What Every Trustee and Professional Advisor Should Know About Minimizing Fiduciary Liability and Reducing Litigation Exposure

Part 1 of a series addressing fiduciary liability and limitation of exposure.

SHARON L. KLEIN

Acting in a fiduciary role requires a trustee to navigate a myriad of potential quandaries. Minimizing fiduciary risk is of particular interest for those who act in that role, and their advisors. Looking at the reasons for which trustees might be sued, it is possible to extract strategies aimed at reducing fiduciary risk.

Part 1 of this 3-part article explores the first three of ten potentially perilous quandaries for trustees and their advisors, and offers guidance and practical suggestions for reducing litigation exposure.

The Quandary – Identifying the Individuals with Whom an Attorney/Client or Fiduciary Relationship Exists and Acting Solely in Their Best Interests

At the outset, it is imperative to clearly identify to whom responsibilities are owed:

1. As a trustee, to who do fiduciary duties extend?
2. As a professional advisor, who is the client?

It is hornbook law that a trustee must act solely in the interests of the beneficiaries. In fact, this duty of undivided loyalty is the bedrock of the trust relationship. A trustee's judgement must not be clouded by an important business relationship.

In *Matter of HSBC Bank (Knox)*,[1] Seymour Knox II (Seymour II) created a trust to benefit the issue of his son, Seymour Knox III (Seymour III) and named the predecessor to HSBC Bank as sole trustee. Neither Seymour II nor Seymour III was named as co-trustee, and the agreement specifically provided that neither the grantor nor any person, other than the trustee, had any rights to participate in any powers or authority granted to the trustee.

The Knox family had a longstanding relationship with HSBC. Seymour II and his son, Northrup Knox, had each headed the bank for a number of years and the Chief Investment Officer referred to the Knox family as "one of the most important clients of the bank and among the founders of the modern bank."

Seymour II funded the trust in part with 5,000 shares of Woolworth stock. Despite some sales, the portfolio remained disproportionately invested in Woolworth. The trustee wrote to Seymour III recommending sale of the stock, but Seymour III refused to authorize the sale. Seymour II and III also recommended the purchase of various

SHARON L. KLEIN is Executive Vice President at Wilmington Trust, N.A, responsible for overseeing delivery of all Wealth Management services by teams of professionals. She is an ACTEC Fellow, was inducted into the Estate Planning Hall of Fame in 2021, was named by Forbes as one of the Top Women Wealth Advisors in the U.S. in 2020-2023 and by Crain's as one of the Most Notable Women in Financial Advice in 2022. The author wishes to thank her colleagues James Byrne, Senior Wealth Relationship Manager, and Shaquille Kampta, Family Wealth Associate for their valuable assistance. This article is for general information only and is not intended as an offer or solicitation for the sale of any financial product, service, or other professional advice. Wilmington Trust does not provide tax, legal or accounting advice. Professional advice always requires consideration of individual circumstances. Wilmington Trust is a registered service mark used in connection with various fiduciary and non-fiduciary services offered by certain subsidiaries of M&T Bank Corporation.

other stocks to the trustee. The trustee purchased the stocks at their request despite the trustee's determination that the stocks were not proper trust investments.

The file was reportedly replete with references to the grantor and his son as "co-trustees," and to deferring to their judgment regarding investment decisions. (For example, stock retained "at the suggestion of co-trustee," and in letters to the grantor "other securities, particularly those which are not recommended by [us] are followed closely by you… and you do not want them sold at this time" and "not presently on our approved list and…. somewhat speculative… the program would be carried out only upon the suggestion of [the grantor and his son]."

When the trustee brought an action to settle its accounting and resign, the beneficiaries objected to the accounting, alleging that the trustee breached its fiduciary duty by negligently retaining the Woolworth stock, retaining overweight positions in other stocks, violating its own internal procedures, and improperly abdicating its fiduciary role to Seymour II and III.

The Court held the trustee had violated its fiduciary duties, among other reasons, by sharing its investment authority and fiduciary responsibilities with Seymour II and III, whom the trustee often improperly referred to as co-trustees; deferring to them on critical investment management issues; allowing them both to effectively override the better judgment of the bank; and negligently purchasing stock at the direction of a non-trustee and against the trustee's own analysis. The Court awarded damages of over $21 million.

