Fiduciary Duties and Litigation 2023

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Foreword

A fiduciary is a person or entity that acts on behalf of another and is required to put that person's interests above their own. This book outlines the different types of fiduciaries, the duties of a fiduciary – including which fiduciaries have an affirmative duty to act - and provides best practices for representing a fiduciary. Also included is an explanation of what happens when there is a breach of fiduciary duty, as well as what remedies are available.

We are especially grateful to our Course Planners and Faculty, Jennifer D. Gayle, Esq., Mannion Prior LLP, King of Prussia; Chloe Mullen-Wilson, Esq., Timoney Knox LLP, West Conshohocken; and Steven Seel, Esq., Huntington Private Bank, Pittsburgh for developing an outstanding program. Each faculty member has devoted significant time and effort developing the course and preparing written materials. For additional information about the faculty, please visit the biographical section that follows.

On behalf of all who will benefit from this program we express our sincere gratitude to all of our volunteers.

Pennsylvania Bar Institute
Susan Pesavento, Program Manager

March 2023

Biographies

FACULTY

Jennifer D. Gayle, Esq.

Ms. Gayle is a partner at Mannion Prior, LLP. She earned her B.A. in History from Ursinus College in 2004, graduating magna cum laude, with Distinguished Honors in History. In 2007, she received her J.D., cum laude, from Villanova University School of Law, where she served as managing editor of outside articles for the Villanova Law Review. Ms. Gayle's practice focuses on litigation involving trusts, estates, guardianships and powers of attorney, including will contests, surcharge and removal actions, interpretation issues, and other fiduciary matters before the Orphans' Court Division of the Court of Common Pleas and the Register of Wills. Ms. Gayle has served as an author and panelist on various Pennsylvania Bar Institute seminars on the utilization of experts in Orphans' Court litigation, litigating in the Orphans' Court, and collection of Orphans' Court judgments, among others. In addition, she has written about the authority granted to plenary guardians of the person. She is a member of the Pennsylvania, Philadelphia and Montgomery Bar Associations, she is the Secretary of the Probate and Trust Law Section of the Philadelphia Bar Association, and she is a Fellow of the American College of Trust and Estate Counsel (ACTEC). Ms. Gayle has been named a Super Lawyers Rising Star® in estate and trust litigation since 2018 by Philadelphia Magazine, she has been included in the The Best Lawyers in America for her work in litigation – trusts and estates since 2018, and she was named a 2015 Lawyer on the Fast Track by The Legal Intelligencer.

Chloe R. Mullen-Wilson, Esq.

Chloe Mullen-Wilson joined Timoney Knox in 2022 as an Associate Attorney in the Wills, Trusts and Estates Department and focuses her practice on Orphans' Court litigation, estate and trust administration, guardianships, special needs trusts, real estate and corporate matters. Before joining Timoney Knox, Chloe worked for a boutique trusts and estates firm, where she gained experience working on matters pertaining to guardianships, special needs trusts, estate and trust planning and administration, and Orphans' Court litigation. Chloe graduated from Seton Hall University, summa cum laude, where she majored in Spanish and History while minoring in Philosophy and Women's Studies, and subsequently graduated from Temple University Beasley School of Law, cum laude. During law school, she clerked for the Honorable Petrese B. Tucker of the U.S. District Court for the Eastern District of Pennsylvania and for the Honorable Anne E. Lazarus of the Pennsylvania Superior Court. Chloe currently serves as the Chair of the Diversity Committee of the Probate and Trust Law Section of the Philadelphia Bar Association. In addition to being a member of the Philadelphia Bar Association, she is also a member of the Real Property, Probate and Trust Law Section of the Pennsylvania Bar Association, the Probate and Tax Section of the Montgomery Bar Association and the Philadelphia Estate Planning Counsel.

Steven H. Seel, J.D.

Mr. Seel is a Senior Vice President and Wealth Strategist with Huntington Private Bank. Steve is a 1992 graduate of the University of Pittsburgh School of Law, graduating *cum laude*, and served as managing editor of the *Journal of Law and Commerce*. Prior to joining Huntington Private Bank, Steve was an attorney in private practice for 29 years, licensed in Pennsylvania and West Virginia, and concentrating on estate planning and administration, advising closely held businesses on operational and succession issues, and associated litigation. Steve is an adjunct professor at the University of Pittsburgh School of Law, where he teaches *Estate Planning*. He is the author of the Pennsylvania Ancillary Administration section of Practical Law, published by Thomson Reuters and a contributor to Leimberg Information Services. He is a contributing author to *Inside the Minds*, published by Thomson Reuters. He has been listed in the Best Lawyers in America for several years and is AV rated by Martindale-Hubbell and Super Lawyers by Thomson Reuters. At Huntington, Steve advises and educates ultra-high net worth clients on efficient wealth transfer techniques.

Table of Contents

Fiduciary Duties & Litigation 1
Jennifer DiVeterano Gayle, Esq., Chloe R. Mullen-Wilson, Esq. and Steven H. Seel, J.D.

I. What Is a Fiduciary? 3

II. Duties of a Fiduciary 3
- a. Duty of Care / Reasonableness 3
  - i. General Rule 3
  - ii. The Honest Exercise of Discretionary Power Produces No Liability Absent "Supine Negligence or Willful Default 3
  - iii. Exceptions 3
  - iv. "Prudent Person Standard" 4
  - v. Duty to Review Retained Investments 5
  - vi. Pennsylvania Adopted Its Own Prudent Investor Rule ("Pa. Rule") 5
  - vii. Degree of Care 5
  - viii. Investment "Shalls" 5
  - ix. Investment "Mays" 6
  - x. Recent Case Law on the Duty of Care 7
- b. Duty of Loyalty 8
  - i. Trustee Shall Administer the Trust in Good Faith 8
  - ii. Executor Is Regarded as a Fiduciary 8
  - iii. Conflict of Interest 8
  - iv. Impartiality 9
  - v. Liability Arising Out of Duty of Loyalty 9
- c. Duty to Keep Records and Make Disclosures 12
- d. Fiduciary Exception to the Attorney-Client Privilege 12
  - i. Limitations of Attorney-Client Privilege 12
- e. Derivative Duties of Counsel to Beneficiaries 14
  - i. Under Common Law 14
  - ii. Confidentiality During Estate and Trust Administration 14

III. Counseling a Fiduciary: Pre-Representation 15
- a. Review of applicable Rules of Professional Conduct 15
- b. Competency and Technology Generally 15
- c. Email and Confidential Information 15

i. Formal Opinion 2022-400 – Ethical Obligations for Lawyers Using Email and Transmitting Confidential Information 15
ii. Under the Opinion, an Attorney May Only Continue to Use Email If 15
iii. What Changes as a Result of This Opinion? 15
iv. Other Concerns 16
d. The Typical Ethical Challenges in Estate Administration 16
i. The Issue of Confidentiality after a Client Dies – RPC 1.6 16
ii. Identifying the Client in an Estate or Trust Administration 17
iii. Communications with Beneficiaries 18
iv. Handling of Estate Assets 18
v. Fiduciary Fraud 19
vi. Correcting Accounts or other Court Filings that Contain Misstatements 19
e. Counsel Needs Full Disclosure of the Representation 19

IV. Fee Disputes 19
a. The General Rule 19
b. Flat Fee Cases 19
i. The Debate between Flat Fees and Hourly Fees 19
ii. *Johnson Estate* 19
iii. Factors to Consider in Setting a Fixed Fee 20
iv. More to Worry About – *Preston Estate* 20
v. Requirements Regarding Fees 20
vi. Fixed Fee Should Not Be Taken in Full until Estate Is Fully Administered 20
c. Rule 1.6(c)(4) 20
d. Rule 3.7(a)(3) 20

V. In the Event of a Breach 20
a. How to Raise Improper Acts of a Fiduciary? 20
i. Petition to Compel Account 20
ii. Petition for Review 21
iii. Petition for Surcharge 21
iv. Removal of Fiduciaries 23
b. Breaches of Fiduciary Duties 26
i. Mismanagement of Investments, Failure to Diversify 26
ii. Duty to Review Retained Investments 26
iii. Conflicts of Interest 26
iv. Failure to Inform or Report 27
v. Conflicts of Interest as Grounds for Removal 28

VI. Defenses to Requests for Surcharge or to Objections to Fiduciary Conduct 28
a. Exclusive Discretion Given Trustee 28
b. Exculpatory Provisions 28
c. Consent or Acquiescence 29
d. Limitation of Action Against a Trustee when Reports Provided 30
i. A Beneficiary Is Barred from Challenging a Transaction or Asserting a Claim Against a Trustee for Breach of Trust If 30
ii. If Not Previously Barred by Section 7785(a) or Section 7798 30

e. Reliance on Trust Instrument 30
i. Event Affecting Administration or Distribution 30
ii. Limitation on Personal Liability of Trustee 30
f. Laches 31
g. Advice of Counsel 31
i. Was Use of Counsel Appropriate? 31
ii. Was the Initial Choice of Counsel Prudent? 31
iii. Was Reliance on Counsel Prudent? 31
h. Appraisals 32
i. Res Judicata 32
j. Collateral Estoppel 32
k. Acting in Accordance with a Court Order 32
l. "A Successor Trustee Shall Not Be Personally Liable for the Acts or Omissions of the Trustee's Predecessor 32
i. General Rule 32

VII. Ethical Issues in Fiduciary Litigation 33
a. Discovery Disputes - Attorney-Client Privilege and Work Product 33
b. Surcharge Litigation 33
c. Will Contest – The Scrivener as Trial Counsel 33
i. Rule 3.7 – Lawyer as Witness 33
ii. Rule 3.7 34

Fiduciary Duties & Litigation

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Fiduciary Duties & Litigation

A Pennsylvania Bar Institute Program presented by Steven Seel of The Huntington Private Bank, Jennifer Gayle of Mannion Prior, LLP, and Chloe Mullen-Wilson of Timoney Knox, LLP

I. What is a Fiduciary?

a. A fiduciary is a person or entity who acts for another and is required to put the interests of the individual for whom they are acting above their own interests.

b. Examples of fiduciaries are:

i. Executor[1]
ii. Trustee[2]
iii. Agent under power of attorney[3]
iv. Guardian[4]
v. Counsel

c. "Fiduciary Duty" is defined as: A duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person.

