMENT (SECOND) OF TRUSTS § 243 cmt. g. See RESTATEMENT (THIRD) OF TRUSTS § 96(1)(b) (Tentative Draft No. 5, 2009).

66. See *supra* note 57 and accompanying text.

67. Comment d to the Tentative Draft No. 5 of the Restatement (Third) of Trusts provides, in part:

*Clause improperly included in terms of trust.* If the terms of the trust were drafted by the trustee, or if the exculpatory clause was caused to be included in the trust by the trustee, the clause is presumptively unenforceable. The presumption is rebuttable, and the clause will be given effect if the trustee proves that the exculpatory provision is fair under the circumstances (including, when applicable, the fiduciary risks to be assumed) and that the existence, contents, and effect of the clause were adequately communicated to or otherwise understood by the settlor.

RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. d (Tentative Draft No. 5, 2009) (citations omitted).

make a judgment concerning the clause; and the extent and reasonableness of the provision.<sup>68</sup>

The commentary to the Restatement further provides that “an exculpatory clause is unenforceable if it is found, by presumption or otherwise, to be the product of undue influence or other improper conduct on the part of the trustee.”<sup>69</sup> And if the inclusion of an exculpatory clause is the result of a mistake, “the terms of the trust are subject to reformation.”<sup>70</sup> The commentary also cautions that

exculpatory clauses are to be distinguished from trust provisions that modify a trustee’s powers and duties; modifications may affect the question of whether certain conduct by the trustee *constitutes* a breach of trust, whereas an exculpatory clause may eliminate or limit the trustee’s *liability* when a breach of trust does occur.<sup>71</sup>

Additionally, “[a]n exculpatory clause must be distinguished from a clause that *expands* a fiduciary’s powers,” which gives a trustee “power to do certain acts rather than give a blanket exoneration for self-dealing and [what would be] other breaches of trust.”<sup>72</sup>

## II. STANDARDS OF CARE AND FIDUCIARIES

When dealing with trust assets, the UPC calls for trustees to observe the standards that would be observed by a prudent man dealing with another’s property. If the trustee happens to be a lawyer, the trustee is also governed by applicable rules of professional

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68. *Id.* The Supreme Judicial Court of Massachusetts looked to the following factors when determining whether an exculpatory clause was the result of an abuse by the trustee of a fiduciary or confidential relationship:

- (1) whether prior to the creation of the trust, the trustee was in a fiduciary relationship with the settlor; (2) whether the trust was drawn by the trustee; (3) whether the settlor had independent advice as to the trust provisions; (4) whether the settlor is a person of experience and judgment or a person unfamiliar with business affairs; (5) whether the insertion was a product of undue influence or improper conduct by the trustee; (6) the extent and reasonableness of the provision.

Rutanen v. Ballard, 678 N.E.2d 113, 141 (Mass. 1997) (quoting RESTATEMENT (SECOND) OF TRUSTS § 222 cmt. d (1959)).

69. RESTATEMENT (THIRD) OF TRUSTS § 96 cmt. d (Tentative Draft No. 5, 2009).

70. *Id.*

71. *Id.* cmt. a.

72. Valente & Palumbo, *supra* note 32, at 3.

conduct that have been adopted in designated jurisdictions. The prudent man rule, recognized across the United States for years, favored risk-adverse safe investments, such as government bonds and disfavored those considered speculative, such as stocks.<sup>73</sup> Each investment was considered and evaluated in isolation, rather than within the context of the entire portfolio.<sup>74</sup> However, in the last two decades, all states have replaced the prudent man rule with a new prudent investor rule, directing the trustee to invest on the basis of “risk and return objectives reasonably suited to the trust,” with the prudence of individual investments considered in the context of the entire trust portfolio, not in isolation.<sup>75</sup> “Assessing the prudence of a particular investment therefore requires consideration of the portfolio as a whole, the beneficiary’s tolerance for risk, and the purpose of the trust.”<sup>76</sup> Referred to as “[p]robably the most significant and pervasive influence on fiduciary standards in this country” in recent years, the prudent investor rule originated in a special volume of the Restatement (Third) project and was then set out in a uniform act.<sup>77</sup> Some scholars questioned why it took so long to shift from the concept of the prudent man to the prudent investor rule. Schanzenbach & Sitkoff suggested that the prudent man rule lasted as long as it did “because sophisticated parties could opt out of its application.”<sup>78</sup> The new rule, like the old rule, “is nominally a default rule that may be altered by the terms of the trust.”<sup>79</sup>