On appeal, however, the Supreme Court reversed the Surrogate's determination that the trustee improperly abdicated its fiduciary duties by following the direction of a non-trustee. The Supreme Court determined that the trustee was expressly authorized by the terms of the trust to rely on the advice of "counsel," which was interpreted more broadly than "legal counsel" to include any type of counsel, including investment counsel. For the most part, the trustee was found to have acted prudently and in good faith in consulting with Seymour II (a "knowledgeable and savvy investor") and considering his advice for investment decisions.[2]

A better solution? The way the trust operated in this case was, in effect, an informal directed trust, where the trustee ostensibly followed the directions of the grantor. However, if a grantor wishes to direct a trustee with respect to investments, there are many jurisdictions, including Delaware, that specifically sanction directed trusts. Historically, a trustee was tasked with all responsibilities relating to the trust, including administering the trust, investing trust assets, and making distribution determinations. A directed trust permits responsibilities to be divided among trust administration, investment, and distribution determinations, allowing a trustee to administer a trust but be directed by a third party regarding investment and distribution decisions. That may be the more prudent path to take if a grantor wishes to direct a trustee with regard to an asset of the trust, whether that is a concentrated stock position, business interest, or other illiquid asset. Trusts can also be directed with regard to certain assets, and allow the trustee investment responsibility over marketable assets.

Regarding professional advisors, it is key to determine who is the client. *Estate of Brooke Astor* is a well-publicized case of self-dealing. New York socialite Brooke Astor died on August 13, 2007 at the age of 105. Her estate was valued at approximately $130 million. In 1995, Mrs. Astor began exhibiting symptoms of dementia, and in 2000, Mrs. Astor was diagnosed with Alzheimer's Disease. Her dementia steadily worsened until her death in 2007.

In 2002, Mrs. Astor signed her last will. Under the terms of the will, her son Anthony Marshall received significantly more assets than under her prior will, which was executed in 1997. Under the 2002 will, Mr. Marshall inherited $40 million in real estate, a 7% annual interest on Mrs. Astor's $60 million in cash and bonds, and he was appointed as executor and trustee. In 2003 and 2004, Mrs. Astor signed two codicils to the 2002 will, which further benefited Mr. Marshall. The 2003 codicil gave Mr. Marshall the right to designate $30 million of her funds to charities of his choice. The 2004 codicil gave Mr. Marshall outright control of $60 million. In 2005, Mr. Marshall awarded himself one million dollars per year in retroactive raises for handling his mother's care and finances.

Mr. Marshall was indicted in November 2007 of multiple criminal charges in connection with his control over Mrs. Astor's estate, and his handling of Mrs. Astor's finances during her lifetime. Francis Morrissey, Mr. Marshall's attorney, was also indicted as a participant in the alleged scheme to defraud Mrs. Astor.

In October 2009, Mr. Marshall was convicted of 14 of the 16 counts against him, including a conviction for first-degree grand larceny in connection with an unauthorized raise of nearly one million dollars that Mr. Marshall gave himself for managing Mrs. Astor's finances. Mr. Morrissey was convicted of all five counts against him. In December 2009, Mr. Marshall and Mr. Morrissey were each sentenced to 1-3 years in prison. Mr. Marshall served 60 days of his sentence before he was released on medical parole on August 22, 2013. He died on November 30, 2014 at the age of 90.

The *Astor* case highlights the issues that can arise when dealing with clients

[1] 30 Misc. 3d 1201A (February 24, 2010), *rev'd in part* by 947 N.Y.S.2d 292 (June 19, 2012).

[2] The Supreme Court did, however, uphold the Surrogate's determination that the Woolworth stock should have been sold after the stock stopped paying dividends.

of declining health or diminished capacity. Mrs. Astor's son allegedly took advantage of his mother's condition to enrich himself with her fortune.

Prosecutors in the *Astor* case alleged that Mr. Morrissey had divided loyalties between Mrs. Astor and Mr. Marshall, and thus did not adequately examine whether the changes to her will reflected *her* wishes, or whether she was competent to effect the changes.

The *Astor* case serves as a graphic illustration of the importance of (a) determining who is the client and (b) ensuring that the instructions given emanate from the client and not another individual, even if the instructions given via another appear reasonable and the individual conveying them appears to be a logical messenger. That might seemingly have been the situation at the time in *Astor*, with an only child speaking to his aging mother's attorney on her behalf.

The Quandary – Conflict Among Beneficiaries: Investing to Balance the Conflicting Needs of Income Beneficiaries and Remainder Persons Pursuant to Prudent Investor Principles

The Prudent Investor Rule is the law governing the investment of trust assets in virtually every jurisdiction. It incorporates the principles of "Modern Portfolio Theory" into the fiduciary investment arena. A model Uniform Prudent Investor Act (UPIA) was promulgated in 1994.

The Prudent Investor Rule is the yardstick by which trustees are judged, the standards for which are illustrated in Exhibit 1.