II. Duties of a Fiduciary

a. Duty of care / reasonableness

i. General rule: The standard of care to which a fiduciary is held in Pennsylvania is that of such common skill, judgment and caution as persons of ordinary prudence, discretion and intelligence under similar circumstances, would exercise in the management of their own estate.[5]

ii. The honest exercise of discretionary power produces no liability absent "supine negligence or willful default."[6]

iii. Exceptions

1. Greater skill: "A trustee who has special skills or expertise relevant to a trust or who is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise relevant to a trust shall use those special skills or expertise in the administration of the trust."[7]

a. Where a fiduciary has (or procures his appointment by representing that he or she has) greater skill than that of a person of ordinary prudence, the fiduciary

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[1] *See generally*, 20 §Pa. C.S. §3301 et. seq.
[2] *See generally*, 20 Pa. C.S. §7701 et. seq.
[3] *See generally*, 20 Pa. C.S. §5601 et. seq.
[4] *See generally*, 20 Pa. C.S. §5501 et. seq.
[5] *In re Musser's Estate*, 341 Pa. 1, 10, 17 A.2d 411, 415 (1941); *In re Estate of Denlinger*, 449 Pa. 393, 396, 297 A.2d 478 (1972); *see also Matter of Estate of Campbell*, 692 A.2d 1098, 1103 (Pa. Super. 1997); *Estate of Bruner*, 691 A.2d 530, 535-36 (Pa. Super. 1997); *In re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 311 (1996), *app. denied*, 546 Pa. 666, 685 A.2d 545 (1996); *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 541-42 (1994); *In re Shahan*, 429 Pa. Super. 91, 631 A.2d 1298 (1993); *Flock Estate (No. 2)*, 20 Fid. Rep. 2d 171 (O.C. Phila. 2000) (exceptions dismissed); *Whiteman Estates*, 27 Fid. Rep. 2d 135 (O.C. Bucks 2007).
[6] *In re Estate of Lohm*, 440 Pa. 268, 269 A.2d 451 (1970); *In re Estate of Lerch*, 399 Pa. 59, 159 A.2d 506 (1960); *Thompson Trust*, 22 Fid. Rep. 2d 411 (O.C. Butler 2002).
[7] 20 Pa. C.S. § 7776.

is required to exercise that greater skill.[8]

b. Usually applied to corporate fiduciary but equally applicable to individuals with special skills or experience.

c. Attorney-executor held to same standard as any other individual executor, and not to the higher standards of a corporate fiduciary.[9]

d. Usually applied to investment practices but equally applicable to other fiduciary duties.

e. Corporate trustee not necessarily held to a higher standard of care.[10]

f. Bank liable for acts of its employees.[11]

g. Administrator employed attorney whose neglect caused unnecessary expenses to the estate; attorney ordered to return his entire fee.[12]

2. Lesser skills may lower standard to prudence.

a. Bank's conduct measured by "ordinary prudence" when unusual matter involved, *i.e.*, collecting assets from criminal defendant in distant state.[13]

b. Administrator with no expertise in real estate surcharged for sale of real estate below market value when sale handled in haphazard fashion without securing appraisals or assistance of realtor.[14]

iv. "Prudent Person Standard": Applicable standard governing investments made by fiduciaries prior to December 25, 1999, subject to the provisions of the governing instrument.[15] The standard includes the following:

1. Duty to keep assets productive. Note that 20 Pa. C.S. § 3316 was amended in 1992 to allow an executor to "make temporary investments as authorized by section 7315(b) (relating to retention of cash; temporary investments) without regard to any investment restrictions imposed by the will."[16]

2. Duty to deal impartially with all beneficiaries. Fiduciary owes both

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[8] *In re Mendenhall*, 484 Pa. 77, 398 A.2d 951 (1979); *In re Estate of Killey*, 457 Pa. 474, 326 A.2d 372 (1974); *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 542 (1994); *In re Estate of Gordon*, 354 Pa. Super. 274, 511 A.2d 869, 871 (1986); *app. denied*, 514 Pa. 648, 524 A.2d 494 (1987); *McCullough Trust*, 19 Fid. Rep. 2d 453 (O.C. Allegh. 1999).

[9] *Grimble Estate*, 3 Fiduc. Rep. 3d 224 (Wash. O.C. 2013); *McGrail Estate*, 25 Fid. Rep. 2d 66 (O.C. Chester 2004).

[10] *Scott Trust*, 14 Fid. Rep. 405 (O.C. Montg. 1964).

[11] *Owens v. Mazzei*, 847 A.2d 700 (Pa. Super. 2004), *aff'g DiCesare Estate*, 23 Fid. Rep. 2d 233 (O.C. Phila. 2003), annotated in Fiduciary Review, June 2003. Guidelines applicable to the conduct of trust business by national banks are found in Regulation 9.7 of the Comptroller of the Currency (12 C.F.R. § 9.7); *see also Springfield Township v. Mellon PSFS Bank*, 586 Pa. 1, 889 A.2d 1184 (2005), annotated in Fiduciary Review, June 2006 (bank liability for malfeasance of fiduciary).

[12] *Gottlieb Estate*, 26 Fid. Rep. 2d 52 (O.C. Montg. 2005), annotated in Fiduciary Review, March 2006, p. 4.

[13] *Brickajlik Estate*, 29 Fid. Rep. 52 (O.C. Bucks 1979) (no surcharge).

[14] *Bosico Estate*, 3 Fid. Rep. 2d 333 (O.C. Montg. 1981).

[15] 20 Pa. C.S. § 7302.

[16] *See generally In re Estate of McCrea*, 475 Pa. 383, 380 A.2d 773 (1977); *Estate of Bruner*, 456 Pa. Super. 705, 691 A.2d 530 (1997); *Birely Estate*, 32 D. & C. 3d 248, 251 (O.C. Chester. 1980).

the duty to produce income for the current beneficiary and the duty to preserve the principal for the successor beneficiary.[17]

3. No absolute duty to diversify. Such a duty "would arbitrarily foreclose executors and trustees from opportunities to retain beneficial holdings." The "preferable approach" is to review the fiduciary's actions on a case by case basis to determine whether a particular investment approach meets the standard governing the particular case.[18] This does not, however, foreclose the finding of negligence or gross negligence for failing to diversify trust investments.[19]

v. Duty to review retained investments.

1. Authorization in the instrument to retain assets does not excuse fiduciary from the duty to review the investment and make the retention decision prudently.[20]

vi. Pennsylvania adopted its own Prudent Investor Rule ("Pa. Rule") on June 25, 1999, by Act No. 28 of 1999 as new Chapter 72 of the Probate Estates and Fiduciaries Code, 20 Pa. C.S. ("PEF Code"). The Pa. Rule is modeled on the Uniform Prudent Investor Act formulated by the Uniform Law Commissioners in 1994, now adopted by a majority of states. The Pa. Rule applies to all actions of fiduciaries on or after December 25, 1999, regardless of when the trust was created. For exceptions to this, *see* §§ 7204 (Diversification), 7206 (Delegation) and 7208 (Life Insurance).

vii. Degree of Care. "Reasonable care, skill and caution," or the "special investment skills" it claims to have.[21]

viii. Investment "Shalls"

1. Consider the purposes, terms and other circumstances of the trust and by pursuing an overall investment strategy reasonably suited to the trust.[22]

2. Consider, among other things, to the extent relevant to the decision or action:[23]

a. the size of the trust;

b. the nature and estimated duration of the fiduciary relationship;

c. the liquidity and distribution requirements of the trust;

d. the expected tax consequences of investment decisions or strategies and of distributions of income and principal;

e. the role that each investment or course of action plays in the

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[17] *In re Estate of Hamill*, 487 Pa. 592, 410 A.2d 770 (1980); *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 542 (1994); *see also* 20 Pa. C.S. § 7773.

[18] *Estate of Knipp*, 489 Pa. 509, 414 A.2d 1007, 1009 (1980); *see also Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 542 (1994). For the contrary view, *see* Church and Snitzer, *Diversification, Risk and Modern Portfolio Theory*, 124 Trusts & Estates 32 (Oct. 1985).

[19] *See In re Scheidmantel*, 868 A.2d 464 (Pa. Super. 2005), annotated in Fiduciary Review, May 2005.

[20] *Estate of Knipp*, 489 Pa. 509, 414 A.2d 1007 (1980); *Matter of Estate of Campbell*, 692 A.2d 1098, 1103 (Pa. Super. 1997).

[21] 20 Pa. C.S. § 7212.

[22] 20 Pa. C.S. § 7203(a).

[23] 20 Pa. C.S. § 7203(c); *see also In re Estate of Grahek*, 2017 WL 1901248 (Pa. Super. 2017) (discussing 20 Pa. C.S.A. § 7203).

overall investment strategy;

f. an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary's activities with the community where that asset is located;

g. to the extent reasonably known to the fiduciary, the needs of the beneficiaries for present and future distributions authorized or required by the governing instrument; and

h. to the extent reasonably known to the fiduciary, the income and resources of the beneficiaries and related trusts.

3. Reasonably diversify investments.[24]

a. Exception: The fiduciary reasonably elects to retain any asset received in kind.[25]

ix. Investment "Mays"

1. Invest in every kind of property and type of investment.[26]
2. Retain assets received in kind.[27]
3. Delegate investment and management functions.

a. A fiduciary may exercise "reasonable care, skill and caution" in selecting an agent to delegate "investment and management functions" that a prudent investor "might delegate under the circumstances"; establishing the terms of the delegation; and periodically reviewing the agent's performance.[28]

b. "An executor who delegates his responsibilities to others must pay for these services [o]ut of his commission."[29]

c. Agent is liable to trust for failing to comply with the terms of delegation; to exercise reasonable care, skill and caution; or to exercise any special investment skills he has claimed to have.[30]

d. A co-fiduciary may delegate to another co-fiduciary if he or she reasonably believes the other has greater investment skills.

e. "Investment in a mutual fund is not a delegation of investment function, and neither the mutual fund nor its advisor is an investment agent."[31]

4. Hold cash uninvested.

a. A fiduciary may hold funds uninvested if she reasonably expects to distribute those funds to beneficiaries as income on a quarterly or more frequent basis, or to use those funds for the payment of debts, taxes, expenses of administration or reinvestment

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[24] 20 Pa. C.S. § 7204.
[25] 20 Pa. C.S. § 7205.
[26] 20 Pa. C.S. § 720
[27] 20 Pa. C.S. § 7205.
[28] 20 Pa. C.S. § 7206; *see also* Solmssen, Jr., *Delegation of Trustee's Investment Discretion*, 19 Fid. Rep. 2d 398 (1999).
[29] *Grimble Estate*, 3 Fid. Rep. 3d 225 (O.C. Wash. 2013).
[30] 20 Pa. C.S. § 7206(c).
[31] 20 Pa. C.S. § 7206(f).

within the next 90 days, or if the amount available for investment does not justify the administrative burden of making the investment in light of the facilities available to the fiduciary. Furthermore, a corporate fiduciary may deposit uninvested funds in its own or an affiliate's commercial department.[32]

b. Fiduciary may temporarily invest funds he could keep uninvested or liquid in short-term, interest-bearing investments, free of any investing restrictions imposed by the governing instruments, and can make a reasonable charge for making this investment.[33]

5. Acquire life insurance. A trustee may acquire or retain life insurance on settlor and/or spouse, without liability for loss where the trustee fails to: determine the propriety of this investment; investigate the issuer; exercise available nonforfeiture provisions; or diversify the contract.[34]

6. Invest in mutual funds. A corporate fiduciary may invest in a mutual fund which it also services for compensation, so long as the portfolio of the fund consists "substantially" of investments not prohibited by the governing instrument.[35]

a. Unless the instrument clearly expresses a contrary intent, a corporate fiduciary may invest in its own mutual and common or collective funds if they consist of investments permitted by the governing instrument.[36]

b. The basis of the fiduciary's compensation for services to the fund must be disclosed "by prospectus, account statement or otherwise to all persons to whom statements of the account are rendered."[37]

7. Invest in trust funds and mortgage investments funds. Corporate fiduciary and its co-fiduciary may invest in its own, or its affiliates', common trust funds, and/or in its own mortgage investment fund.[38]

x. Recent Case Law on the Duty of Care

1. In *In re Estate of Sisak*,[39] the administrator, who was an attorney, was deemed not to have breached her duty of care to the beneficiaries when she consulted a bankruptcy attorney to advise her when making distributions to a beneficiary who had filed for bankruptcy, and to the bankruptcy trustee, despite the fact that the bankruptcy trustee had not filed objections to the accounting filed by the administrator. The Superior Court found that the administrator working diligently to obtain a compromise with the bankruptcy trustee and consulting with the bankruptcy attorney for advice on how to address the claim were actions taken in accordance with her fiduciary duties.