Today, most states approach exculpatory clauses in trust instruments in one of three ways. States tend to follow the Restatement principles or the UTC, or implement statutes nullifying exculpatory

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73. See Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON 681, 681–82 (2007).

74. See *id.* at 682.

75. *Id.* The new prudent investor rule provides that the “trustee’s investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” UNIF. PRUDENT INVESTOR ACT § 2 (1994), 7B U.L.A. 20 (2006). See also RESTATEMENT (THIRD) OF TRUSTS § 90 (2005).

76. Schanzenbach & Sitkoff, *supra* note 73, at 685.

77. Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CAL. L. REV. 1877, 1918 (2000). One commentator referred to the 1990s as “the decade of trust reform,” because it featured creation of “the Restatement of Trusts in 1992, followed by the Uniform Prudent Investor Act in 1994, and the Uniform Principal and Income Act in 1997,” which together “mark[ed] the formal entrance of Modern Portfolio Theory into trust law.” Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don’t Have to Think of England Anymore*, 62 ALB. L. REV. 543, 567–68 (1999) (footnotes omitted).

78. Schanzenbach & Sitkoff, *supra* note 73, at 687 (citations omitted).

79. See *id.* (citations omitted).

clauses based on public policy concerns.<sup>80</sup> A matter of particular concern to this author, however, is the situation where a lawyer names himself, his firm, or an institution with which he works, to a fiduciary position, and includes an exculpatory provision within the governing instrument.

### A. *The Lawyer as Fiduciary*

In the not too distant past, a lawyer attempting to influence a client to name him as an executor or trustee was frowned upon. An Ethical Consideration in the Model Code of Professional Responsibility stated that “[a] lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”<sup>81</sup>

Lawyers were not to suggest themselves for fiduciary roles, let alone use language in an instrument that would excuse them from liability for breach of trust. With the advent of the Model Rules of Professional Conduct in 1983,<sup>82</sup> however, this prohibition against a lawyer influencing a client to name the lawyer to a fiduciary position was not reasserted. To that end, the Rules provided the following explanation when addressing the legal background of new Model Rule 1.8 on Conflict of Interest:

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80. Parker, *supra* note 22, at 55.

81. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-6 (1983). The Canons of Professional Ethics (Canons), originally promulgated in 1908 and replaced by the Model Code of Professional Responsibility (Model Code), did not prohibit the practice of lawyers serving as executors. See Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 FORDHAM L. REV. 1357, 1376 (1994). The Model Code replaced the Canons in 1969 because, in part, “a consensus developed among the bar that the Canons were incomplete, unorganized, and failed to ‘recognize the distinction between the inspirational and proscriptive.’” Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785, 792 (2000) (quoting Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 5 (1970)). “The Model Code [was] composed of three parts: (1) Canons—concise statements setting forth the basic duties of lawyers[;] (2) Ethical Considerations—statements of activity and conduct to which practitioners should aspire[;] and (3) Disciplinary Rules—statements setting forth minimum standards of conduct that must be met.” Hill, *supra*, at 792 n.40 (citing MODEL CODE OF PROF'L RESPONSIBILITY (Preliminary Draft 1969)).

82. The ABA, in 1983, “replaced the Model Code with the Model Rules of Professional Conduct (Model Rules). The movement that led to the Model Code’s replacement began in the 1970s, when members of the bar contended that the tripartite structure of the Model Code was confusing.” Hill, *supra* note 81, at 802 (footnotes omitted).



