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Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiducaries

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Fiduciary Duty: A New Ethical Paradigm for Lawyer/Fiduciaries

*Paula A. Monopoli**

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I. INTRODUCTION

The modern academic trend, as embodied in the Uniform Probate Code (“UPC”) and the new Uniform Trust Code (“UTC”), has been to move from an interventionist model of probate toward a minimalist approach to judicial intervention.¹ That model may not be working when it comes to lawyers acting

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1. In large part, this has been a response to legitimate concerns about cost, delay, and corruption in the probate process on the part of the public and the profession. In some part, it has been an effort to synthesize the probate and nonprobate methods of wealth transmission upon death. See John H. Langbein, *The Nonprobate Revolution and*

as fiduciaries. The ethical issues and monitoring problems inherent in the confidential relationship that characterizes the attorney/client/fiduciary relationship may warrant more, rather than less, intervention.² These monitoring problems and the underlying issues of conflict of interest are particularly acute when the lawyer acting as fiduciary drafted the instrument in which he or she was named. Traditional rules of fiduciary and agency law inform the attorney/client relationship as a whole and become even more pertinent when attorneys move from a general attorney/client relationship to a more “statutory” fiduciary relationship with a client or his or her beneficiaries as executor or trustee. This Article examines how those rules should inform a choice of appropriate ethical models for drafting attorney/fiduciaries.³

There have been a number of cases in the media during the past decade that highlight the malfeasance of lawyers as executors and trustees. Lawyers are not ethically forbidden from acting as fiduciaries nor are they subject to any greater probate court scrutiny than laypeople when petitioning to be appointed as fiduciaries. This is true in most states, even when lawyers draft the instrument in which they are named as executor or trustee. This Article raises a red flag as to the revision of the ethical rules in this area proposed by the American Bar Association’s Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct (“Ethics 2000”) and approved by the ABA House of Delegates. The Ethics 2000 revision states that the Model Rules of Professional Conduct (“Model Rules”) do *not* prohibit a lawyer from seeking (which is synonymous with “soliciting”)⁴ to have himself or herself named as executor of the estate or to another potentially lucrative fiduciary position.⁵ While other new language in the Ethics 2000 proposal is a welcome clarification as to the

the Future of the Law of Succession, 97 HARV. L. REV. 1108, 1115-25 (1984).

2. For a summary of these monitoring problems, see Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1126-30 (1981); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2418-20 (1995).

3. For a discussion of the similarity between the principles of fiduciary and agency law with regard to fiduciary duties, see generally Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1242-51 (1995), which discusses limitations on waivers of rights to fiduciary duties, and Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 449 n.42 (1998) (citing Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 601-07 (1997), which discusses fiduciary obligations under trust and agency law).

4. ROGET’S 21st CENTURY THESAURUS 713 (2d ed. 1999).

5. ABA, Commission on Evaluation of the Rules of Professional Conduct, *Report with Recommendations to the House of Delegates, Rule 1.8(c) cmt. 8* (2001) [hereinafter ABA Report], available at <http://www.abanet.org/cpr/e2k-rule18rem.html> (last visited May 2, 2002).

disclosure duties of attorneys nominated as fiduciaries, the existence of the language with regard to seeking appointment is arguably a step backward in this area of attorney ethics.

This Article proposes the adoption of a “disclosure” model⁶ with regard to drafting attorney/fiduciaries to minimize the dual harms of failing to protect client autonomy and of reputational harm to the legal profession as a whole. That model would include ethical rules that mandate full disclosure by the drafting attorney, which theoretically would result in informed consent by the client to the appointment of the lawyer/draftsperson.⁷ In conjunction with such an ethical construct, the model also would include procedural and substantive rules that provide for increased judicial intervention and scrutiny in such cases.