2. In *Trust of Tobias*,[40] the executor-trustee was found to have breached his fiduciary duty by failing to transfer assets of the estate which poured over from the testator's will

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[32] 20 Pa. C.S. § 7207(a).
[33] 20 Pa. C.S. § 7207(b).
[34] 20 Pa. C.S. § 7208.; *cf.* 31 ACTEC Journal 280 (Spring 2006).
[35] 20 Pa. C.S. § 7209.
[36] 20 Pa. C.S. § 7211.
[37] 20 Pa. C.S. § 7209.
[38] 20 Pa. C.S. § 7210.
[39] 2022 Pa. Super. Unpub. LEXIS 2704, No. 120 WDA 2022 (Pa. Super. Nov. 15, 2022).
[40] 272 A.3d 490 (Pa. Super. 2022).

into a revocable trust for more than six years. The Superior Court, while upholding the finding of a breach of the duty of care, reversed the levying of a surcharge on the fiduciary because there was no allegation that the failure to transfer assets in a timely manner actually resulted in a loss. The Superior Court upheld a separate surcharge on the fiduciary for his failure to sell real estate in the estate due to the agreement of all of the beneficiaries that the property would be sold; accordingly, the fiduciary's failure to sell such real estate resulted in carrying costs and related maintenance, the cost of which comprised the surcharge amount.

b. Duty of loyalty

i. Trustee shall administer the trust in good faith, in accordance with its provisions and purposes and the interests of the beneficiaries and in accordance with applicable law.[41]

ii. Executor is regarded as a fiduciary and is held to the highest degree of good faith.[42]

iii. Conflict of Interest. A trustee shall administer the trust solely in the interests of the beneficiaries and may not place itself in a position actually or potentially inconsistent with the interests of the trust.[43]

1. The following are permissible transactions if fair to all beneficiaries:[44]

a. an agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

b. the payment of reasonable compensation to the trustee and payment of reasonable compensation to affiliates of a corporate trustee if the compensation is disclosed to the current beneficiaries;

c. a transaction between a trust and another trust, decedent's estate or guardianship, of which the trustee is a fiduciary or in which a beneficiary has an interest;

d. a deposit of trust money in a regulated financial-service institution operated by the trustee;

e. an advance by the trustee of money for the protection of the trust; or

f. a transaction authorized by section 7209 of the PEF Codef.

2. The UTA assumes that a sale, purchase, exchange, encumbrance or other disposition of property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with:[45]

a. the trustee's spouse;

b. the trustee's parent or a spouse of the parent;

c. a descendant of the trustee's parent or a spouse of the descendant;

d. an agent of the trustee unless the trustee is a corporation and the agent is an affiliate of the corporation or the transaction is authorized by section 7209 (relating

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41 20 Pa. C. S. § 7771.

42 *Zettle Estate*, 30 Fid. Rep. 2d 148 (Centre O.C. 2010).

43 20 Pa. C.S. § 7772.

44 20 Pa. C.S. § 7772(h).

45 20 Pa. C.S. § 7772(c).

to mutual funds);

e. a corporation or other person or enterprise in which the trustee or a person that owns a significant interest in the trustee has an interest that might affect the trustee's judgment; or

f. the trustee personally.

3. Subject to the rights of persons dealing with or assisting the trustee as provided in section 7790.2 (relating to protection of person dealing with trustee - UTC 1012), a sale, purchase, exchange, encumbrance or other disposition of property between a trust and either the trustee in the trustee's individual capacity or one of the persons identified in subsection (c) is voidable by a court upon application by a beneficiary affected by the transaction unless:[46]

a. the transaction was authorized by the trust instrument;

b. the transaction was approved by the court;

c. the beneficiary did not commence a judicial proceeding within the time allowed by section 7785 (relating to limitation of action against trustee);

d. the beneficiary consented to the trustee's conduct, ratified the transaction or released the trustee in compliance with section 7789 (relating to beneficiary's consent, release or ratification - UTC 1009); or

e. the transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming a trustee.

iv. Impartiality: "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 in light of the purposes of the trust."[47]

v. Liability Arising out of Duty of Loyalty

1. General Rule of Undivided Loyalty: The fiduciary is under a duty to administer the estate assets solely in the interests of the beneficiaries.[48] This is a rule of absolute liability regardless of standard of care to which fiduciary is otherwise held. If self-dealing or conflict of interest is proved, surcharge will follow without regard to whether self-interest influenced fiduciary's decision or transaction was fair.[49]

2. Self-dealing: Fiduciary may not deal with estate or trust property for self or others.

a. "The test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it *might* have affected his judgment in material connection."[50]

b. Executor surcharged for, among other things: (1) redeeming decedent's shares in a closely held business without court approval at an amount significantly less than their fair market value, which redemption resulted in the executor holding an increased interest

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[46] 20 Pa. C.S. § 7772(b).

[47] 20 Pa. C.S. § 7773.

[48] *In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 414 (1950); *accord* 20 Pa. C.S. § 7772(a).

[49] *Catlin Memorial Trust*, 21 Fid. Rep. 2d 435 (O.C. Lack. 2001) (where trustee cannot produce records showing purchasers of trustee's stock as shown in account, court assumes that sales were to trustee's officers, directors, and employees and constituted self-dealing and imposed a surcharge).

[50] *Noonan's Estate*, 361 Pa. 26, 63 A.2d 80, 83 (1949) (emphasis in original).

in the company, which was later sold for a substantial sum; and (2) for selling the majority of the estate's interest in another closely held business without court approval to a group of investors which included the executor.[51]

c. Executor surcharged for, among other things, purchasing various estate assets without court approval and, in some instances, over the objection of the beneficiaries of the estate.[52]

d. Guardian surcharged for loaning money to guardianship account and repaying herself while acting as fiduciary.[53]

e. Agent under power of attorney surcharged for using only principal's money to improve real property of which he was joint-tenant with principal.[54]

f. Extends to partner or firm of fiduciary.[55]

g. Does not extend to a fiduciary's purchase from itself of assets earmarked at time of acquisition by fiduciary for various trusts administered by it.[56]

h. Settlor can authorize self-dealing expressly in the trust instrument, or by implication, "where he knowingly places his trustee in a position which might conflict with the interests of the trust or its beneficiaries, and gives the trustee power to act in that dual capacity."[57]

3. Gifts Made under Power of Attorney

a. When an agent under a power of attorney (if the agency resulted from a confidential relationship between the agent and principal) makes a gift on behalf of the principal to the agent and/or the agent's friends or family (and assuming that the power of attorney authorizes the agent to make gifts), the burden shifts to the agent/donee to show that the gift was free of any taint of undue influence or deception.[58]

b. Executor removed and surcharged for making substantial gifts to himself as agent under power of attorney and to the agent's friends and family, and also for making substantial cash withdrawals from the principal's assets. The agent used principal's funds to create a charitable trust, which then made gifts to, among others, the agent and to the agent's friends and family.[59]

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[51] *Estate of Aiello*, 993 A.2d 283 (Pa. Super. 2010); *see also Estate of Estelle Segal*, 9 Fiduc. Rep. 3d 38 (O.C. Phila. 2018) (guardian surcharged for missing assets and self-dealing using husband's company to clear out estate properties, and ordered to disgorge fees collected while serving as guardian); *Estate of Estelle Segal, No. 2*, 9 Fiduc. Rep. 3d 46 (O.C. Phila. 2018) (same).

[52] *Rappaport Estate*, 30 Fid. Rep. 2d 407 (O.C. Bucks 2010).

[53] *Whiteman Estates*, 27 Fid. Rep. 2d 135 (O.C. Bucks 2007).

[54] *Gardner Estate*, 30 Fiduc Rep. 3d 387 (Clinton Co. 2012).

[55] *Curtis Trust*, 45 D. & C. 2d 701 (O.C. Phila. 1968).

[56] *Curtis Trust*, 45 D. & C. 2d 701 (O.C. Phila. 1968); *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983).

[57] *Estate of McCredy*, 323 Pa. Super. at 297, 470 A.2d at 600 (citations omitted).

[58] *Estate of Loretta Frances Wolf*, 29 Fid. Rep. 2d 4 (O.C. Allegh. 2002) (citing *Estate of Clark*, 467 Pa. 628, 634-35, 359 A.2d 777, 780 (1976); *Shaffer v. Shaffer*, 344 Pa. 158, 23 A.2d 883 (1942); *Union Trust Co. of Pittsburgh v. Schreck*, 335 Pa. 190, 6 A.2d 428 (1939)).

[59] *Estate of Loretta Frances Wolf*, 29 Fid. Rep. 2d 4, 11-13 (O.C. Allegh. 2002); *accord Kuehn Estate*, 29 Fid. Rep. 2d 374 (O.C. Phila. 2009) (agent under power of attorney surcharged for having made gifts to agent and to

4. Waiver of Duty of Loyalty

a. Explicit waiver: Where explicit language exists, simple defense to prove.[60] The UTA deems a transaction between a trust and its trustee or between a trust and those persons closely identified with the trustee (*see* discussion above) as being voidable unless, among other reasons, the trust instrument authorized the transaction.[61]

b. Implicit waiver: Where seeking inference of waiver, more difficult to prove and some judicial reluctance to accept inference.

i. General rule of inference. "There is no proper distinction between express and implied power. Where the power, indeed duty, to engage in self-dealing is necessarily implied in the terms of the testator's will . . . rule against self-dealing is waived."[62]

ii. Applied where the conflict is forced upon the fiduciary by the testator/settlor, i.e., court will find implicit waiver where a person with a known conflict is named as a fiduciary by the settlor or testator.

1. *E.g.*, executor was a long-time personal friend of decedent, and executor had loaned decedent $3 million before decedent's death. Court noted that decedent and executor discussed transferring various properties to executor before decedent's death, and Court refused to surcharge executor for transferring four properties to himself as repayment of the loan after decedent's death. Court stated, "as [executor] was placed in a conflicting position as executor and creditor, he had implied authorization to repay the loan to himself. Accordingly, this transaction was neither unlawful self-dealing nor unreasonable." Note, however, that the Court did conclude that executor engaged in other self-dealing transactions and therefore surcharged executor for those transactions.[63]

2. Evident on face of document: power to retain includes stock of corporate fiduciary.[64]

3. Courts may infer knowledge of situational conflict from less obvious facts and circumstances. Power to retain includes stock in which fiduciary has substantial interest where fiduciary and testatrix had close relationship and fiduciary's personal interest was well known and publicly documented.[65]

iii. Inference not made: Where no situational conflict, courts reluctant to infer waiver.

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agent's family from funds of the principal (her mother)); *Brodsky Estate*, 29 Fid. Rep. 2d 57, 58 (O.C. Montg. 2008) (agent under power of attorney surcharged for having gifted himself $210,000 from funds of principal (his mother) "to spend down his mother's money so the government could 'pick up the tab' for his mother's care.").

60 *See Lavino Trust*, 28 Fid. Rep. 441 (O.C. Montg. 1978).

61 20 Pa. C.S. § 7772(a).

62 *In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 416 (1950); *Litman Estate*, 19 Fid. Rep. 2d 266 (O.C. Allegh. 1997).

63 *See Rappaport Estate*, 30 Fid. Rep. 2d 407 (O.C. Bucks 2010).

64 *In re Glauser's Estate*, 350 Pa. 192, 38 A.2d 64 (1944); *Child Trust*, 8 Fid. Rep. 1 (O.C. Phila. 1957).

65 *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983); *see also In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 414 (1950); *contra Abbott Trust*, 3 Fid. Rep. 2d 243 (O.C. Allegh. 1983) (appointment of son/lessee as trustee does not give power to continue lease).

1. Broadest of powers (e.g., power to treat real estate as though owned by trustee in fee simple) does not include power to sell to self.[66]

2. Power to purchase common stock at book value or exchange common stock for Class A stock does not authorize purchase of Class A stock at book value.[67]

3. Stated rationale. "Absent an express and specific direction to self-deal, such a power will not be inferred."[68]

c. Duty to keep records and make disclosures

i. A trustee must keep "adequate" records of the administration of the trust; must not commingle funds; and must designate trust property so that the interest of the trust appears in trust records.[69]

ii. An Agent under Power of Attorney must keep full and accurate records of all actions, receipts and disbursements on behalf of the principal.[70] Records evidencing debt incurred by the Agent that could relate to matters involving self-dealing, "should be generated reasonably contemporaneously with the creation of the debt." [71]

iii. A beneficiary's access to trust records "is an essential part of a beneficiary's right to complete information concerning the administration of a trust." But the right is not unfettered, and must be exercised in good faith and with due regard for the rights of other interested parties.[72]

iv. In *In re Goodwin*,[73] where the trustee could not account for various funds that had been transferred to the trust, including three checks in the amount of $10,000 each, the trial court noted the trustee's recordkeeping was "abysmal." Finding that the "primary duty of a trustee is the preservation of the assets of the trust and the safety of the trust principal," the Superior Court affirmed a surcharge on the trustee, for "had [she] been acting with ordinary prudence in the care of the trust and maintain[ed] proper records throughout her time as trustee, she could have provided the accounting and documentation with alacrity."

d. **Fiduciary Exception to the Attorney-Client Privilege**

i. Limitations of Attorney-Client Privilege

1. Generally –

a. Under *Follansbee*, the trustee's duty to provide complete and accurate information to beneficiaries gave the beneficiaries, in certain circumstances, the right to discover relevant communications between the fiduciary and the attorney.[74]

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66 *Waldman v. Weisenberg*, 75 D. & C. 2d 779 (O.C. Allegh. 1975).