The key point about the Prudent Investor Rule is not that it mandates any particular result. Trustees are not judged in hindsight. Compliance with the Rule is determined in light of the facts and circumstances existing at the time of a trustee's decision. Accordingly, the key to the Prudent Investor Rule is that it sets forth a *standard of conduct.* If trustees are careful to follow the standard of conduct – and document the fact that they have done so – they may be insulated from liability, even though the consequences of their actions are disappointing.

This fundamental principle is well illustrated in *Matter of The Stuart Cochran Irrevocable Trust.*[3] Stuart Cochran created an irrevocable trust, pursuant to the terms of which his two daughters were named beneficiaries. When Stuart was 52 years old and the insurance policies had a combined death benefit of over $8 million, the successor trustee had the policies reviewed and determined to exchange them for policies having a reduced but guaranteed death benefit of approximately $2.5 million.

When Stuart died unexpectedly at age 53, the exchange of the policies resulted in a significant reduction in the death benefits paid to the beneficiaries. They sued the trustee for breach of fiduciary duties.

In determining that no violation of the Prudent Investor Act had occurred, the Court noted that the trustee was working with the following circumstances:

1. A rapidly declining stock market,
2. Recent losses in the performance of the existing policies with the expectation of further losses,
3. A grantor in his early 50s with a life expectancy of 88 years,
4. A grantor who had suffered economic losses, with no further funds to invest in the trust, and
5. Policies estimated to lapse within five years without a further infusion of cash.

Although in hindsight the beneficiaries clearly would have benefitted from retention of the existing policies, according to the Court:

> Although it is tempting to analyze these cases with the benefit of hindsight, we are not permitted to do so, nor should we.

Interestingly, in a graphic demonstration of the importance of process, the Court found:

> [The trustee] examined the viability of the existing policies and investigated at least one other option. Of course, it could have done more, but nothing in the record leads us to second-guess the trial court's conclusion, that, while [the trustee's] 'process was certainly less than perfect;' it was adequate.

Similarly in *In re Est. of Grahek*,[4] when beneficiaries objected to losses sustained in a trust portfolio, the Court found that the trustee complied with its obligations under the Prudent Investor Rule in developing an investment strategy that would both replace the income owed to the life tenant as a result of the sale of commercial real estate and attempt to grow the principal for the remainder beneficiaries. The Court noted that the objections were based on hindsight, finding that loss in the trust's portfolio was attributable to a catastrophic decline in the financial markets in 2008 for which the trustee could not be held liable.

In *Figel, et al v. Wells Fargo Bank, N.A., et al*,[5] Gloria Figel set up a trust to benefit, among others, the two plaintiffs who were the income beneficiary and remainder beneficiary of the trust. The trustee was given broad discretion to make investments in "stocks, bonds, mortgages, securities, real estate and other investments as it may deem proper and suitable."

The income beneficiary made requests to obtain principal disbursements to maintain a certain lifestyle, despite the fact that he never had a job. The requests included providing alimony and child support to his ex-wife, and purchasing a house where he lived with his son, the remainder beneficiary. Pursuant to the trust terms, the trustee granted those requests.

---

[3] 901 N.E.2d 1128 (Ind. Ct. App. 2009).

[4] No. 554 MDA 2016, 2017 WL 1901284 (Pa. Super. Ct. Apr. 27, 2017).

[5] 2011 WL 860470 (S.D. Florida, March 9, 2011).

[6] See New York's Estate Powers and Trusts Law section 11-2.3(e).

EXHIBIT 1
Pursuant to Prudent Investor Standards a Trustee:

Is Required to Pursue an Overall Investment Strategy:	Is Required to Consider all the Facts and Circumstances:	Is Required to Invest for Total Return:	Is Required to Have Investment Skill:	Is Required to Diversify Assets:	Is Authorized to:
• Each investment should not be viewed in isolation • The overall strategy must have risk and return objectives reasonably suited to the entire portfolio	• Size of the portfolio • Estimated duration of the fiduciary relationship • Distribution requirements • General economic conditions • Inflation/Deflation • Expected tax consequences of investment decisions and distributions • Expected total return • Needs of the beneficiaries for present and future distributions	• Maximize total return having regard to both income generation and capital appreciation • Preserve purchasing power	• Delegation is permitted, provided the trustee exercises care and skill in (a) selecting the delegee (b) establishing the scope of the delegation (c) periodically reviewing the delegee and (d) controlling costs	• Unless the trustee reasonably determines that it is in the best interests of the beneficiaries not to diversify	• Invest in any type of investment; no investment is inherently imprudent • Consider related trusts and the income and resources of the beneficiaries

Ultimately, however, the income beneficiary received a letter from the trustee informing him that he needed to reduce his budget because his discretionary requests were depleting the trust at a rate of 7% per year. The trustee also sent the income beneficiary quarterly statements, showing the state of the trust, types of investments made, and any cash disbursements.