6. For a comprehensive analysis of the benefits of a disclosure model in another context, see William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1710-11 (1999) (identifying four important rationales for disclosure laws, including: (1) the “competition rationale,” *i.e.*, “disclosure can promote the competitive provision of health insurance and medical services,” ameliorating “longstanding problems of asymmetric information affecting patients and purchasers . . . and serv[ing] goals of transactional and allocative efficiency;” (2) the “agency rationale,” *i.e.*, “disclosure . . . strengthen[s] agency relationships and enforce[s] fiduciary obligations,” thus “support[ing] efficient decision making and convey[ing] non-economic values such as respect for persons;” (3) the “performance rationale,” *i.e.*, “disclosure . . . overcome[s] incomplete information” and, thus, enhances systemic performance; and (4) the “democratic rationale,” *i.e.*, “disclosure . . . increase[s] public awareness” of rights and obligations and “fosters distributive justice”). Sage has noted that “informed consumerism is incomplete as a normative model for health care because fiduciary responsibilities . . . traditionally have been defined apart from economic considerations or a contractual framework.” *Id.* at 1711. Sage’s observation is equally applicable to the delivery of legal and fiduciary services.

7. The Author uses the phrase “theoretically” to acknowledge that informed consent does not necessarily follow from disclosure and that “consent” is not always what it implies. Acquiescence is not always tantamount to fully informed consent, especially on the part of those in society most susceptible to subtle societal influence, including elderly clients, in general, and elderly women, in particular. *See, e.g.*, Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117 (1999). West has stated:

Women consent to events and transactions and arrangements all the time—day in and day out—that do us considerable harm: from marriages, to love affairs, to one-night stands, to unequal pay for comparable work, to sexually harassing work and school environments, to second shifts in the home, to mommy tracks at work. The harm these consensual relations, environments, transactions, events, acts and transfers occasion become increasingly hard to describe, to quantify, to identify, to name, or to recognize as the language and apparatus of consent-based ethics overtake our moral as well as legal discursive world.

Id. at 2139.

Drafting attorneys would have the burden of proving disclosure and informed consent. Failing that, judges would have the discretion to refuse to appoint a personal representative or to put the representative on a supervised track. If the drafting attorney is the trust's sole trustee, the court would be required to remove the attorney if he or she could not rebut the presumption of lack of disclosure.⁸

In December of 1993, Fordham University School of Law convened an important conference on the pressing issues involved in representing the elderly in this country. The conference was the joint effort of a number of organizations, including: the American Bar Association ("ABA") Commission on Legal Problems of the Elderly; the ABA Section on Real Property, Probate and Trust Law; the American College of Trust and Estate Counsel ("ACTEC"); and the National Academy of Elder Law Attorneys ("NAELA"). The insightful papers and recommendations that came out of that conference were published in a special issue of the *Fordham Law Review* and included the thoughtful article, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, by Edward D. Spurgeon and Mary Jane Ciccarello.⁹ That article revisited the issue of attorneys acting as fiduciaries, reviewed the previous literature on the subject, and made a number of important proposals that would

8. The Author will leave for a future article a deeper exploration of the inadequacies of the disclosure model when it comes to fiduciary relationships. William Sage summarized them well in the health care context when he noted:

[r]egulating fiduciary obligations through disclosure therefore presents a logical fallacy. To the extent that the fiduciary obligation between physician and patient arises from a relationship of dependence, not from an express contractual agreement, physicians' duty of loyalty arguably should not be waivable upon disclosure.

Sage, *supra* note 6, at 1757-64. Similar concerns about lawyer/draftsperson/client relationships will be briefly considered herein, *see infra* notes 127-28 and accompanying text, but a longer analysis of the implications for a disclosure model, and of the disproportionate power relationship inherent in the lawyer/client relationship will be addressed in a future article.