EC 5-6 of the Code states that a lawyer should not seek to have himself or a partner or associate named in an instrument as executor of the client's estate. Such an appointment is not expressly prohibited under this Rule, but is subject to the general conflict of interest provision in Rule 1.7 and the more specific requirements of paragraph (a) of this Rule.<sup>83</sup>

Even before the promulgation of the Model Rules, it was generally felt that as long as the idea of the lawyer as fiduciary originated with the client, there was little that was objectionable to a lawyer assuming this role.<sup>84</sup> This premise had its skeptics, however, for it

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83. MODEL RULES OF PROF'L CONDUCT R. 1.8, legal background (Proposed Final Draft 1981) (citations omitted). Model Rule 1.8(a) provided:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
  - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
  - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
  - (3) the client consents in writing thereto.

MODEL RULES OF PROF'L CONDUCT R. 1.8(a) (1983). Model Rule 1.7 provided as follows:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
  - (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

*Id.* R. 1.7.

84. See Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 98 (1984). Professor Johnston put forth reasons why a client might want a lawyer to serve as an executor and why a lawyer would be interested in assuming this role:

An attorney might be motivated to serve in this capacity to accommodate the client. This could be the case, for example, when the provisions of the will vest considerable discretion in the executor, and for this reason the testator would prefer not to

was noted that it was “unusual for a client to ask an attorney to serve in such a fiduciary capacity, unless the seeds of that ‘request’ were planted by the attorney draftsman.”<sup>85</sup> With the client likely to be dead when the issue arises, “it is often the attorney’s testimony alone that may be the only evidence” of such an arrangement.<sup>86</sup> When the Model Rules did not address the propriety of suggesting oneself as a fiduciary, let alone condemn the practice, some were disappointed, expressing the opinion that preparation of a will naming the draftsman as attorney “should be considered unethical and subject to disciplinary sanctions.”<sup>87</sup> Johnston noted that “[a]lthough an attorney’s action in designating himself or herself as a fiduciary may violate some of the more general ethical rules, such as those pertaining to conflict of interest, it would have been infinitely better if the new code had expressly forbidden this conduct,” which, of course, the Model Rules did not.<sup>88</sup>

As the twenty-first century approached, the Model Rules underwent significant scrutiny and subsequent revision.<sup>89</sup> The Model Rules affirmatively recognized the position of the lawyer in a fiduciary role.<sup>90</sup> The commentary to Model Rule 1.8 was revised to

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appoint a corporate fiduciary, and feels that friends or relatives would not be appropriate persons to serve in this capacity. Alternatively, the attorney, having rendered legal services to the testator in the past, may have become familiar with the testator’s family, assets, or business interests, and therefore might be the logical choice to look after these matters once the testator has died . . . . Furthermore . . . [it] can be lucrative.

*Id.* at 86–87 (footnotes omitted).

85. *Id.* at 98 (footnote omitted).

86. *Id.*

87. *Id.* at 112. Apparently, an early draft of the Model Rules contained a note in the commentary that echoed the premise of EC 5-6, stating that a lawyer should not “seek” to have himself named as an executor in an instrument. This, however, was not included in the Model Rules’ final version. *See* Spurgeon & Ciccarello, *supra* note 81, at 1377.

88. *See* Johnston, *supra* note 84, at 98 (footnote omitted). It was noted that:

The newly adopted Model Rules of Professional Conduct are considerably less specific with regard to the potential impropriety of an attorney preparing a will in which he or she is designated as executor . . . . [T]he Model Rules of Professional Conduct fall far short of the Code of Professional Responsibility, because specific rules provide more effective guidelines for lawyers seeking to act within ethical bounds.

*Id.* at 91 (footnotes omitted).

89. In 1997, the ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) was established to study and evaluate the Model Rules. It recommended changes to over two-thirds of the existing Model Rules, and suggested that several new rules be added. *See* Louise L. Hill, *Electronic Communications and the 2002 Revisions to the Model Rules*, 16 ST. JOHN’S J. LEGAL COMMENT. 529, 531–32 (2002).