Plaintiffs brought suit, alleging that the corporate trustee was negligent and breached its fiduciary duty. Plaintiffs claimed that the trustee could have earned a higher rate of return on the trust if it had invested differently.

The plaintiffs submitted:

> Had Wells Fargo maintained a 70/30 split in asset allocation, with 70% in conservative investments, and 30% in equities, the Trust would have a market value of between approximately $3-4 million more than the value it currently has, and would have distributed approximately the same amount of money to [the income beneficiary].

Interestingly, the Court held that *even accepting this fact as true* (that is, that the corpus of the trust was not invested as well as it could have been with the benefit of hindsight), that does not evidence a “breach of trust.”

On the issue of breach, the Court held that the trustee had invested the corpus of the trust in equities and other securities, which was a manner consistent with the terms set forth in the trust and pursuant to the trustee’s buy list. In addition, the trustee sent quarterly statements to the beneficiaries that revealed the state of the trust. The “undisputed facts” showed that the trustee made the investment decisions it did in an attempt to provide income, and grow the trust to replace principal distributions and provide growth for the remainder beneficiary. The Court found that the trustee’s investment decisions were largely based on the income beneficiary’s constant requests for principal distributions. Therefore, the Court held that no reasonable fact finder could find that the trustee failed to exercise reasonable business judgment in investing the trust.

Prudent Investor Principles Can Apply to Estate Assets. Many states also apply the Prudent Investor Rule standard to the management and investment of estate assets. Under New York law, for example, the definition of trustee specifically includes personal representative.[6]

Executors can face unique challenges. Investment strategies must be reflective of the nature and expected duration of the fiduciary relationship. During the typically short-term period of estate administration, executors must balance the goal of maintaining liquidity for payment of taxes, expenses, and distributions with the goal of investing pursuant to prudent investor principles. Executors might also have to consider the need to fund continuing trusts and other vehicles, and might therefore have to evaluate which estate assets are appropriately held for continuing investments.

In re Maloy,[7] is an important reminder that, even during an estate administration, an executor cannot permit funds in their possession to lie fallow, if they are not required for the payment of claims or expenses and are not necessary for distribution within a reasonably short period of time. In *Maloy*, an executor was surcharged for acting negligently in failing to transfer estate assets to a testamentary trust and instead letting the funds sit idle in an estate account for five years.

The Quandary – How to Protect the Professional Advisor/Trustee from Liability Through Proper Documentation

It is key that an attorney or other individual acting as trustee not only fulfill all the responsibilities imposed under the Prudent Investor Rule, but also that the trustee *document* that they have done so.

Although the Surrogate's determination in *Knox*,[8] was reversed on appeal, it is instructive to review the importance the Surrogate placed on documentation, and as a practical matter, to ensure the file is properly documented to avoid the scrutiny to which the trustee was subjected. The Surrogate held that the trustee repeatedly failed to maintain any documentation regarding its decision to depart from internal protocols by purchasing securities not approved by the bank, maintaining concentrated positions, and failing to develop an investment plan for the overall trust. According to the Surrogate, if a fiduciary fails to maintain adequate records of its conduct and transactions, all doubts and presumptions are resolved adversely against it.

In *In Re Charles G. Dumont*,[9] a trust was funded almost entirely with Eastman Kodak stock. The corporate trustee maintained the nearly exclusive concentration in Kodak stock for almost half a century, despite precipitous drops in the stock's value. In the course of his determination to surcharge the trustee nearly $21 million dollars for failure to diversify, the Surrogate noted that, during the period of time in question, there were no copies of correspondence, no copies of trust review forms, no internal memoranda regarding the trust's terms, and no documentation as to the investment strategy of the trust or Kodak performance.

The Surrogate's determination to surcharge the trustee for failure to diversify was overturned on appeal on very technical grounds, and it is telling to heed the Surrogate's finding that the complete lack of documentation alone was a breach of trust.

To demonstrate compliance with the Prudent Investor Rule, it is prudent for a trustee to document investment objectives, investment process, review, and monitoring of the trust portfolio, and maintain records of meetings, correspondence, and other communications with the trust beneficiaries. Specifically, an Investment Policy Statement should be in place for the trust, the purpose of which is to define investment goals and the parameters of the investment strategy designed to achieve those goals.