9. Edward D. Spurgeon & Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, 62 *FORDHAM L. REV.* 1357 (1994) [hereinafter Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*]. This Article owes much to the premises laid out in Professor Spurgeon's and Attorney Ciccarello's article. It expands on their analysis and delineates additional procedural, statutory, and structural reforms necessary to deter inappropriate use of attorney/fiduciaries and to safeguard the client if drafting attorneys are allowed to act as executors or trustees. This Article does not address the issue of attorneys appointed as guardians, a related issue but one that is so broad as to be outside the scope of this Article. However, Professor Spurgeon and Attorney Ciccarello recently have written about the specific issue of attorneys as guardians in a forthcoming article: Edward D. Spurgeon and Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 *STETSON L. REV.* (forthcoming 2002).

enhance the guidance for attorneys acting in those roles. The *Report of the Working Group on Lawyer as Fiduciary* and the recommendations that came out of the conference made concrete proposals for reform in this area.¹⁰ In particular, these proposals focused on changes to the ethical principles embodied in the ABA's Model Rules. However, seven years later, the Ethics 2000 Commission approach to clarification fails to implement these important proposals fully.

This Article picks up where Spurgeon, Ciccarello, and the Working Group left off, compares the suggested revisions of the ABA Ethics 2000 Commission to the Working Group's recommendations, and finds some things to laud but others to lament. It urges reconsideration by the Ethics 2000 Commission and further drafting to incorporate all of the safeguards offered by the Fordham Conference Working Group.

This Article adds several other dimensions to the Fordham Conference's focus on ethical reform. In addition to endorsing many of the ethical reforms laid out seven years ago, it delves further into procedural, statutory, and structural reforms that will reduce the incentives for fiduciary abuse in this area of the law. The Article offers a cost/benefit analysis of these reforms and concludes that a multi-faceted approach to reform in this area is appropriate and justifies the economic and efficiency costs of some of the reforms proposed.

Part II reviews the existing academic literature and theories on the ethical propriety of drafting attorneys naming themselves as fiduciaries. Part III proposes changes to the ABA's Model Rules, and Part IV proposes reforms to the UPC and the new UTC that allow for increased intervention on the part of the probate court—and, thus, an increased level of protection for vulnerable elderly clients—in the appointment of drafting attorney/fiduciaries in probate and trust proceedings. Part V proposes reforms to existing statutory approaches to fiduciary fee arrangements that would provide disincentives for lawyers to act as fiduciaries in inappropriate cases. This Article concludes with additional reforms that will provide more monitoring and compensatory protections for clients in this area.

This is a critical issue in an era when the American population is aging and increasingly vulnerable to financial abuse by lawyers acting as fiduciaries. As trillions of dollars pass from the World War II generation to the Baby Boom generation, the legal profession must continue its vigilance in analyzing the underlying ethical, procedural, and structural flaws in the wealth transfer system.

10. *Proceedings of the Conference on Ethical Issues in Representing Older Clients: Recommendations of the Conference*, 62 FORDHAM L. REV. 989, 997 (1994) [hereinafter *Recommendations of the Conference*]; Ned Spurgeon & Mary Jane Ciccarello, *Proceedings of the Conference on Ethical Issues in Representing Older Clients: Report of the Working Group on Lawyer as Fiduciary*, 62 FORDHAM L. REV. 1055 (1994) [hereinafter Spurgeon & Ciccarello, *Report of the Working Group*].

Failure to do so means risking further ethical lapses and consequent damage to both the public and the profession's overall image.

What follows is a review of many of the monitoring problems inherent in fiduciary relationships identified by legal scholars,¹¹ as well as the ethical issues of solicitation, conflicts of interest, and overreaching raised by such practice. This Article then raises the issue whether the legal profession should revise its ethical rules when it comes to drafting attorneys naming themselves as fiduciaries. On a more conceptual level, it challenges the prevailing academic trend in the field of probate law that the preferable model of reallocating property at death is always a hands-off, minimalist approach to judicial intervention in the probate process. It argues for a more proactive model of judicial inquiry in this area.