67 *Bullitt Trust*, 2 Fid. Rep. 2d 11 (O.C. Phila. 1981).

68 *Waldman v. Weisenberg*, 75 D. & C. 2d 779 (O.C. Allegh. 1975)*; cf. In re Flagg's Estate*, 365 Pa. 82, 73 A.2d 411, 414 (1950).

69 20 Pa. C.S. § 7780.

70 20 Pa. C.S. § 5601(e)(4).

71 *Gardner Estate*, 30 Fid. Rep. 3d 387 (O.C. Clinton 2012).

72 *Thouron Estate (No. 2)*, 3 Fid. Rep. 3d 443 (O.C. Chester. 2013) (citing *In re Rosenblum*, 459 Pa. 201 (1974)).

73 258 A.3d 533 (Pa. Super. 2021).

74 *Follansbee v. Gerlach*, 22 Fid.2d 319 (Allegheny 2002).

b. Under *Scaife*, the Superior Court solidified the rights of trust beneficiaries to information relating to the administration of the trust permit the beneficiaries to discover relevant communications between the fiduciary and the attorney before litigation ensues.[75]

2. The *Scaife* Exception – When a fiduciary engages counsel to provide advice for the fiduciary's own protection, communications after that point are generally protected from discovery.

a. To take advantage of this protection, it is advisable to engage counsel other than the attorney representing the fiduciary in the day-to-day administration.

b. It is also advisable (though not necessary under *Scaife*) to compensate this separate attorney from the fiduciary's separate funds to possibly limit arguments regarding derivative duties to beneficiaries.

c. It may be advisable to exclude the attorney who generally represents the fiduciary from litigation discussions (due to their on-going derivative obligations to beneficiaries).

d. The Reporter's Notes to the ACTEC Commentaries support the *Scaife* exception:

> "[A] lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other non-clients. See ACTEC Commentaries on MRPCs 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) and 4.1 (Truthfulness in Statements to Others)."

e. The ACTEC Commentaries [Rule 1.2] also support the distinction between representing a fiduciary generally and individually, and suggest a reduction in the derivative duties owed to the beneficiaries when an attorney represents a fiduciary in their individual capacity.

3. However, PBA Informal Opinion 2017-025 suggests that special litigation attorney may still owe derivative duties to beneficiaries, but is generally not in a position to make a mandatory disclosure under RPC 1.6.

a. Note that the existence of a court proceeding would implicate RPC 3.3, and implies a different result at least as regards the tribunal.

b. Best practice is to address this issue in the engagement with the fiduciary, and clarify that any defalcation must be disclosed to the beneficiaries.

c. If the fiduciary has embezzled funds or engaged in egregious behavior to the detriment of the beneficiaries, counsel is in a position of permissive disclosure under RPC 1.6(c)(2).

In the Opinion, counsel was advised: "If you decide that you have duties to the beneficiaries, either because they are client or because you have duties to them, you must disclose the embezzlement to them." This is, of course, spectacularly unhelpful – the lawyer is forced to make the preliminary

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[75] In *Scaife*, the court balanced the established right of trust beneficiaries to receive information relating to their trust estate with two competing evidentiary privileges – the attorney-client privilege and the work product doctrine.

determination of the existence of the duty owed to the beneficiaries, which was the reason for requesting the opinion.

e. **Derivative duties of counsel to beneficiaries**

i. Under common law, "[a trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person."[76]

ii. Confidentiality During Estate and Trust Administration -- The Derivative Duties to Beneficiaries.

1. *Pew Trusts*, 16 Fid. 2d. 73 (Montg. 1996) – The "Last Word"?

a. An attorney representing a fiduciary owes duties – largely restrictive in nature – to the beneficiaries of the estate or trust.

b. The restrictive duties include preventing the attorney from taking advantage of his or her position to the detriment of the beneficiaries.

c. What is the source of these duties? They are derived from the fact that the estate was created for the sole benefit of the beneficiaries, that the lawyer is paid from the estate, and that the lawyer stands in a superior position vis-a-vis the beneficiaries who typically repose trust and confidence in the lawyer.

2. PBA Opinions

a. Informal Opinion 2017-025 – leaves to the lawyer the determination of whether a derivative duty to beneficiaries exists.

b. Formal Opinion 2017-100 – states that an attorney has no positive duty to disclose a fiduciary's malfeasance, absent prior statements to beneficiaries that have now become false or misleading, but has a permissive exception to Rule 1.6, based on fraud. It reiterates the obligations under RPC 3.3 (duty to tribunal) in the context of an active litigation.

3. There are no Pennsylvania appellate decisions on this point in the context of estate administration.

4. Comment 11 to RPC 1.2 references the special obligations owed by an attorney to beneficiaries when the client is a fiduciary.

5. Under the ACTEC Commentaries to the Model Rules:

a. The Commentaries indicate that Pennsylvania accords with the majority view that a lawyer representing a fiduciary has restrictive duties to beneficiaries, especially as regards the lawyer making sales to, or purchases from, the fiduciary.

b. The Commentaries note that a lawyer also "is required to act in good faith and with fairness toward the beneficiaries. In addition, the lawyer should advise the fiduciary to act impartially with respect to the beneficiaries and to provide the beneficiaries with information regarding material matters affecting their interests in the fiduciary estate."

c. As reflected in the ACTEC Commentaries, some jurisdictions go so far as to hold the attorney to the same obligations as the represented fiduciary.

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[76] *But see Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993) (*quoting* Restatement (Second) of Trusts, § 173, comment d (1959)); *accord Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1180 (3d Cir. 1996).

d. Although the ACTEC Commentaries are not Pennsylvania-specific, it is reasonable to assume that new questions that arise under Pennsylvania law will be analyzed with reference to leading cases in other jurisdictions.

III. Counseling a Fiduciary: Pre-Representation

a. Review of applicable Rules of Professional Conduct.
   i. Rule 1.6
   ii. Rule 1.7
   iii. Rule 3.3
   iv. Rule 4.1
   v. Rule 4.3
   vi. Rule 8.4

b. Competency and Technology Generally

i. A lawyer must stay reasonably informed about developments in technology used in client communications and document storage, including improvements, discoveries of risks, and best practices.

ii. This means, if a lawyer does not understand the security risks posed by their phone, tablet, and computer system, then they have failed to maintain competency under RPC 1.1.

iii. Comment [8] to RPC 1.1 ("Competence") explains that lawyers must be aware of relevant technology to provide competent representation:

1. To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

c. Email and Confidential Information

i. Formal Opinion 2022-400 -- Ethical Obligations for Lawyers Using Email and Transmitting Confidential Information

ii. Under the opinion, an attorney may only continue to use email if the attorney:

1. Considers the security risks associated with email;
2. Determines whether competence requires the use of encryption software or secure file-sharing options for specific email;
3. Recognizes that certain information, absent additional security precautions such as the use of a password or encryption, should never be sent by email, including but not limited to such as information for which the client has requested maximum security;
4. Considers whether to advise clients generally about the risks associated with sending information by email;
5. Advises clients of the risks when dealing with highly sensitive materials, and items for which a client has requested maximum security;
6. Discusses with the client and determines whether the attorney and client will communicate by email and, if so, whether the client desires any limitations as to the nature of the communications or materials attached to them.

iii. What changes as a result of this Opinion? Just about everything.

1. The broad pronouncement of the opinion is that no lawyer can communicate with a client via email without specifically addressing the risks of unintended interception of confidential electronic communications.

2. Best practices

a. Memorialize the client's consent in the engagement letter. Following is language that might serve as a starting point:

Because of our concerns regarding the security of email and attachments, when we send your documents via email, we will normally transmit them using a secured email system. You may direct us to send documents unsecured, but by doing so, you acknowledge the risk that poses of interception by third parties or other disclosure of the contents of the email or its attachments. We do not recommend that you proceed in this manner and are happy to discuss it further with you.

b. Better yet, use encryption all the time and without exception. Do not offer clients an option. Financial institutions have done it for many years and clients live with it. However, be prepared for clients complaining about the inconvenience and an inability to access documents.

c. Use a secure portal for clients to access documents, rather than through email.

iv. Other concerns

1. Consider the risk of sending Word vs PDF documents, where clients or others can alter, print, and sign documents without the lawyer's knowledge.

2. Consider the risk posed by misaddressed emails.

3. Consider the lack of privacy emanating from clients using employer email addresses for communications with you.

d. The Typical Ethical Challenges in Estate Administration

i. The Issue of Confidentiality After a Client Dies – RPC 1.6

1. The Pennsylvania RPC are silent on the issue of confidentiality obligations after a client dies, but Rule 1.6(e) makes clear that the duty to maintain confidentiality continues after the representation terminates.

a. Numerous opinions of the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility have made this responsibility clear, and have also offered guidance on the many nuanced situations in which the issue can present itself.

b. However, the answers are not so clear or bright line as one might desire, absent consent from the personal representative.

2. PA Bar Opinions weigh in on post-death confidentiality:

a. Informal Opinion 2011-022 – "Death of a client does not affect lawyer's duty of confidentiality."

AND

"The executor is the legal representative of the decedent's estate; therefore you may look to that person for decisions on behalf of the estate."

b. Informal Opinion 94-134 – In a pre-probate situation where sons of decedent indicate intent to challenge father's Will, attorney possessing the Will has a duty under RPC 3.3 to ensure the Will is available for the Register of Wills to assess its validity, and notes that this is the attorney's sole remaining duty to his deceased client.

c. Informal Opinion 97-129 – In a situation where lawyer drafted the first Will for now-deceased client, but learns that a second Will was prepared by a second attorney, the key consideration is whether the circumstances of the second Will were "benign" or "suspicious." If suspicious, then RPC 8.4(d) requires action. If the circumstances are "benign," then the lawyer should remain silent.

d. Informal Opinion 99-154 – This opinion suggests that a lawyer who prepared a prior Will may not reveal its existence to an executor appointed under a subsequent Will. However, this opinion seems to ignore the power of a decedent's personal representative to waive the decedent's claims to attorney-client privilege, as referenced in Informal Opinion 2011-022.

3. The ACTEC Commentaries note two Pennsylvania ethics opinions regarding confidentiality obligations after a client dies, and observe that the personal representative of an estate may preserve or waive the privilege of the decedent:

a. Phila. Bar Op. 91-4 (1991). A lawyer may not disclose to a client's children the contents of a deceased client's prior will: "The earlier will constitutes confidential information relating to your representation of the testator, and your duty not to reveal its contents continues even after your client's death."

b. Phila. Bar 2003-11. The executor of the testator's estate does have the authority to consent to the disclosure of confidential information pertaining to the estate planning and other aspects of the representation of the testator.

4. The ACTEC Commentaries

a. "A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets, and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness."

b. These ACTEC Comments were quoted favorably by PBA Informal Opinion 2011-022 (suggesting that there may be implied consent to reveal information regarding beneficiary designations, even where the personal representative does not expressly consent).