Minimizing fiduciary risk is of particular interest for those who act as trustees, and their advisors.

Accountings and Releases can Sever Liability. Taking the importance of documentation to the next level, accountings and releases can help minimize ongoing fiduciary liability.

In *Matter of HSBC Bank U.S.A. (Littleton)*,[10] the trust contained a retention clause stating that the trustee had "absolute discretion" to retain "any stocks, bonds or other securities … including securities of Corning Glass Works and any successor or affiliate thereof." In addition, the clause exonerated the trustee from liability, stating that the trustee "shall not be or be held responsible for any loss or depreciation that may occur in the value [of those securities] …" Corning Glass stock constituted more than 80% of the trust assets.

Upon settlement of the trust, an informal accounting containing the trust's complete transaction history was sent to petitioners' attorney along with a receipt and release agreement. The accounting disclosed significant declines in the value of Corning Glass stock. Petitioners signed their respective releases, which provided that the trustee was forever absolved from all liability for the handling of trust assets.

Three years later, petitioners commenced a proceeding to set aside the releases, claiming breach of fiduciary duty. The New York Appellate Division affirmed the Surrogate's decision to dismiss the breach of fiduciary duty claim. The Court found that the trustee fulfilled its fiduciary duty by providing petitioners with a full accounting of the trust to which they failed to object, and executed releases waiving their rights against the trustee.

Similarly in the estate context, beneficiaries who have signed releases have been barred from pursuing claims against the fiduciaries they have released. In *Matter of Mercer*,[11] the parties reached a Settlement to admit the decedent's propounded instruments to probate. The Settlement provided for the mutual release of obligations "including but not limited to any claims and cause of action that…[the parties] have asserted against each other *or claims they could have asserted*…" [emphasis added].

Reversing the Surrogate's decision that the decedent's sons did not intend to release claims of which they had no knowledge at the time they entered into the Settlement, the Appellate Division found that the language of the Settlement unambiguously reflected a desire to resolve any and all claims, with no indication that the parties in-

tended to limit the release to claims known at the time the Settlement was signed.

In *In re Advani*,[12] the court summarily dismissed a compulsory accounting proceeding of two distributees against an administrator after executing duly acknowledged receipts, releases, waiver, and refunding agreements, including an informal accounting and waiver of judicial accounting. The Court noted that the informal account was provided to the distributees who had the opportunity to consult an attorney and accountant before they signed and received their distributions. The distributees failed to claim or demonstrate bad faith, fraud, or duress on behalf of the administrator in obtaining the notarized receipt, release, waiver, and refunding agreement that would warrant the court to direct a judicial accounting.

In *In re Spacek*,[13] a disgruntled estate beneficiary sought to revoke an agreement she signed releasing the executor from any claims, alleging she was not made aware that the executor was to receive a larger share of the estate assets because the executor was a joint holder of various bank accounts with the decedent. Affirming the Surrogate's Court denial of the motion to set aside the release, the Appellate Division held that, while formal estate accountings are generally done in the context of a judicial proceeding, a fiduciary may also account informally:

> Such an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree…[I]f a fiduciary gives full disclosure in his [or her] accounting to which the beneficiaries are parties…they should have to object at that time or be barred from doing so after the settlement of the account.

These cases illustrate the importance of a fiduciary obtaining releases from beneficiaries, even pursuant to an informal accounting, to sever otherwise lingering liability. Particularly in states, like New York, where there is no requirement for recurring trust accountings, trustees might consider periodic accountings, particularly if an investment strategy or proposed distribution could be contentious.

The same result affirming enforceability has been reached in the context of a family settlement agreement with a trustee and the former trustee's estate. After the settlement agreement was executed, one of the parties sued the estate of the former trustee. In dismissing the claim, the Texas Court of Appeals in *Austin Trust Co. v. Houren*,[14] found that the settlement agreement, which had been fully negotiated among the parties with competent legal counsel, specifically and unambiguously released the claim.

Documentation is also Key for the Professional Advisor. To protect a professional advisor against a potential claim of malpractice, record keeping can be key. Almost all states have eliminated the concept of strict privity, where only an individual (the client) in strict privity with an attorney can assert a malpractice claim against the attorney. In the estate context, where malpractice is usually only discovered after the client's death, strict privity meant that the claim against the attorney typically died with the client. However, in the vast majority of states, there are circumstances under which third parties can maintain an action against the decedent's attorney for malpractice.