II. DRAFTING ATTORNEYS AS FIDUCIARIES: CURRENT ETHICAL MODELS

The term fiduciary "is derived from the Roman law, and means a person . . . having a duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking"¹² and includes "scrupulous good faith and candor"¹³ among its attributes. Some commentators have addressed the broader policy question as to whether lawyers have conflicts created by naming themselves and being appointed as personal representatives and trustees.

Spurgeon and Ciccarello identified five possible options in terms of selecting an ethical paradigm for attorney/drafters being named as fiduciaries.¹⁴ From those five options, the Author would distill essentially three different models that have been offered to deal with this potential conflict of interest: (1) an "absolute prohibition" model; (2) an "increased judicial inquiry" model *prior* to fiduciary appointment; and (3) an "increased judicial inquiry model with teeth" that extends scrutiny beyond the initial appointment of a drafting attorney/fiduciary. This Part briefly reviews those models offered. The following Part proposes a model that adopts various components of the second and third approaches, and blends them with disclosure and increased judicial intervention. This "disclosure" model would place the burden of proving disclosure and informed consent explicitly on the drafting attorney. It would provide for judicial discretion as to either removal or continued supervision of

11. See Scott & Scott, *supra* note 2, at 2418-20.

12. BLACK'S LAW DICTIONARY 431 (6th ed. 1990).

13. *Id.*

14. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1382-86.

the attorney during the probate process, if the attorney failed to meet his or her burden. This model departs from previous models by bifurcating the analysis when the fiduciary is a personal representative as opposed to a trustee, and it offers different tools with which to deal with the failure of meeting the burden. This differing approach to personal representatives versus trustees is justified on the basis of the differing costs to the wealth transfer system. The costs are fewer when it comes to increasing supervision in the rather short probate process. They begin to mount in the much longer time frame in which attorneys may act as trustees.

Because lawyers are steeped in legal rules and hone their analytic abilities in law school, they appear well-suited to carry out the duties involved in representing the elderly, the disabled, and the dead.¹⁵ A sharp sense of the law lends itself to fulfilling the duties imposed by statute and case law on executors and trustees. The ethical training in law school and the regulation of lawyers as a profession should produce good candidates for fiduciary positions.

What are the general fiduciary duties of a lawyer to her client? In 1953, Henry S. Drinker quoted then Ethical Canon 11 when he wrote about the lawyer as fiduciary:

[t]he lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client. Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly.¹⁶

Drinker also made the point that the lawyer's fiduciary duty is particularly strong when the client is borderline competent. "While the lawyer may act for such a one whom he honestly believes to be competent, he owes him a special duty not to overreach him."¹⁷ This applies to the lawyer not only as a general fiduciary but also when the lawyer takes on the specific mantle of "statutory fiduciary" as executor or guardian.

15. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1359. While the Author generally agrees with the proposition that lawyers are "well-suited" to serve as fiduciaries, they are currently trained to be much more the "zealous litigator/advocate" who implements the decisions of the client rather than the fiduciary who often must make independent judgments on behalf of a deceased or incompetent client. See generally Paula A. Monopoli, *Teaching Lawyers to Be More than Zealous Advocates*, 2001 WIS. L. REV. 1159.

16. ABA CANONS OF PROFESSIONAL ETHICS Canon 11 (1908), *cited in* HENRY S. DRINKER, *LEGAL ETHICS* 89 (1953).

17. DRINKER, *supra* note 16, at 93.

Fiduciary relationships include “trustee and beneficiary, guardian and ward, agent and principal, attorney and client, executor or administrator and legatees and next of kin of the decedent.”¹⁸ In addition to the general attorney/client relationship, lawyers who assume the mantle of “statutory fiduciary”—executor, trustee, or guardian—overlay a more specific dimension onto their general fiduciary duty.¹⁹ Each of these associations may vary in the depth and nature of the confidential relationships involved and the fiduciary duties that arise, but they all are premised on the duty of loyalty that arises when one reposes trust and confidence in another. As Austin Scott noted in his 1949 article, *The Fiduciary Principle*:

[t]he greater the independent authority to be exercised by the fiduciary, the greater the scope of his fiduciary duty. Thus, a trustee is under a stricter duty of loyalty than is an agent upon whom limited authority is conferred or a corporate director who can act only as a member of the board of directors or a promoter acting for investors in a new corporation. All of these, however, are fiduciaries and are subject to the fiduciary principle of loyalty, although not to the same extent.²⁰

What are the ethical problems and practical risks associated with attorneys acting as fiduciaries as opposed to simply attorneys? They may not be obvious to most clients at first. If a lawyer actually drafts the instrument that names him or her as personal representative, that act may raise issues later when the lawyer is paid a fee as personal representative. If the client is weak or frail, there may be the specter of the lawyer exercising undue influence in pushing the client to name him or her as fiduciary. If a lawyer represents the client before the client dies and the lawyer becomes the personal representative post-death, new duties arise to the client’s children, grandchildren, and any other heirs or beneficiaries. This kind of “multiple representation” often generates serious conflicts of interest—real or imagined—in the lawyer/fiduciary.

As noted previously, there has been minimal scholarly attention given to this issue although there have been some discussions among academics and practitioners over the years. The bulk of the existing literature was brought together in Professor Spurgeon and Attorney Ciccarello’s 1994 article.²¹ They

18. Austin Scott, *The Fiduciary Principle*, 37 CAL. L. REV. 539, 541 (1949).

19. Note that Spurgeon and Ciccarello discuss whether the ethical rules applying to attorneys extend to attorneys acting as specific fiduciaries. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1366-67.

20. Scott, *supra* note 18, at 541.

21. See Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9; see also DRINKER, *supra* note 16; Luther J. Avery, *The Rules of Professional Conduct* <https://scholarship.law.missouri.edu/mlr/vol67/iss2/6>

cited the proceedings of an October 1972 conference at which Professor Alan Polasky hosted a panel of trusts and estates partners from law firms in Michigan, New York, and Boston.²² Polasky characterized the issue of lawyers serving as executors and trustees as a “subject of major importance, both in terms of service to clients and in terms of the risk which attorneys may incur.”²³ Several authors have noted the lack of cases in which courts have disciplined attorneys for naming themselves as fiduciaries in the instruments they draft.²⁴ The fact that

for Lawyers Are Confusing, 131 TR. & EST. 8 (Apr. 1992); Ronald Chester, *The Lawyer as Charitable Fiduciary: Public Trust or Private Gain*, 25 PAC. L.J. 1353 (1994); Bradley R. Cook, *New Developments Alter the Role of Estate Planners in Recommending Fiduciaries*, 16 EST. PLAN. 356 (Nov./Dec. 1989); Frank Coolidge, *New Avenues for Lawyers Boasts Old Tradition*, 128 TR. & EST. 20 (Dec. 1989); Joseph W. deFuria, Jr., *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275 (1988); Edgar C. Gentile, III, *Lawyers as Executors and Trustees: Snakes and Ladders*, 48 ALA. LAW. 94 (1987); William D. Haight, *Attorneys Take Fiduciary Roles*, 127 TR. & EST. 10 (Feb. 1988); Gerald P. Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57 (1984); Louis D. Laurino, *The Duties and Responsibilities of the Attorney/Fiduciary*, 19 U. MIAMI PHILIP E. HECKERLING INST. ON EST. PLAN. ¶ 1601.2 (John T. Gaubatz ed., 1985); *Lawyers Serving as Executors and Trustees*, 7 REAL PROP. PROB. & TR. J. 745 (1972) (Alan N. Polansky, Moderator, Seminar on The Lawyer’s Role and Compensation in Estates and Trusts); Leonard Levin, *Legal Ramifications of Unethical Estate Practices*, 124 TR. & EST. 47 (Oct. 1985); Ronald C. Link, *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1 (1987); William M. McGovern, Jr., *Undue Influence and Professional Responsibility*, 28 REAL PROP. PROB. & TR. J. 643 (1994) (See, in particular, pages 668-73 “Part C. The Drafter as Fiduciary.”); *Recommendations of the Conference*, *supra* note 10; *Report of the Special Study Committee on Professional Responsibility, Preparation of Wills and Trusts That Name Drafting Lawyer as Fiduciary*, 28 REAL PROP. PROB. & TR. J. 803 (1994) [hereinafter *Report of the Special Study Committee*]; Spurgeon & Ciccarello, *Report of the Working Group*, *supra* note 10; Nancy Stranger Wood, *Selection of Fiduciaries and the Role of the Attorney Draftsperson, Ethical Considerations, Administrative Powers, Simultaneous Death, and Tax Apportionment, in Handling Your First Basic Will—1992*, at 207-08 (PLI Tax & Estate Planning Course Handbook Series No. D4-5236, 1992); Debra T. Landis, Annotation, *Conduct of Attorney in Capacity of Executor or Administrator of Decedent’s Estate as Ground for Disciplinary Action*, 92 A.L.R.3d 655 (1979); Frank D. Wagner, Annotation, *Attorneys at Law: Disciplinary Proceeding Based upon Attorney’s Naming of Himself or Associate as Executor or Attorney for Executor in Will Drafted by Him*, 57 A.L.R.3d 703 (1974).