90. *See infra* note 91 and accompanying text.

include language that “there is nothing improper about a lawyer suggesting to a client that he, or someone in his firm, be named to a lucrative fiduciary position.”<sup>91</sup>

In a 2002 American Bar Association Formal Opinion which addressed a lawyer serving as fiduciary for an estate or trust, the ABA Standing Committee on Ethics and Professional Responsibility stated that a “lawyer may serve as a fiduciary under a will or trust that the lawyer is preparing for the client.”<sup>92</sup> Such a role was subject, however, to satisfying the obligations under Model Rule 1.4(b)<sup>93</sup> and 1.7(b),<sup>94</sup> which address communication and conflict of interest, respectively.<sup>95</sup> Under Model Rule 1.4(b), the lawyer’s role as fiduciary must be explained to the client so the client can make an informed decision about the representation.<sup>96</sup> The ABA Opinion indicated this would require a lawyer to

discuss frankly with the client her options in selecting an individual to serve as fiduciary. This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary’s desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate

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91. MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 8 (2010). Noting that such an appointment will be subject to the general conflict of interest provision of Model Rule 1.7, the comment goes on to state that “[i]n obtaining the client’s informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer’s financial interest in the appointment, as well as the availability of alternative candidates for the position.” *Id.*

92. ABA Formal Op. 02-426 (May 31, 2002).

93. Model Rule 1.4(b) states that “[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2010).

94. Subsection (b) of Model Rule 1.7 provides as follows:

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - (4) each affected client gives informed consent, confirmed in writing.

MODEL RULES OF PROF’L CONDUCT R. 1.7(b) (2010).

95. ABA Formal Op. 02-426, *supra* note 92.

96. See *supra* note 93.

fiduciaries, and family members; and the benefits and detriments of using each, including relative costs.<sup>97</sup>

Model Rule 1.7(b) addresses resolution of a conflict of interest where the representation of a client may be materially limited by a personal interest of the lawyer. Under this rule, the representation may proceed if *the lawyer reasonably believes* that she can render competent and diligent representation to the client, and the client gives informed written consent.<sup>98</sup> The ABA Opinion holds lawyers to a more exacting standard than Model Rule 1.7: “The ABA opinion would attach a duty of disclosure regardless of whether 1.7 applies,” something that is inconsistent with the commentary to Model Rule 1.7, which “implies that only a Rule 1.7 case triggers disclosure plus informed consent.”<sup>99</sup>

In addition to the general rule on conflict of interest at Model Rule 1.7, Model Rule 1.8 addresses specific rules relating to conflicts, including gifts to clients and business transactions with clients.<sup>100</sup> ABA Formal Opinion 02-426 notes specifically that accepting an appointment as a fiduciary falls into neither of these categories.<sup>101</sup> However, the ABA Opinion states additionally that while a lawyer fiduciary’s appointment of himself or his firm as counsel for the fiduciary does not constitute an inherent conflict of interest, the overall compensation must be reasonable.<sup>102</sup> Whether

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97. ABA Formal Op. 02-426, *supra* note 92.

98. *Supra* note 94 (emphasis added).

99. Paula A. Monopoli, *Drafting Attorneys as Fiduciaries: Fashioning an Optimal Ethical Rule for Conflicts of Interest*, 66 U. PITT. L. REV. 411, 427 (2005). Professor Monopoli notes that “all cases require ‘discussion,’ which the ABA opinion seems to use interchangeably with disclosure.” *Id.*

100. MODEL RULES OF PROF’L CONDUCT R. 1.8(a)(c) (2010).

101. ABA Formal Op. 02-426, *supra* note 92. The Opinion states:

Because a fiduciary performs services for compensation, accepting appointment as fiduciary is not accepting a gift from a client who is unrelated to the lawyer, such as Rule 1.8(c) prohibits. In addition, because appointing a fiduciary is not a “business transaction with a client,” Rule 1.8(a) does not apply to require the client to give her signed, informed consent to the essential terms of the arrangement after receiving the lawyer’s written advice to seek independent legal advice.