Sampling of Approaches to Privity

California. In *Biakanja v. Irving*,[15] the California Supreme Court rejected the strict privity test for professional liability. The Court held that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are:

1. the extent to which transaction was intended to affect the plaintiff;
2. the foreseeability of harm to him;
3. the degree of certainty that the plaintiff suffered injury;
4. the closeness of the connection between the defendant's conduct and the injury suffered;
5. the moral blame attached to the defendant's conduct; and
6. the policy of preventing future harm.

Connecticut. In *Krawczyk v. Stingle*,[16] the Connecticut Supreme Court noted that determining when attorneys should be held liable to parties with whom they are not in privity is a question of public policy. In addressing this issue, the Supreme Court observed that courts have looked principally to whether the primary or direct purpose of the transaction was to benefit the third party. Additional factors considered include:

1. the foreseeability of harm;
2. the proximity of the injury to the conduct complained of;
3. the policy of preventing future harm; and
4. the burden on the legal profession that would result from the imposition of liability.

Delaware. In Delaware, a beneficiary may sue a testator's attorney where a testator's intent is apparent on the face of a testamentary instrument and the bequest fails solely due to the scrivener's drafting. Where the drafting is correct, yet the bequest fails for

7 167 N.Y.S.3d 719 (N.Y. Sur. 2022).

8 30 Misc. 3d 1201A (February 24, 2010), *rev'd in part* by 947 N.Y.S.2d 292 (June 19, 2012).

9 791 N.Y.S.2d 868 (2004), *rev'd in part* by 809 N.Y.S.2d 360 (App. Div. 4th Dep't 2006), appeal denied, 813 N.Y.S.2d 689 (App. Div. 4th Dep't 2006), appeal denied, appeal dismissed, 855 N.E.2d 1167 (2006), reargument denied, 860 N.E.2d 993 (2006).

10 70 A.D.3d.1324, 895 N.Y.S.2d 615 (2010).

11 141 A.D.3d 594, 35 N.Y.S.3d 692 (2016).

12 NYLJ, Aug. 9, 2021, at p. 17 (Sur. Ct., Bronx Co.).

13 155 A.D.3d 747, 64 N.Y.S.3d 65 (2017).

14 No. 14-19-00387-CV, 2021 WL 970819 (Tex. App. Mar. 16, 2021), *review granted* (June 17, 2022).

15 320 P.2d 16 (Cal. 1958).

16 543 A.2d 733 (Conn. 1988).

17 *Pinckney v. Tigani,* No. CIV.A. 02C-08-129FSS, 2004 WL 2827896 (Del. Super. Ct. Nov. 30, 2004).

other reasons, the disappointed heir must allege facts that irrefutably lay the bequest's failure at the scrivener's door.[17]

Florida. In Florida, generally, a legal malpractice claim may be brought only by one who is in privity with the attorney. However, an exception exists that permits an intended third-party beneficiary of the legal services to bring suit where "testamentary intent as expressed in the will … [was] frustrated by the attorney's negligence and as a direct result of such negligence the beneficiaries' legacy [wa]s lost or diminished."[18]

Hawaii. In Hawaii, a beneficiary may sue a testator's attorney for failing to draft an instrument that carries out the testator's intentions.[19]

Michigan. In Michigan, a beneficiary may sue a testator's attorney for failing to draft an instrument that carries out the testator's intentions. However, Michigan courts have declined to allow plaintiffs to introduce extrinsic evidence to prove the testator's intent when the trust terms are clear and unambiguous.[20]

Missouri. In *Donahue v. Shughart, Thomson & Kilroy, P.C.*,[21] the Supreme Court of Missouri concluded that the first element of a legal malpractice action may be satisfied by establishing as a matter of fact either that an attorney-client relationship exists between the plaintiff and defendant, or an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit plaintiffs. As a separate matter, the question of legal duty of attorneys to non-clients will be determined by weighing the factors in a modified balancing test. The factors are:

1. the existence of a specific intent by the client that the purpose of the attorney's services was to benefit the plaintiffs;
2. the foreseeability of the harm to the plaintiffs as a result of the attorney's negligence;
3. the degree of certainty that the plaintiffs will suffer injury from attorney misconduct;
4. the closeness of the connection between the attorney's conduct and the injury;
5. the policy of preventing future harm; and
6. the burden on the profession of recognizing liability under the circumstances.