22. *Lawyers Serving as Executors and Trustees*, *supra* note 21.

23. *Lawyers Serving as Executors and Trustees*, *supra* note 21, at 745.

24. Wagner, *supra* note 21, at 705 (Although not disciplining the “two attorneys, a brother and sister who practiced as partners . . . court said its opinion was intended to establish guidelines for future disciplinary proceedings . . . the lawyer as scrivener must

this is a common-but-ethically-problematic practice has given rise to several proposed models to constrain attorneys who might engage in it.

A. First Model—An “Absolute” Prohibition Model

The first of these models—an absolute prohibition against lawyers ever naming themselves as fiduciaries—is laid out clearly in Professor Joseph deFuria Jr.’s article, *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*.²⁵ Professor deFuria noted that:

[o]ne of the more troublesome practices, which has received surprisingly little attention in the literature, is that of the attorney who drafts a will that names him as a testamentary fiduciary. It is both common knowledge and well-documented that lawyers in many jurisdictions routinely serve as fiduciaries under wills that they have drawn.²⁶

The revenue-generating aspects of such an appointment and the vulnerability of often elderly clients raise a host of possible ethical pitfalls with the practice.

After reviewing the paucity of ethics committee opinions and court decisions on the matter, Professor deFuria also criticized the 1983 ABA Model Rules of Professional Conduct as they apply to this issue. He questioned whether the profession’s tolerance for the practice should be reconsidered and then proposed a model that he believed “would resolve the ethical problems implicit in the drafting practice.”²⁷

Professor deFuria noted the ABA Committee on Significant Developments in Probate and Trust Law Practice’s criticism of the Model Rules and their lack of specificity with regard to “estate practice ethics, and fiduciary designations in particular.”²⁸ In Professor deFuria’s view, this lack of specificity “underscores both rules’ inadequacy for policing the practice. . . . In fact, the effect of the

be especially careful that he does not in any way suggest or insinuate that he be appointed in a fiduciary capacity.” (citing *State v. Gulbankian*, 196 N.W.2d 733 (Wis. 1972)); see also Landis, *supra* note 21, at 658-59; Philip White, Jr., Annotation, *Attorneys at Law: Disciplinary Proceedings for Drafting Instrument Such as Will or Trust Under Which Attorney Drafter or Member of Attorney’s Family or Law Firm Is Beneficiary, Grantee, Legatee, or Devisee*, 80 A.L.R.5th 597, 609-12 (2000).