*Id.*

102. *See id.* (citations omitted). With respect to fiduciary compensation, the ABA Opinion notes:

Rule 1.5(a), which sets standards for determining the reasonableness of lawyers’ fees, does not in specific terms cover compensation that a lawyer may receive as a fiduciary. Nevertheless, the fiduciary compensation the lawyer and his firm receive for his time

a lawyer or firm, serving in both capacities, can be paid in full for services rendered in both roles, differs from jurisdiction to jurisdiction.<sup>103</sup>

While the 2002 ABA Opinion voiced no inherent conflict when a lawyer, serving as fiduciary, names himself or his firm as legal counsel for the fiduciary, there are those that disagreed. Some saw this situation as “replete with ‘serious problems of conflict of interest, overreaching, undue influence and solicitation.’”<sup>104</sup> Others thought this situation suggested “a move away from client protection and toward a more arm’s-length view of the attorney-client relationship—from a fiduciary to a contractarian view of the relationship.”<sup>105</sup> Giving the lawyer the authority to determine if a conflict of interest is consentable indicates a departure “from the notion that the relationship of lawyer and client has certain immutable duties that may not be waived.”<sup>106</sup> Rather than seeing “this kind of conflict [as] a per se conflict,” which would preclude the practice, the ABA embraced a “more contractarian view of conflict rules.”<sup>107</sup>

### B. Standards of Care as Default Rules

While the Model Rules of Professional Conduct allow an attorney to serve as a fiduciary for a client, they do not address the matter of incorporating exculpatory clauses into an instrument drafted by the lawyer. Nor is the matter of exculpatory clauses addressed in the UPC, which defers to common law and to statutory law by specifying that the definition of breach of fiduciary duty should mirror that in the case of a trustee of an express trust.<sup>108</sup>

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and labor is relevant in determining what amount of legal fees is reasonable under Rule 1.5(a).

*Id.* (citations omitted).

103. See *id.* at nn.18–20 and accompanying text.

104. *E.g.*, Monopoli, *supra* note 99, at 438 (quoting Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 299 (1988)).

105. *E.g.*, Monopoli, *supra* note 99, at 439.

106. *Id.* (concluding that “[t]he very financial benefit conferred poses a risk to the independent advice of the attorney, and the decision as to whether there is a conflict under Rule 1.7 should not be discretionary”). See also *supra* text accompanying note 96.

107. *Id.*

108. The UPC provides that with respect to the probate of wills and administration of estates, the personal representative “is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 7-302.” UNIF. PROBATE CODE § 3-703(a) (2011), 8 U.L.A. pt. II, at 38 (Supp. 2011). This personal representative “is liable to

While exculpatory clauses are not raised in the UPC, it does set forth a standard of care and expresses the notion that if a trustee has special skills, it is the trustee's duty to use them. However, like the UTC and the Restatement, the UPC makes these default rules, stating:

*Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.*<sup>109</sup>

One can argue that the phrase "except as otherwise provided by the terms of the trust" modifies only the standard of care to which the trustee is held, and not the provision relating to special skills.<sup>110</sup> But, to echo a long-standing concern, should it follow that a lawyer or professional trustee can be hired for his or her expertise, and then can contract around the obligation to exercise it?<sup>111</sup>

The UTC calls for exculpatory clauses to be fair, in light of the circumstances in which they are used.<sup>112</sup> It is unclear what constitutes "fair." It is also somewhat troubling that under the UTC, the fiduciary meets this burden of proving fairness if the settlor is represented by counsel, even if the trustee's form is used.<sup>113</sup> Notwithstanding this, rationales have been proposed for professional trustees to use exculpatory clauses:

First, the settlor might fear frivolous litigation by disappointed beneficiaries, litigation that will ultimately reduce the value of the trust for all beneficiaries. Second, the settlor may believe that trustee compensation will be less expensive if the trustee is not bound by common-law fiduciary duties and their attendant risk of litigation. Third, the settlor may face a particular problem or set of problems for which fiduciary duties present a sub-optimal solution. For instance, the settlor

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interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust." § 3-712 (2011), 8 U.L.A. pt. II, at 160 (Supp. 2011).