New Jersey. In New Jersey, courts have simplified the test for surmounting the privity requirement through reliance, considering the following factors in determining whether the duty undertaken by an attorney extends to a third party not in privity with the attorney:

1. the extent to which [the attorney/client relationship] was intended to affect the plaintiff;
2. the foreseeability of reliance by the plaintiff and the harm it could thereby suffer;
3. the degree of certainty that plaintiff has been harmed; and
4. the need from a public policy standpoint of preventing future harm without unduly burdening the profession.[22]

New Mexico. In rejecting privity of contract, New Mexico's Supreme Court[23] expressly referenced a California line of cases in which a multiple factor balancing test is used to determine liability to a third person. The factors are:

1. the extent to which the transaction was intended to affect the plaintiff;
2. the foreseeability of harm to him;
3. the degree of certainty that he suffered injury;
4. the closeness of the connection between the defendant's conduct and the injury suffered; and
5. the policy of preventing future harm.

New York. Sufficient privity exists between the personal representative of an estate and the estate planning attorney for the personal representative to maintain a malpractice claim against the attorney on the estate's behalf. The estate essentially "stands in the shoes of a decedent," giving the estate capacity to maintain the malpractice action. However, strict privity remains a bar against malpractice suits by estate beneficiaries or other third parties, absent fraud or other special circumstances.[24]

Ohio. In Ohio, because the personal representative assumes the right to prosecute any surviving cause of action after the decedent's death, the personal representative's right to sue succeeds the decedent's right to sue. The personal representative, therefore, is in privity with the decedent. Consequently, a personal representative may bring a cause of action for legal malpractice on behalf of the estate for negligent estate planning that occurred during the decedent's lifetime.[25]

West Virginia. In West Virginia, a direct, intended, and specifically identifiable beneficiary may sue a testator's attorney who prepared the will where the testator's intent expressed in the will has been frustrated by negligence on the part of the attorney so that the beneficiaries' interest(s) under the will is either lost or diminished.[26]

18 *Gallo v. Brady*, 925 So. 2d 363 (Fla. Dist. Ct. App. 2006); *Ellerson v. Moriarty*, 331 So.3d 767 (Fla. Dist. Ct. App. 2021).

19 *Blair v. Ing*, 21 P.3d 452 (Haw. 2001).

20 *Mieras v.DeBona*, 550 N.W.2d 202, at 209 (Mich. 1996); *In re Solomon Gaston Miller Trust*, No. 341502, 2018 WL 6252061, at 7 (Mich. Ct. App. Nov. 29, 2018).

21 *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995).

22 *Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988); *Varelli v. White*, No. A-4675-16T3, 2019 WL 3229679 (N.J. Super. Ct. App. Div. July 18, 2019), *cert. denied*, 220 A.3d 986 (N.J. 2019), and *cert. denied*, 220 A.3d 991 (N.J. 2019).

23 *Wisdom v. Neal*, 568 F. Supp. 4 (D.N.M. 1982).

24 *Estate of Saul Schneider v. Finmann*, 933 N.E.2d 718 (N.Y. 2010).

25 *White v. Sheridan*, 2022-Ohio-2418.

26 *Calvert v. Scharf*, 619 S.E.2d 197 (W. Va. 2005).

27 99 A.D.3d 476, 952 N.Y.S.2d 126 (2012).

Statutes of Limitations. Bear in mind that a permissible malpractice action against an estate planning attorney is generally subject to statute of limitations rules.

Under New York Civil Practice Law and Rules (CPLR) section 214(6) and Connecticut General Statutes Annotated section 52-577, for example, legal malpractice actions have a three-year statute of limitations. However, the statute of limitations period could possibly be extended in some states under the doctrine of continuous representation. Pursuant to this doctrine, the statute of limitations is tolled for a legal malpractice action until the end of an ongoing representation which pertains directly to the matter in which the attorney committed the malpractice.

In *Hadda v. Lissner & Lissner LLP*,[27] the New York Supreme Court discussed the doctrine of continuous legal representation, and under what circumstances that doctrine might result in the tolling of the statute of limitations for a legal malpractice action.

In the *Hadda* case, a law firm drafted a trust for clients in 2003. The clients alleged that the law firm was guilty of legal malpractice in failing to advise the plaintiffs of changes in Medicaid law, which became effective in 2006. The law firm moved to dismiss the claim on the basis that it was time-barred – pursuant to CPLR section 214(6), an action to recover damages for legal malpractice must be commenced within three years from the date when the malpractice is committed. Both sides agreed that the three-year statute of limitations applied, but disputed when the legal representation ceased.

The Court reiterated existing law that the continuous legal representation doctrine permits the tolling of the statute of limitations for commencing a legal malpractice action "until the ongoing representation is complete." The Court found that the law firm had not submitted conclusive proof as to when the relationship had ended, a disputed few weeks apparently being the difference between a time-barred or live claim.