5. NOTES –

a. When in doubt, remain silent regarding any aspect of prior representation. Think carefully through the ethical implications of both silence and disclosure, and seek a protective opinion from ethics counsel, if necessary.

b. An engagement letter could be crafted to address these situations.

ii. Identifying the Client in an Estate or Trust Administration

1. No one represents the "Estate."

2. The client is the personal representative or trustee (but note derivative duties to beneficiaries).[77]

iii. Communications with Beneficiaries

1. This issue involves *Scaife* and five RPC rules –

a. Rule 1.2 -- Scope

b. Rule 1.6 -- Confidentiality

c. Rule 4.1 -- Truthfulness in Statements to Others

d. Rule 4.3 -- Dealing with Unrepresented Person

e. Rule 8.4 -- Misconduct

2. Bear in mind the derivative duty owed to beneficiaries, which is now well settled in Pennsylvania.

3. A fundamental question is when Rule 1.6 yields if the issue involves a fiduciary's potential financial wrongdoing.

a. Under RPC 1.6(a), the attorney owes the client (the fiduciary) the duty of confidentiality.

b. However, as recognized in *Pew Trust* (and subsequent PBA Informal Opinions), the lawyer representing a fiduciary also owes a derivative duty to the beneficiaries.

c. If there is a court proceeding (as opposed to merely a probate submission), a lawyer representing a fiduciary also has a duty of candor to the tribunal (RPC 3.3) and a duty of truthfulness to third persons (RPC 4.1).

4. Consider the perceptions of beneficiaries regarding representation (which implicates RPC 4.3):

a. Beneficiaries are rarely separately represented.

b. Beneficiaries usually misunderstand the role of the estate administration attorney.

c. Because the interests of beneficiaries can become adverse to the fiduciary very quickly, it is important to be vigilant, especially when fielding complaints from a beneficiary.

5. The ACTEC Commentaries to MRPC 4.3 provide: "If the lawyer knows, or reasonably should know, that an unrepresented beneficiary, or another unrepresented person, misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding. The lawyer should not permit the beneficiaries to believe that the lawyer is the lawyer for the parties interested in the matter if the lawyer is representing only the fiduciary."

iv. Handling of Estate Assets

1. Advise fiduciaries to aggregate all estate assets and to avoid comingling of funds.

2. Advise to liquidate all investments to preserve the value of the estate and avoid exposure for market fluctuations.

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[77] *Dorsett v. Hughes*, 509 A.2d 369 (Pa. Super. 1986).

3. Limit or avoid online banking if possible, to eliminate chance for hard-to-document transactions.

4. Attorney should not have signing authority on estate checking account.

5. Reconcile estate checking account to statements on a monthly basis to catch problems before they escalate.

v. Fiduciary fraud

1. RPC 3.3 requires disclosure if an appearance has been filed.

2. Under PBA Informal Opinion 96-75, merely filing a probate petition would not qualify as an "appearance."

vi. Correcting accounts or other court filings that contain misstatements

1. Under RPC 1.6(b), the attorney has a clear exception that requires the attorney to fulfil the duty of candor to a court under RPC 3.3.

2. Under RPC 3.3, the attorney has a clear duty to correct an inaccuracy with the court.

e. Counsel needs full disclosure of the representation, including what type of fiduciary the client will be, what assets and duties they will be charged with administering, etc. to ensure counsel has the proper knowledge to advise client moving forward

i. For example, situs of all trusts?

ii. If real estate is involved, is there tangled title?

iii. Where are original documents?

iv. Lawyer-drawn or "homemade" documents?

IV. Fee Disputes

a. The general rule is that the burden is on the attorney to prove the reasonableness of his or her fees.[78]

b. Even in flat fee cases, keep careful time records to substantiate the work performed.

i. The debate between flat fees and hourly fees:

1. Flat fees can promote efficiency and hourly fees reward inefficiency.[79]

2. Hourly rates do not reflect the high liability associated with large estates.

3. RPC 1.5 prohibits excessive fees.

a. But how can attorney know when a flat fee is excessive?

b. How can an attorney know when an hourly rate is too high?

4. All fees are subject to review by the Orphans' Court, whether hourly or fixed.

ii. *Johnson Estate*

1. Widely used, and also widely disavowed.

2. Under PEF Code §3537, fixed fees are acceptable; excessive fees are not.

3. Ultimately, the Orphans' Court has the ability to determine what amount of fees are reasonable.

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[78] *In Estate of Sonovick*, 541 A.2d 374 (Pa. Super. 1988).

[79] *See Wohlpart Estate*, 21 Fid. 2d. 103 (Montg. 2000).

iii. Factors to consider in setting a fixed fee:[80]

1. The amount of work
2. The character of the services
3. The difficulty of the problems involved
4. The importance of the litigation
5. The value of the estate
6. The lawyer's degree of responsibility
7. The skill and standing of the attorney
8. The results obtained by the attorney
9. The ability of the client to pay a reasonable fee for the services rendered.

iv. More to worry about – *Preston Estate*, 560 A.2d 160 (Pa. Super. 1989):

1. The court states that joint assets should not be factored into a fixed fee.
2. However, joint assets are taxable and may require substantial work by the attorney to properly value and report for tax purposes.
3. The failure in *Preston* may have been the lack of support for the attorney's fee.

v. Requirements regarding fees:

1. For a new client, the basis of the fee must be in writing.
2. The factors of Rule 1.15 are the same as the factors at play in *LaRocca* and should be addressed.

vi. Given the reality of on-going judicial scrutiny, best practices would indicate that a fixed fee should not be taken in full until the estate is fully administered.

c. Rule 1.6(c)(4) permits an attorney to disclose otherwise confidential information in the context of a fee dispute.

d. Rule 3.7(a)(3) clearly permits a lawyer to be both advocate and witness when the question before the court is the lawyer's fees.

V. <u>In the Event of a Breach</u>

a. How to raise improper acts of a fiduciary?

i. **Petition to Compel Account**. If the surcharge is sought for a period for which an account has not been filed, the action may be commenced by petition to compel an account which, if granted, can be followed by the filing of objections to the account.[81] For procedural rules and options after petition is filed, see Pa. O.C. Rule 3.6 through 3.11 and local Orphans' Court Rules.

1. Objections to a fiduciary's account of the administration of an estate or trust complying with "local rules" may present claims for surcharge. Pa. O.C. Rule 2.7. Most, if not all, local Orphans' Court Rules for all counties that have published them are available online.
2. Objections shall be served on accountant or accountant's counsel, if represented, and on each interested party and claimant who received notice under Pa. O.C. Rule 2.5.

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[80] *LaRocca Estate*, 431 Pa. 542 (1968).

[81] *See, e.g.*, *Estate of Freedman*, 1 Fid. Rep. 2d 60 (O.C. Allegh. 1980), *aff'd,* 307 Pa. Super. 413, 453 A.2d 651 (1982).

3. An accountant's notice required by Pa. O.C. Rule 2.5 must contain the date, time, and place that objections must be filed.[82]

4. A formal account may be necessary for a Court to later determine the proper amount to surcharge a fiduciary, especially where information has not been provided to the beneficiaries for them to determine the amount of such surcharge.[83]

ii. **Petition for Review**. In general a party is barred from raising surcharge questions regarding an account after the confirmation of that account. In certain instances, however, a surcharge action may be initiated or renewed by filing a Petition for Review.[84]

1. Time for filing. In the absence of fraud, a petition for review must be filed within five years after the final confirmation of the account in question.[85] Where beneficiaries were never notified of proceedings for distribution of estate confirmed by adjudication nine years earlier, petition for review was not time barred due to executor's failure to use reasonable efforts to locate heirs.[86]

2. Minor and unborn persons are bound by five year limit even though not represented at audit of account.[87]

3. Standing to open adjudication: The fiduciary is not a party in interest and, therefore, does not have standing to open the adjudication.[88]

4. Standard for granting review: Review under 20 Pa. C.S. §§ 3521 and 7183 will be granted only where:

a. errors of law appear on face of the record;
b. new matter has arisen since confirmation of account; or
c. justice and equity require review.[89]

5. Reopening an adjudication: If the petition for review is granted, the prior adjudication will be reopened and the party seeking review will have the opportunity to present his surcharge claim.[90]

iii. **Petition for Surcharge**. If the harm caused by the fiduciary is known to the beneficiaries, a petition for surcharge may be filed.

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[82] *Butz Estate*, 8 Fiduc. Rep. 3d 7 (O.C. Monroe 2018) (no deadline for objections to be filed was sent to objector except for publication).

[83] *Guardo v. Buzzuro*, 7 Fiduc. Rep. 3d 14 (O.C. Monroe 2016) (where Orphans' Court could not make determination surcharge based on accountant's informal account and objector/petitioner's account, Orphans' Court directed accountant to submit own accounting so that Court could determine credibility of claims for offset).

[84] 20 Pa. C.S. §§ 3521, 7183.

[85] 20 Pa. C.S. § 3521; *Estate of Thomas*, 495 Pa. 93, 432 A.2d 968 (1981); *Estate of Braun*, 437 Pa. Super. 372, 650 A.2d 73 (1994).

[86] *In re Estate of Alexander*, 758 A.2d 182 (Pa. Super. 2000).

[87] *In re Elkins Estate*, 325 Pa. 373, 190 A. 650 (1937).

[88] *In re Trust Under Agreement of David H. Keiser*, 392 Pa. Super. 137, 572 A.2d 734 (1990).

[89] *See, e.g.*, *In re Estate of Litostansky*, 499 Pa. 321, 453 A.2d 329 (1982); *Osterling's Estate*, 337 Pa. 21, 10 A.2d 437, *cert. denied*, 309 U.S. 689 (1940).

[90] *See, e.g.*, *In re Huff's Estate*, 300 Pa. 64, 150 A. 98 (1930).

1. Definition of Surcharge: The "penalty for failure to exercise common prudence, common skill and common caution in the performance of the fiduciary's duty."[91]

2. Loss Required: Surcharge is awarded to compensate beneficiaries for loss occasioned by a fiduciary's breach of one or more of the duties owed to them.[92] Surcharge is imposed for fiduciary's failure to fulfill duty of care.[93]

a. Exception: When breach arises from a conflict of interest or self-dealing, a loss to the estate is not required to give the beneficiaries a remedy against the fiduciary.[94] In surcharge matters not arising out of alleged conflicts of interest or self-dealing, a fiduciary will be surcharged only if his breach caused a loss.[95]

i. Even if the fiduciary acted in good faith and paid fair consideration.[96]

ii. The beneficiary may choose whether to affirm the transaction and obtain sum lost; or disavow the transaction and restore status quo at expense of fiduciary.[97] A court of common pleas is authorized to remove an administrator where a conflict of interest is apparent from the circumstances.[98]

3. Noting a "disappointing" lack of communication between corporate co-trustee and income beneficiary, the Court surcharged the corporate co-trustee for continuing to make distributions to beneficiary despite beneficiary having died in 2005. The corporate co-trustee was also required to reimburse commissions paid to the individual co-trustee who had died in 2000, rejecting the corporate co-trustee's position that the individual co-trustee's law firm continued to provide services to the trust.[99]

4. Corporate trustee surcharged for failing to document and keep track of 40 paintings in which decedent's wife held a life estate (and a limited right to sell "some" of the

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[91] *In re Estate of Dobson*, 490 Pa. 476, 484, 417 A.2d 138 (1980) (citing *Estate of Stephenson*, 469 Pa. 128, 364 A.2d 1301 (1976) and *Miller's Estate*, 345 Pa. 91, 26 A.2d 320 (1942); *see also Matter of Estate of Campbell*, 692 A.2d 1098, 1102 (Pa. Super. 1997); *In re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 311 (1996), *app. denied*, 546 Pa. 666, 685 A.2d 545 (1996); *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 541 (1994); *Dentler Family Trust*, 873 A.2d 738, 745 (Pa. Super. 2005).

[92] Restatement (Second) of Trusts § 205 (1959); *In re Estate of Dobson*, 490 Pa. 476, 417 A.2d 138 (1980); *In re Estate of Wagner*, 232 A.3d 878 (Pa Super. 2002).