109. § 7-302, 8 U.L.A. pt. II, at 507 (1998) (emphasis added).

110. This position is tenuous, however, because the components are contained in the same sentence.

111. See *supra* notes 29–33 and accompanying text.

112. See *supra* note 57 and accompanying text.

113. See *supra* notes 59–60 and accompanying text.

may desire that the trustee hold assets in trust that the trustee is reluctant to accept.<sup>114</sup>

While some reasons support exculpation from the settlor's perspective, a broad exculpatory clause that might read, "the trustee named in this instrument shall not be liable for the trustee's acts or failure to act, except for willful misconduct or gross neglect," is not the best way to address these concerns.<sup>115</sup> A settlor who fears suits by beneficiaries can address this concern, for instance, through the use of a no contest clause.<sup>116</sup> If problematic assets are at issue, a clause can be narrowly drawn in the form of a waiver that relieves a trustee from liability should the value of those specific assets subsequently decline.<sup>117</sup> And if trustee compensation purportedly is to be lower because of the inclusion of a broad exculpatory clause, a settlor can insist on "two prices for two different services: one commission for full-service trusteeship, and a lower commission for an agreement that includes an exculpatory clause."<sup>118</sup> Having been offered the choice, if the settlor elects to go with a reduced price, only then should the exculpatory clause be enforceable.<sup>119</sup> Professor Leslie posits that "requiring the trustee to price the exculpatory clause would discourage trustees from routinely insisting on such clauses."<sup>120</sup>

### *C. Reciprocal Agreements Between Fiduciaries*

Just as a lawyer may draft an instrument naming himself as an executor or trustee, a lawyer may draft an instrument naming himself as an attorney for the underlying estate. This can enable the lawyer to "earn substantial legal fees during probate that more than offset the tendency among practitioners to undercharge for their work in planning estates and preparing the necessary implementing documents."<sup>121</sup> While in almost all jurisdictions the

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114. Leslie, *supra* note 23, at 101–02.

115. *Id.* at 103 (quoting DRAFTING CALIFORNIA REVOCABLE LIVING TRUSTS, CAL. C.E.B. § 16.22 (J. Cohan ed., 4th ed. 2003)).

116. *See id.* at 102.

117. *See id.* at 102–03.

118. *Id.* at 102 (footnote omitted).

119. *Cf. id.* Professor Leslie notes that "a large price differential is likely to induce the settlor to obtain independent advice about the rights she gives up when she agrees to the exculpatory clause." *Id.*

120. *Id.*

121. Johnston, *supra* note 84, at 87.

designation that a particular lawyer or law firm be retained by the executor is not binding, in most cases the lawyer who drafts the estate plan is retained by the named trustee or executor.<sup>122</sup> The practice of retaining the services of the lawyer who drafted the underlying instrument for any legal work associated with the estate or trust administration is widespread, especially when a corporate fiduciary is named as executor or trustee.<sup>123</sup>

This practice of retaining the lawyer who drafted an instrument for the provision of legal services, or routinely calling on the same lawyer who suggested retaining the corporate trustee, has been described as

a “gentleman’s agreement” between financial institutions and the bar, as “reciprocal back scratching,” as a “symbiotic relationship,” and, less generously, as a “conspiracy” between corporate executors and lawyers to exploit the client by recommending that the testator name a bank as executor in exchange for assurance that the executor, once approved, will retain the attorney to assist in the probate of the testator’s estate.<sup>124</sup>

Since revisions to the Model Rules acknowledge and approve of reciprocal agreements between lawyers and non-lawyers, provided that these agreements are not exclusive and the arrangements are disclosed to clients,<sup>125</sup> it stands to reason that these relationships will continue, if not flourish. Legal ethics is not the avenue to control this “extensive practice” because banks, which do not come under the purview of rules that regulate lawyers’ conduct, often implement these policies.<sup>126</sup> This, in and of itself, seems somewhat ineffective as to lawyer regulation, because the lawyer’s role is governed by conflict of interest rules that call for resolution based on an individual lawyer’s belief that competent representation can be

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122. *See id.* at 105–06.