According to the Court, the doctrine applies until the clients are on notice that the attorney is no longer addressing their needs. A formal motion to withdraw is not required, but the notice must be reasonably sufficient to advise the client that the attorney will no longer pursue the matter. The law firm asserted that the clients were surely on notice that the firm was no longer addressing their needs, final contact with the client occurring in June 2007. The Court however, looked to the *clients'* perspective of when the relationship had terminated, and found that the clients painted a different picture. It was not reasonable to conclude that the firm had terminated representation "…just because an attorney did not return a phone call within two weeks…"

The key point about the Prudent Investor Rule is not that it mandates any particular result. Trustees are not judged in hindsight. Compliance with the Rule is determined in light of the facts and circumstances existing at the time of a trustee's decision.

Indeed, the fact that the clients formally terminated the services of the attorneys by letter dated July 16, 2007 arguably reflected their belief that the representation had continued up to that date.

The Court denied the motion to dismiss the legal malpractice action. The Appellate Division, however, reversed the lower's court decision, finding that the continuous representation doctrine did not apply to toll the three-year limitations period. Even if the husband of the former client had the authority to speak on her behalf, the intermittent telephone contact between the former client's husband and the law firm did not constitute clear indicia of an ongoing, developing, and dependent relationship between the client and the attorney or of a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim.

Despite the Appellate Division reversal, the *Hadda* case raises the issues of the ongoing responsibility of attorneys to keep clients apprised of changes in the law. Do law firm alerts suffice to notify clients of changes in the law? Or could clients use law firm alerts as evidence their attorneys continued to represent them, invoking the continuous legal representation doctrine? Some attorneys focus on defining the scope of an engagement to potentially limit open-ended liability. Some, for example, are very explicit in their engagement letters, referencing the specific documents they have agreed to draft, and sending a "termination letter" at the conclusion of the representation, letting the client know it was a pleasure to represent them, and that the representation has concluded. Since the concept of a termination letter is not particularly attractive from a business development perspective, because attorneys generally wish their clients to feel they can contact them at any time, some attorneys couple the letter with the sending of executed documents or an explanation of where the documents are held

for safekeeping, to blunt the impact of the "termination" message.

In *DeLeo v. Nusbaum*,[28] the Supreme Court of Connecticut joined the majority of states in concluding that the continuous representation doctrine should be adopted in Connecticut. Under the rule adopted by the Court, a plaintiff may invoke the doctrine, and thus toll the statute of limitations, when the plaintiff can show:

1. the attorney continued to represent him with regard to the same underlying matter; *and*
2. either the plaintiff did not know of the alleged malpractice *or* the attorney could still mitigate the harm allegedly caused by that malpractice during the continued representation.

Regarding the first prong, the representation continues for the purposes of the continuous representation doctrine until either formal or de facto termination of the attorney-client relationship. The formal termination of the relationship occurs when the attorney is discharged by the client, the matter for which the attorney was hired concludes, or a court grants the attorney's motion to withdraw from the representation. A de facto termination occurs if the client takes a step that unequivocally indicates that he has ceased relying on his attorney's professional judgment in protecting his legal interests, such as hiring a second attorney to consider a possible malpractice claim or filing a grievance against the attorney.

A permissible malpractice action against an estate planning attorney is generally subject to statute of limitations rules.

The continuous representation doctrine only tolls the statute of limitations for as long as either the plaintiff does not know of the alleged malpractice or the attorney may still be able to mitigate the harm allegedly caused.

In *Allmen v Fox Rothschild,*[29] the Court did grant a summary judgment motion to dismiss a malpractice action as time barred where the facts were not sufficient to invoke the doctrine of continuous legal representation. The Court pointed out that the doctrine tolls the statute only where the continuous representation pertains specifically to the matter in which the attorney committed the malpractice.

In *Allmen*, attorneys drafted a will for an individual who died, and were subsequently retained by the executor. The malpractice claim arose in connection with the drafting of the decedent's will and the executor claimed that the representation of the executor tolled the statute of limitations on the estate malpractice claim. However, the Court held that the execution of a new Letter of Engagement with the executor was objective proof that none of the parties had an understanding of continuous representation. The executor retained the attorneys to represent her as such, and the duties outlined in the engagement letter were distinct from the will drafting duties.

Conclusion

Part 1 has addressed the first three of ten potentially perilous quandaries for trustees, along with the author's insights and suggestions for reducing the litigation exposure these scenarios can bring. Parts 2 and 3 will explore the next seven quandaries and offer guidance and practical suggestions for minimizing fiduciary risk. ■

[28] 821 A.2d 744 (Conn. 2003).

[29] 34 Misc. 3d 1224(A), 946 N.Y.S.2d 65 (Sup. Ct. 2012).