[93] *In re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 311 (1996), *app. denied*, 546 Pa. 666, 685 A.2d 545 (1996); *Paxson Trust I*, 893 A.2d 99, 120 (Pa. Super., 2006); *Novosielski Estate*, 27 Fid. Rep. 2d 255 (O.C. Westmoreland 2007).

[94] *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983); Restatement (Third) of Trusts § 78 (2007); *Cunningham Trust*, 12 Fid. Rep. 2d 94 (O.C. Montg. 1991); *see also* 20 Pa. C.S. § 7783(a) ("A trustee is accountable to an affected beneficiary for any profit, excluding reasonable compensation, made by the trustee arising from the administration of the trust, even absent a breach of trust").

[95] *In re Mendenhall*, 484 Pa. 77, 398 A.2d 951, 954 n. 3 (1979); *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 542 (1994).

[96] *In re Estate of Banes*, 452 Pa. 388, 305 A.2d 723 (1973); *Kreisel Trust*, 9 Fid. Rep. 2d 151 (O.C. Montg. 1989); Restatement (Third) of Trusts § 78, Comment d (2007).

[97] *Tracy v. Central Trust Company*, 327 Pa. 77, 192 A. 869 (1937); Restatement (Second) of Trusts § 206, Comment c (1959).

[98] *In re Estate of Gadiparthi*, 158 Pa. Commw. 537, 632 A.2d 942, 946 (1993).

[99] *Dungan Trust*, 4 Fid. Rep. 3d 41 (Mont. O.C. 2013).

paintings with the concurrence of decedent's brothers), and in which the residuary trust at issue held the remainder interest. Eleven paintings were sold and/or lost between the date of decedent's death and the death of the life tenant. Trustee obtained a settlement from the life tenant's estate, but the Trustee was surcharged one-half of the expense of the investigation into the whereabouts of the paintings in light of its failure to take reasonable steps to take control of and protect the paintings.[100]

5. Surcharge will follow if distribution not authorized by exact terms of instrument.[101]

6. Under lower standard of care, executor's failure to inquire as to the effects of making in-kind distribution and subsequent sale of securities for a loss was surcharged for amount of losses incurred.[102]

7. Agent under a power of attorney may be surcharged for improperly withdrawing and distributing trust funds to herself pursuant to her power of attorney during the settlors' lifetimes. The corporate trustee has standing to challenge the improper distributions when the distributions cause the trust, including its beneficiaries, to suffer direct harm.[103]

iv. **Removal of Fiduciaries**. The authority to remove a fiduciary may be granted in the instrument creating the fiduciary estate. Where such authority is not granted in the governing instrument or where the fiduciary relationship is created by an order of the court or the Register of Wills (e.g., an incompetency proceeding or an intestacy), the fiduciary may only be removed by the court. The grounds for the removal of a fiduciary through a court proceeding are set out below.

1. "A person seeking trustee removal . . . must show by clear and convincing evidence that [removal is proper]."[104]

2. Grounds for Complete Removal.[105]

a. Waste or mismanagement of an estate.[106]

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[100] *Young Trust*, 29 Fid. Rep. 2d (O.C. Phila. 2009).

[101] *See Hurlock Trust*, 2 Fid. Rep. 2d 100 (O.C. Phila. 1982) (instrument only authorized distribution "during illness or emergency"; trustee surcharged for making generalized support distributions).

[102] *Litman Estate*, 19 Fid. Rep. 2d 266 (O.C. Allegh. 1997); *see also* 20 Pa. C.S. § 3534.

[103] *Golub Trust*, 27 Fid. Rep. 2d 260 (O.C. Phila. 2006).

[104] *In re McKinney*, 67 A.3d 824, 830 (Pa. Super. 2013) ("no-fault" trustee removal action under 20 Pa. C.S. § 7766(b)(4) due to "substantial change of circumstances").

[105] *DiMarco Estate*, 435 Pa. 428, 437, 257 A.2d 849 (1969) (statutory grounds provide the "framework").

[106] 20 Pa. C.S. § 3182(1); *see also Estate of Westin*, 874 A.2d 139, 2005 Pa. Super. 158 (2005) (executor removed where assets of estate embezzled by employee of law firm retained by executor); *In re Estate of Frey*, 693 A.2d 1349 (Pa. Super., 1997); *James Estate*, 29 Fid. Rep. 2d 470, 474 (O.C. Northampton 2008) (administrator who obtained letters of administration despite known existence of will removed, and executor named in that will (administrator's brother) denied right to serve as executor of estate and neutral third party administrator appointed where Court concluded that: (1) neither Administrator nor proposed executor had acted diligently and in a timely manner to marshal estate assets to pay federal or state tax obligations, which may lead to significant penalties and interest assessed against estate; (2) the parties' own interests and business dealings "are or may be commingled or in conflict with the estate"; (3) "fundamental mistrust between the parties . . . could undermine the fair and expedient administration of the estate"; and (4) neither Administrator nor executor named in will demonstrated the "level of expertise necessary to manage the estate" (which included among its assets interests in international real estate and international business interests)); *Tracy Estate*, 16 Fid. Rep. 2d 211 (O.C. Montg. 1996).

b. Failure to act as a reasonably prudent person in the investment and monitoring of incapacitated person's estate.[107]

c. Insolvency.[108]

d. Failure to perform any duty imposed by law.[109]

e. Incapacitated to discharge the duties of his office because of sickness or physical or mental incapacity and his incapacity is likely to continue to the injury of the estate.[110]

f. Has removed from the Commonwealth or has ceased to have a known place of residence therein, without furnishing such security or additional security as the court shall direct.[111]

g. When, for any other reason, the interest of the estate is likely to be jeopardized by his continuance in office.[112]

h. Failure to file federal estate and Pennsylvania inheritance tax returns in a timely manner, which resulted in payment of interest and penalties by estate, and where additional tax issues remained to be resolved.[113]

i. Embezzlement.[114]

j. Entry of safe deposit box before appointment as fiduciary.[115]

k. Hindering sale of real estate and commingling funds between estates.[116]

l. Fraud and failure to give Pa. O.C. Rule 10.5 (formerly Pa. O.C. Rule 5.6) notice.[117]

m. Crimes of dishonesty.[118]

3. Grounds for Removal of Trustee under the UTA. "The court may remove a trustee if it finds that removal of the trustee best serves the interests of the beneficiaries of the trust and is not inconsistent with a material purpose of the trust, a successor co-trustee or

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107 *Cooper, Incapacitated*, 27 Fid. Rep. 2d. 147 (O.C. Phila. 2005) (where guardian retained an improper investment advisor and failed to keep proper records of investments, guardian was removed and both guardian and investment advisor surcharged the amount of money lost).

108 20 Pa. C.S. § 3182(1).

109 20 Pa. C.S. § 3182(1); *Alwood Trust*, 26 Fid. Rep. 2d 107 (O.C. York 2004).

110 20 Pa. C.S. § 3182(3).

111 20 Pa. C.S. § 3182(4).

112 20 Pa. C.S. § 3182(5); *see In re Francis Edward McGillick Foundation*, 537 Pa. 194, 642 A.2d 467 (1994); *In re Estate of Croessant*, 482 Pa. 188, 193, 393 A.2d 443 (1978); *James Estate*, 29 Fid. Rep. 2d 470 (O.C. Northam. 2008); *Worth v. McCausland*, 22 Fid. Rep. 2d 29 (O.C. Chester 2001); *Bradley Estate*, 19 Fid. Rep. 2d 212 (O.C. Chester 1999).

113 *Wicker Estate*, 29 Fid. Rep. 2d 44 (O.C. Phila. 2007).

114 *Westin Estate*, 874 A.2d 139 (Pa. Super. 2005) (Orphans' Court ordered to remove executor and appoint new executor and to proceed with hearings on surcharge of executor, the estate attorney and the attorney's law firm where $370,000 was embezzled from the law firm).

115 *Crust Estate*, 25 Fid. Rep. 2d 397 (O.C. Centre 2005), annotated in Fiduciary Review, Nov. 2005, p. 3.

116 *Huber Estate*, 26 Fid. Rep. 2d 65 (O.C. Centre 2005).

117 *Hydock Estate*, 26 Fid. Rep. 2d 209 (O.C. Phila. 2006) (executor removed and counsel chastised)

118 *Rentschler Estate*, 11 Pa. D. & C. 357 (O.C. Phila. 1957).

successor trustee is available and:

> (1) the trustee has committed a serious breach of trust; (2) lack of cooperation between co-trustees substantially impairs the administration of the trust; (3) the trustee has not effectively administered the trust because of the trustee's unfitness, unwillingness or persistent failures; or (4) there has been a substantial change of circumstances."[119]

4. Grounds for Interim or Temporary Removal
   a. In a position of conflicting interest; or
   b. In any situation where his functioning as a fiduciary for a temporary period may not be in the best interests of the estate, then
   c. The Court may appoint a "substituted fiduciary pro tem."[120]

5. Of course, a request for removal may be denied if statutory or case law requirements are not met.[121]

6. The removal of a fiduciary is a drastic action, and proof of the need for this remedy must be clear.[122]

7. The removal of a fiduciary is a matter wholly within the discretion of the Orphans' Court.[123]

8. In the exercise of that discretion, the court is entitled to distinguish between fiduciaries named by the testator or settlor and those appointed by the court or Register of Wills.[124]

9. "No-Fault" Removal. Under 20 Pa. C.S. § 7766(b)(4), "a person seeking trustee removal . . . must show by clear and convincing evidence that: (1) the removal serves the beneficiaries' best interests; (2) the removal is not inconsistent with a material purpose of the trust; (3) a suitable successor trustee is available; and (4) a substantial change in circumstances has occurred."[125]

10. How much is too much? A single breach of fiduciary duty may not

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[119] 20 Pa. C.S. § 7766.

[120] 20 Pa. C.S. § 4301; *see also Gribben v. Carpenter*, 323 Pa. 243, 185 A. 712 (1936); *Flocco Estate*, 20 Fid. Rep. 2d 111 (O.C. Allegh. 2000) (during the term of appointment of a temporary fiduciary, the first appointed fiduciary cannot exercise fiduciary powers or discretion); *Hirt Trusts*, 19 Fid. Rep. 2d 184 (O.C. Erie 1998) (applying standard for preliminary injunctive relief).

[121] *Edelman Trust (No. 2)*, 23 Fid. Rep. 2d 43 (O.C. York 2002); *Swiantek Estate*, 23 Fid. Rep. 2d 74 (O.C. Fayette 2002); *Mumma Estate*, 7 Fiduc. Rep. 3d 323 (O.C. Cumber. 2017) (awarding counsel fees where claim lacked merit and actions were dilatory, obdurate and vexatious).

[122] *In re Francis Edward McGillick Foundation*, 537 Pa. 194, 642 A.2d 467 (1994); *see In re Estate of Croessant*, 482 Pa. 188, 193, 393 A.2d 443 (1978); *In re Estate of Frey*, 693 A.2d 1349 (Pa. Super., 1997); *Thorpe Estate*, 21 Fid. Rep. 2d 111 (O.C. Montg. 2001) (conflict of interest not established so as to warrant removal).

[123] *Beichner Estate*, 432 Pa. 150, 247 A.2d 779 (1968).

[124] *In re Francis Edward McGillick Foundation*, 537 Pa. 194, 642 A.2d 467 (1994); *Beichner Estate*, 432 Pa. 150, 247 A.2d 779, 781 (1968); *see also In re Estate of Frey*, 693 A.2d 1349 (Pa. Super. 1997).

[125] *In re McKinney*, 67 A.3d 824 (Pa. Super. 2013); *see also In re Trust under Agreement of Taylor*, 164 A.3d 1147 (Pa. 2017) (Section 7766 is the "exclusive provision regarding removal of trustees").

be sufficient to warrant removal.[126]

11. How wide of a focus? Attorney-executor removed and surcharged for actions in settling decedent's estate and during decedent's lifetime under power of attorney.[127]

b. Breaches of Fiduciary Duties

i. Mismanagement of Investments, Failure to Diversify.