123. *Cf. id.* at 115 (noting that the practice is widespread when a bank is named as executor or trustee, and that, “in probating a testator’s estate, legal services are virtually always needed because of the strict application of laws relating to unauthorized practice of law, which preclude corporate fiduciaries from handling matters processed through the probate court system”). *Id.* (footnote omitted).

124. *Id.* (footnotes omitted).

125. *See* MODEL RULES OF PROF’L CONDUCT R. 7.2(b)(4) (2010).

126. *See* Johnston, *supra* note 84, at 119.



rendered. It has been suggested that legislation should govern this type of activity.<sup>127</sup>

#### *D. Revisions to the Uniform Probate Code*

In the recent revisions to the UPC, fiduciary duties continue to be recognized as default provisions, with deference being given to common law and statutory law to set applicable standards.<sup>128</sup> Drafters of the revisions should have weighed in on a fiduciary's use of exculpation, or examined whether fiduciary duties should be immutable rules, although this might have been viewed as beyond the scope of their mandate. However, rather than taking an affirmative position that would address a move toward embracing prudence mandates, no UPC revisions were made in this regard.

Perhaps the drafters of the revisions were comfortable with the default nature of fiduciary duties. Perhaps the drafters of the revisions were comfortable with the UTC's and Restatement's condemnation of exculpation for breach of trust committed in bad faith or with (reckless) indifference, and placing the burden on the trustee to prove an exculpatory term is fair and its terms adequately communicated to the client. However, even if the drafters of the revisions chose to endorse these provisions through inaction, it seems they should have seized the opportunity to weigh in on the nature of fiduciary duties and the practice of exculpation.

Considering the ethical obligations and the responsibilities that underlie fiduciary duties, the drafters of the UPC revisions should have directly addressed these fundamental obligations and the use of exculpatory provisions. Since the default nature of fiduciary duties was left intact, the revisions should have voiced a position on whether the cutoff should be just shy of bad faith and indifference, with fairness being the objective. Weighing public policy concerns, client protection, and the responsibilities associated with fiduciary duties, the standard of prudence should not so easily be abandoned.

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127. *See id.* (noting that legislation must govern both banking institutions and members of the bar). At least one jurisdiction has enacted legislation that gives the principal beneficiaries the opportunity to select attorneys to represent the named trustee or executor. *See id.* at 120–21 (discussing Wisconsin's unique legislation that permits the beneficiaries to select their representative).

128. *See supra* notes 108–109 and accompanying text.

## CONCLUSION

With some exceptions, exculpatory clauses that absolve a fiduciary from liability for breach of trust are widely used. While some jurisdictions condemn exculpatory clauses as public policy violations, the UTC and the Restatement acknowledge their use, while precluding exculpation for bad faith, intentional misconduct, or (reckless) indifference. The new UPC, rather than taking a definitive position on fiduciary duty status and the use of exculpatory clauses, chose to continue to defer to other law and regard fiduciary duties as default provisions rather than majoritarian immutable rules. Given this practice, and given that (1) representation by counsel may satisfy the “fairness” requirement the use of exculpation clauses calls for; (2) lawyers are permitted to offer themselves for fiduciary roles; and (3) lawyers are permitted to work in tandem with non-lawyer professional trustees, more direction would have been welcome. The duty to administer the trust solely in the interest of the beneficiary has been characterized as the most fundamental of the fiduciary duties. The revisions to the UPC should have underscored this requirement by affirmatively recognizing that there are some duties which should not be contracted around.