1. Two individual trustees who were urged to diversify a concentrated holding of one stock, where the trustees were aware of the volatility of the stock, but refused to do so were removed and personally surcharged $593,546 for damages to the charitable trust. Additionally, those trustees were ordered to pay the corporate co-trustees' attorney's fees of $425,506. The Orphans' Court held that the trust terms, including an exoneration clause, did not protect the individual trustees from a failure to diversify which resulted in decline in value of over 85% in three years. The court determined that the individual trustees had breached their fiduciary duty.[128] In a non-precedential, unpublished opinion, the Superior Court affirmed in part, reversed in part and remanded the matter back to the Orphans' Court.[129] The Superior Court affirmed the surcharge of $593,546 and the removal of one individual trustee, but it reversed the removal of the second individual trustee and the award of counsel fees. Regarding the latter, the Superior Court reasoned, in part, that the corporate co-trustee incurred those fees not because of the conduct of the surcharged co-trustees, but in defense of allegations of its own misconduct. Because the corporate co-trustee was found not to be liable, the Superior Court concluded that its fees were properly payable from the trust.[130]

ii. Duty to review retained investments.

1. "[W]hen a trustee continues to hold such non-legal investments, after a time when he could properly dispose of them, and a loss occurs, he must be held liable for a failure to exercise due care, unless he shows that his retention of the securities in question represented, not a mere lack of attention, but an honest exercise of judgment based on actual consideration of existing conditions."[131]

2. When a guardian fails to properly vet the investment advisor and fails to monitor investment activity, both the guardian and the investment advisor can be surcharged an amount equal to the amount of money lost based on the failure to act prudently.[132]

iii. Conflicts of Interest.

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126 *Edelman Trust (No. 2)*, 23 Fid. Rep. 2d 43, 56 (O.C. York 2002) (citing *In re Hoover's Estate*, 63 Pa. D. & C. 517, 531 (O.C. Northum. 1947)) (court concluded that trustee breached his fiduciary duty in failing to provide a copy of the trust to beneficiary, but Court denied petition to remove trustee, and stated that "a single act of the trustee amounting to a breach of his trust, or proof of an isolated instance of a breach of the trust may not be sufficient to warrant his removal . . . , [but] [i]nstead should consider an overall view of the entire picture, rather than focusing on isolated instances or technical breaches of the trust").

127 *Krause Estate*, 25 Fid. Rep. 2d 430 (O.C. Allegh. 2004), *aff'd, In re Estate of Krause*, 903 A.2d 58 (Pa. Super. 2006) (table).

128 *Rosenfeld Foundation Trust*, 29 Fid. Rep. 2d 271 (O.C. Phila. 2006).

129 *See Trust Estate of Rosenfeld*, 953 A.2d 849 (Pa. Super. 2008).

130 Thanks to Adam T. Gusdorff, Esquire of Heckscher, Teillon, Terrill & Sager, P.C. for the summary of the unpublished opinion of the Superior Court.

131 *In re Casani's Estate*, 342 Pa. 468, 21 A.2d 59, 61 (1941).

132 *Cooper, Incapacitated*, 27 Fid. Rep. 2d 146 (O.C. Phila. 2005).

1. Impermissible Transactions

a. Transactions between trustee and beneficiary: A transaction between a trustee and a beneficiary that does not concern trust property but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary and from which the trustee obtains an advantage is voidable by a court upon application by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.[133]

b. Conflict regarding trust opportunity: A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.[134]

c. Business enterprises: In voting shares of stock or in exercising powers of control over similar interests in other forms of business enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or business enterprise in the best interests of the beneficiaries.[135]

d. Corporate fiduciary may not retain own stock[136]: Individual fiduciary may not purchase or retain stock in which he has "substantial" or "controlling" personal interest.[137]

e. Attorney-executor's acceptance of referral fee from outside counsel for estate not disclosed to the beneficiaries posed an unavoidable conflict of interest constituting prohibited self-dealing.[138]

f. Multiple breaches of fiduciary duty by executor, including the removal of decedent's safe containing decedent's financial records, the subsequent refusal to turn over financial information to co-executor and to beneficiaries, and the use of power of attorney to issue two $80,000 checks in decedent's name which were not later disclosed on the estate tax return, all create a conflict of interest that required removal.[139]

iv. Failure to Inform or Report. Executor breached his fiduciary duty by keeping financial records away from co-executor and beneficiaries by instructing the bank not to give access to details about the estate account without his consent. Because executor's actions in thwarting the administration of the estate constituted "dilatory, obdurate and vexatious conduct during the pendency of a matter," executor was surcharged for legal fees and costs incurred by co-executor.[140]

1. But where estate documents relate to the "defensive interests" of the executor, rather than the management of the estate, such documents may be withheld on a basis of

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133 20 Pa. C.S. § 7772(d).
134 20 Pa. C.S. § 7772(e).
135 20 Pa. C.S. § 7772(g).
136 *See Child Trust*, 8 Fid. Rep. 1 (O.C. Phila. 1957). *Compare to Long Trust*, 23 Fid. Rep. 200 (O.C. Phila 1973) (loss resulted from general depression and not conflict of interest).
137 *See Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983).
138 *In re Estate of Harrison*, 745 A.2d 676 (Pa. Super. 2000).
139 *Jonik Estate*, 1 Fid. Rep. 3d 296 (Phila. O.C. 2010).
140 *Jonik Estate*, 1 Fid. Rep. 3d 296 (O. C. Phila. 2011).

privilege.[141] *See* discussion of *Scaife* above.

v. Conflicts of Interest as Grounds for Removal.

1. Where a conflict of an interest or self-dealing is apparent from the circumstances, there is no need to demonstrate that the fiduciary acted in bad faith or with fraudulent intent.[142]

2. "The test of forbidden self-dealing is whether the fiduciary had a personal interest in the subject transaction of such a substantial nature that it might have affected his judgment in a material connection . . . . The fiduciary's disqualifying interest need not be such as 'did affect his judgment' but merely such as 'might affect his judgment.'"[143]

3. It is not necessary to have a loss and the surcharge need not be based on the loss, but instead, the surcharge should prevent the guardian or fiduciary from taking any part of the profit that results from his or her self-dealing.[144]

4. Where the fiduciary may be indebted to the estate, removal is justified.[145]

5. Executor was removed where he was also serving as executor of a second estate which had a claim against the first estate.[146]

VI. Defenses to Requests for Surcharge or to Objections to Fiduciary Conduct

a. Exclusive Discretion Given Trustee.

i. Really an enlargement of powers changing the normal fiduciary duties but sometimes viewed as a defense.[147]

ii. Not a defense against bad faith. Fiduciary accused of self-dealing required to account despite provision in will waiving account.[148]

b. Exculpatory Provisions.

i. "A provision of a trust instrument relieving a trustee of liability for breach of trust is unenforceable to the extent that it 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 was inserted as the result of an abuse by the trustee of a fiduciary or confidential

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141 *Thouron Estate (No. 2)*, 3 Fid. Rep. 3d 443 (O.C. Chester 2013) (citing *In Re Rosenblum*, 459 Pa. 201 (1974)). *But see In re Estate of McAleer*, 194 A.3d 587 (2018), *app. granted*, 2019 WL 423074 (February 4, 2019) (table) (issue, as stated by petitioner, is "Do the attorney-client privilege and work product doctrines protect communications between a trustee and counsel from discovery by beneficiaries when the communications arose in the context of adversarial proceedings between the trustees and beneficiaries?").

142 *Banes Estate*, 452 Pa. 388, 395, 305 A.2d 723, 727 (1973); *see also In re Estate of Brown*, 422 Pa. Super. 448, 619 A.2d 762 (1993).

143 *Paxson Trust I*, 893 A.2d 99, 120-21 (Pa. Super. 2006). *Paxson Trust I* also stands for the proposition that an objector may elect one or more remedies from all remedies available to him or her.

144 *Gardner Estate*, 27 Fid. Rep. 2d. 76 (O.C. Bucks 2006).

145 *Roadcap Estate*, 26 Fid. Rep. 26, 28 (O.C. Dauphin 1975).

146 *Costello Estate*, 28 Fid. Rep. 208 (O.C. Montg. 1978); *accord Bosley Estate*, 1 Fid. Rep. 3d 185 (O.C. York 2010).

147 *See Wanamaker Estate*, 105 Montg. Co. L.R. 372 (1979) (will precludes, as a matter of law, assertions of claim of mismanagement and failure to provide information); *see also In re Hartman's Estate*, 331 Pa. 422, 200 A. 49 (1938) and *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983).

148 *Abbott Trust*, 3 Fid. Rep. 2d 243 (O.C. Allegh. 1983).

relationship to the settlor."[149]

ii. Viewed as a proper defense against negligence but not against bad faith or reckless disregard of trust.[150]

iii. Exculpatory or immunity provisions can relieve a fiduciary of liability for certain acts in certain circumstances.[151]

iv. "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."[152]

1. Exculpatory clause was ruled effective as to non-attorney co-executor but not effective as to attorney co-executor whose partner drafted the will.[153]

2. Courts tend not to rely exclusively on exculpatory clauses.[154]

3. Such a clause will not protect a fiduciary who misused trust assets or engaged in self- dealing.[155]

c. Consent or Acquiescence.

i. "A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach, unless the consent, release or ratification of the beneficiary was induced by improper conduct of the trustee."[156]

ii. Approval of investments, or continuing failure to object to an investment known to the beneficiary, constitutes acquiescence which is a complete bar against all acquiescing parties.[157]

iii. Inference: The more evidence of knowledge, the more likely acquiescence

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149 20 Pa. C.S. § 7788(a); *see also* Restatement (Third) Trusts § 96.

150 Restatement (Second) Trusts § 222; *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983).

151 *In re Markle's Estate*, 182 Pa. 378, 38 A. 612 (1897); *see also Wanamaker Estate*, 105 Montg. Co. L.R. 372 (1979); *Sullivan Trust*, 21 Fiduc Rep. 2d 187 (O.C. Berks 2001). As to responsibility of attorney scrivener inserting exculpatory language, *see also Dentler Family Trust (No. 2)*, 24 Fid. Rep. 2d 329 (O.C. Montg. 2004), *aff'd, In re Dentler Family Trust*, 873 A.2d 738 (Pa. Super. 2005).

152 20 Pa. C.S. § 7788(b).

153 *Cf. Kramer Estate*, 23 Fid. Rep. 2d 245 (O.C. Montg. 2003).

154 *See, e.g.*, *Estate of McCredy*, 323 Pa. Super. 268, 470 A.2d 585 (1983) (decision of auditing judge also concluded no breach of trust because of different standard of care imposed by will); *see also In re Estate of Niessen*, 489 Pa. 135, 413 A.2d 1050 (1980) (court interpreted exculpatory clause as lowering standard of care); *Kramer Estate*, 23 Fid. Rep. 2d 245 (O.C. Montg. 2003); *Kramer Estate (No. 2)* 24 Fid. Rep. 2d 198 (O.C. Montg. 2004).

155 *Abbott Trust*, 3 Fid. Rep. 2d 243 (O.C. Allegh. 1983).

156 20 Pa. C.S. § 7789.

157 *In re Ward's Estate*, 350 Pa. 144, 38 A.2d 50 (1944); *In re Clabby's Estate*, 338 Pa. 305, 12 A.2d 71 (1940); *Estate of Warden*, 2 A.3d 565, 579 (Pa. Super. 2010), *alloc. denied*, 17 A.3d 1255 (2011) (citation omitted) ("A competent beneficiary who with full knowledge of the facts and of his rights expressly consents to or affirms an investment by the trustee cannot, in the absence of fraud, thereafter question its propriety."); *Trust of Munro v. Commonw. Nat. Bank*, 373 Pa. Super. 448, 541 A.2d 756 (1988), *alloc. den.,* 520 Pa. 607, 553 A.2d 969 (1988); *McCullough Trust*, 21 Fid. Rep. 2d 135 (O.C. Allegh. 2001); *Walton Trust*, 23 Fid. Rep. 2d 365 (O.C. Chester 2003), annotated in Fiduciary Review, Dec. 2003.

will be inferred.

iv. Weight: Although theoretically a complete bar, seldom sole factor precluding surcharge. More important as equitable argument buttressing other defenses.[158]

v. Extent: Appointees of general power of appointment bound by life tenant's approval.[159]

d. Limitation of Action Against a Trustee When Reports Provided.

i. A beneficiary is barred from challenging a transaction or asserting a claim against a trustee for breach of trust if:

1. the trustee provided the beneficiary at least annually with periodic written financial reports concerning the trust;

2. the transaction was disclosed in a report to which subparagraph (1) refers or such report provided sufficient information so that the beneficiary knew or should have known of the potential claim or should have inquired into its existence;

3. in the 30 months after a report to which subparagraph (2) refers was sent by the trustee to the beneficiary, the beneficiary did not notify the trustee in writing that the beneficiary challenges the transaction or asserts a claim and provides in writing the basis for that challenge or assertion; and

4. all reports were accompanied by a conspicuous written statement describing the effect of this paragraph.

5. A claim not barred hereunder may nevertheless be subject to a five-year absolute bar.

ii. If not previously barred by Section 7785(a) or Section 7798 (relating to failure to present claim at audit), a five-year absolute bar may apply.[160]

e. Reliance on Trust Instrument: "A trustee who acts in reasonable reliance on the express provisions of the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance."[161]

i. Event affecting administration or distribution: "If the happening of an event, including marriage, divorce, performance of educational requirements, attaining a specific age or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge."[162]

ii. Limitation on personal liability of trustee

1. "Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity."[163]

2. "A trustee is personally liable for torts committed in the course of

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158 *See Estate of McCredy*, 2 Fid. Rep. 2d 43, 55 (O.C. Phila. 1981); *Evans Trust*, 3 Fid. Rep. 2d 304 (O.C. Lehigh 1982).

159 *Wilbur's Estate*, 334 Pa. 45, 5 A.2d 325 (1939); *In re Curran's Estate*, 312 Pa. 416, 167 A. 597 (1933)

160 20 Pa. C.S. § 7785(b).

161 20 Pa. C.S. § 7786.

162 20 Pa. C.S. § 7787.

163 20 Pa. C.S. § 7790(a).

administering a trust or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault."[164]

3. "A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity on an obligation arising from ownership or control of trust property or on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim."[165]

f. Laches. Defense of laches requires heavy burden of proof. Delay and prejudice to the fiduciary from delay required.[166]

i. The Superior Court refused to apply doctrine of laches against unsophisticated widow/beneficiary, who did not file petition compelling executor to file an account of administration of estate until 20 years after self-dealing transactions by executor at issue, where executor failed to file final account of his administration of the estate, thereby leaving himself open to a future claim, and where executor's self-dealing was so egregious that the Superior Court concluded he was not entitled to the equitable relief of the application of the doctrine of laches to the matter.[167]

ii. Death of witness does not necessarily constitute prejudice.[168]

iii. Laches must be raised in pleadings or it is waived.[169]

g. Advice of Counsel. Reliance on counsel is not a defense in all circumstances.[170]

i. Was use of counsel appropriate? Usually no defense where non-legal issue such as prudence of investment involved.

ii. Was the initial choice of counsel prudent?[171] Acting on advice of counsel is not a blanket of immunity where fiduciary did not explain choice of inexperienced counsel.[172]

iii. Was reliance on counsel prudent?

1. No, if reliance involved a key fact which should have been known to fiduciary (such as due date of tax returns).[173]

2. For example, executor removed and surcharged for filing tax returns

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164 20 Pa. C.S. § 7790(b).

165 20 Pa. C.S. § 7790(c).

166 *Estate of Warden*, 2 A.3d 565 (Pa. Super. 2010); *alloc. denied*, 17 A.3d 1255 (2011).

167 *Estate of Aiello*, 993 A.2d 283 (Pa. Super. 2010).

168 *Kehoe v. Gilroy*, 320 Pa. Super. 206, 467 A.2d 1 (1983); *see also In re Jones*, 442 Pa. Super. 463, 660 A.2d 76 (1995); *McCullough Trust*, 21 Fid. Rep. 2d 135 (O.C. Allegh. 2001).

169 *In re Estate of Scharlach*, 809 A.2d 376 (Pa. Super. 2002).

170 *In re Trust of Mintz*, 444 Pa. 189, 282 A.2d 295, 301 (1971); *see also In re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306, 311, *alloc. den.*, 546 Pa. 666, 685 A.2d 545 (1996); *Should the Fiduciary Trust his Lawyer*?, 19 Real Prop. Prob. & Tr. J. 786 (1984), discussing when a fiduciary can protect itself by relying on the advice of counsel.

171 *In re Estate of Lohm*, 440 Pa. 268, 269 A.2d 451 (1970).

172 *In re Evelyn Smith*, 890 A.2d 1082 (Pa. Super. 2006).

173 *In re Estate of Lohm*, 440 Pa. 268, 269 A.2d 451 (1970); *In re Estate of Geniviva*, 450 Pa. Super. 54, 675 A.2d 306 (1996).

untimely, with surcharge of interest and penalties to be paid 90% by counsel and 10% by executor.[174]

3. Yes, if decision concerns a matter so dependent on legal expertise as whether to institute litigation.[175]

4. Reliance on advice of counsel defense is not available to a fiduciary who fails to carry out the express terms of its trust.[176] If the fiduciary is in doubt as to the extent of its duties and powers under the instrument, it can protect itself by obtaining instructions from the court.[177]

h. Appraisals. Reliance on appraisal that "woefully lacked documentation" not a defense to surcharge claim where corporate fiduciary sold property at private sale for approximately 15% of the property's fair market value, even though objector was present and entered a bid at the sale.[178]

i. Res Judicata. Usually bars objections to transactions reflected in account previously approved by court.[179]

i. To remedy an overpayment in an earlier account.[180]

ii. After-discovered evidence, fraud or record error.[181]

j. Collateral Estoppel. Bars re-litigation of a trust's damages against an investor after an arbitration judgment was entered.[182]

k. Acting in accordance with a court order. Prohibits fiduciaries from being surcharged when acting in accordance with an order of court that directs the payment of funds from their trust where the right to trust income was an issue in the court proceedings.[183]

i. Change in law is no excuse: Trustee liable for failure to identify known adoptee as proper distributee after governing law changed.[184]

l. "A successor trustee shall not be personally liable for the acts or omissions of the trustee's predecessor and shall have no duty to investigate the acts or omissions of the predecessor."[185]

i. **General rule**: Court will not second guess the decisions of a trustee who acted in good faith.

1. Surcharge refused after the Court determined "[a]bsolute

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174 *Janiga Estate*; 28 Fid. Rep. 2d 219 (O.C. Phila. 2007); *Wicker Estate*, 29 Fid. Rep. 2d 44 (O.C. Phila. 2007), *aff'd*, 938 A.2d 1126 (Pa. Super. 2007).

175 *Estate of Stetson*, 463 Pa. 64, 345 A.2d 679 (1975).

176 *Borden's Estate*, 59 D. & C. 195 (O.C. Phila. 1947), *aff'd*, 358 Pa. 138, 56 A.2d 108 (1948).

177 *Estate of Sewell*, 487 Pa. 379, 409 A.2d 401, 404 (1979); *see also* Judicial Code, 42 Pa. C.S. § 7535 relating to declaratory judgments and 3A Hunter's Orphans' Court Commonplace Book, Judgments.

178 *In re Estate of Gordon*, 354 Pa. Super. 274, 511 A.2d 869 (1986), *alloc. denied*, 514 Pa. 648, 524 A.2d 494 (1987).

179 *Snyder Trust*, 20 Fid. Rep. 2d 212 (O.C. Berks 2000).

180 *Lambert Trust*, 2 Fid. Rep. 2d 302 (O.C. Phila. 1982); *Matson Estate*, 8 Fid. Rep. 2d 19 (O.C. Lehigh 1987) (where the court raised the matter *sua sponte*).

181 *In re Estate of Bell*, 463 Pa. 109, 343 A.2d 679 (1975); *In re Sloan's Estate*, 254 Pa. 346, 350, 98 A. 966 (1916).

182 *Anderson Trusts*, 27 Fid. Rep. 2d 97 (O.C. Allegh. 2007).

183 *Id.*; *Estate of Pew*, 440 Pa. Super. 195, 655 A.2d 521, 538 (1994).

184 *See Estate of Sewell*, 487 Pa. 379, 409 A.2d 401 (1979).

185 20 Pa. C.S. § 7770.

evenhandedness is impracticable and, in most cases, impossible. We can only expect our fiduciaries to act with sound judgment and proper motives under the particular circumstances of each case."[186]

2. Trustee will not be surcharged on basis of alleged error in judgment on matter where lawyers and judges might well differ in opinion and where trustee's action is not inconsistent with trust instrument.[187]

VII. Ethical Issues in Fiduciary Litigation

a. Discovery Disputes - Attorney-Client Privilege and Work Product

i. The resolution of the evidentiary rules relating to attorney-client privilege and the work product doctrine do not fully resolve an attorney's ethical duties.

ii. In re: *Trust of Scaife*. The Scaife decision by the Pennsylvania Superior Court is now published and precedential.[188]

b. Surcharge Litigation

i. Because of the nature of the lawyer's derivative duties to beneficiaries under RPC 1.2, Pew Trust, and numerous PBA Informal Opinions, an attorney engaged to represent the fiduciary should take great care if defending the fiduciary in a surcharge litigation brought by a beneficiary.

ii. ACTEC Commentaries recognize the distinction between "generally" representing the fiduciary, and representing the fiduciary "individually."

iii. The *Scaife* decision makes this distinction a part of Pennsylvania law, though there are practical challenges in establishing exactly when a fiduciary seeks advice in anticipation of litigation.

iv. The better course, even if not mandated, would be for the fiduciary to hire independent litigation counsel, who would be compensated by the fiduciary, not the fiduciary estate (though the source of compensation was rejected in *Scaife* as a relevant factor). Litigation counsel likely has more competency.

v. Litigation counsel should have an engagement that is very narrow as to the role of counsel, so as to limit the applicability of derivative duties to beneficiaries.

vi. Under RPC 4.3, the beneficiaries should be informed of the changed role of the lawyer, if they switch into "litigation" mode.

c. Will Contest -- The Scrivener as Trial Counsel

i. Rule 3.7 -- Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case;

or

(3) disqualification of the lawyer would work substantial hardship on the client.

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[186] *See In re Estate of Feinstein*, 364 Pa. Super. 221, 527 A.2d 1034, 1037-38 (1987).

[187] *Fox Trust*, 16 Fid. Rep. 2d 342 (O.C. Allegh. 1996).

[188] 276 A.3d __ (Pa. Super. 2023).

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

ii. Thus, under Rule 3.7, another lawyer in the scrivener's law firm may act as trial counsel in a Will contest case, subject to the duty to prevent conflicts of interest and to maintain duties to former clients.

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Civility is a virtue, not a shortcoming. Willingness to temper zeal with respect for society's interest in preserving responsible judicial process will help to preserve it.

Unwritten rules of professional courtesy have long sustained us. Since they are sometimes forgotten, we should set them down again and conscientiously observe them.

1 Treat with civility the lawyers, clients, opposing parties, the Court, and all the officials with whom we work. Professional courtesy is compatible with vigorous advocacy and zealous representation.

2 Communications are lifelines. Keep the lines open. Telephone calls and correspondence are a two-way channel; respond to them promptly.

3 Respect other lawyers' schedules as your own. Seek agreement on meetings, depositions, hearings and trial dates. A reasonable request for a scheduling accommodation should never be unreasonably refused.

4 Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and the judicial system.

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6 Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.

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