25. deFuria, Jr., *supra* note 21.

26. deFuria, Jr., *supra* note 21, at 276.

27. deFuria, Jr., *supra* note 21, at 278.

28. deFuria, Jr., *supra* note 21, at 298 (citing Link et al., *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 REAL PROP. PROB. & TR. J. 1, 2 (1987)).

Model Rules is to grant attorneys virtually free license to engage in the practice of drafting testamentary instruments in which they name themselves fiduciaries.²⁹

Professor deFuria characterized attorneys engaged in such practice as ignoring “serious problems of conflict of interest, overreaching, undue influence and solicitation inherent in the drafting practice. The fact that such conduct is not forbidden under the ethics codes does not make the practice proper, since even scrupulously ethical behavior will not attenuate the potential for an appearance of impropriety.”³⁰

In response to these observations, Professor deFuria essentially offered an “absolute prohibition” model. In his view, the rule should be that:

an attorney is absolutely precluded from drafting a testamentary instrument in which he is named as a fiduciary. Furthermore, any lawyer who drafts such an instrument would not be permitted to serve in a fiduciary capacity thereunder. Finally, if a client insists that his regular attorney serve in a fiduciary capacity under his will, the document would have to be drafted by a truly independent attorney.³¹

Professor deFuria observed that “[d]espite the potential for abuse, lawyers continue to act as fiduciaries under wills that they have drafted, perhaps because relatively few courts, ethics committees, or commentators have seriously questioned such behavior.”³²

B. Second Model—Increased Judicial Scrutiny Prior to Appointment

The second model—increased judicial scrutiny *prior* to initial appointment—was delineated by Professor Gerald Johnston. In his article, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*,³³ Professor Johnston noted that:

the practice exists among attorneys in certain areas of the country to name themselves as executors in wills that they draft . . . an attorney qua executor can, in a particular estate, “earn” a fee that is well beyond what that same attorney might receive for the performance of

29. deFuria, Jr., *supra* note 21, at 298-99.

30. deFuria, Jr., *supra* note 21, at 300.

31. deFuria, Jr., *supra* note 21, at 309.

32. deFuria, Jr., *supra* note 21, at 277.

33. Johnston, *supra* note 21.

comparable legal services involving the same expenditure of time and effort.³⁴

Professor Johnston reviewed the ethical problems raised by this practice, including conflicts of interest and improper solicitation. He noted that the risks of overreaching vis á vis an existing client may be even greater than with a new client, given the relationship of trust and confidence between the old client and the attorney. Like Professor deFuria, Professor Johnston highlighted the retrenchment in the ABA's Model Rules, which dropped the prior (and more specific) Ethical Consideration 5-6 ("EC 5-6") of the ABA's prior Model Code of Professional Responsibility ("Model Code"), which prohibited a lawyer from "consciously influencing" a client to name him as fiduciary or lawyer in the instrument.³⁵

In his article, Professor Johnston analyzed a number of ethics opinions in the area, including one from the New York Committee on Professional Ethics that interpreted the phrase "consciously influence" to mean "substantially less psychological pressure than 'undue influence.'"³⁶ The Committee did find some circumstances in which it might be ethical for a lawyer to suggest himself or herself. For example, these might include situations where the parties "had a long term relationship."³⁷ *Estate of Weinstock*³⁸ was an example of a court's finding that lawyer/executors were guilty of "impropriety and overreaching" when the two attorneys (father and son) had just met the testator who "had not independently and freely designated the attorneys to be his executors."³⁹ The court based its decision on the old Model Code's EC 5-6, adopted by New York in its own state ethics code.⁴⁰

Professor Johnston concluded that, "all things considered, much can be said from an ethical standpoint for an absolute prohibition of the designation of an attorney-draftsman as executor or trustee."⁴¹ However, he offered an alternative solution. Rather than an absolute ban on lawyer/scrivener acting as fiduciaries, Professor Johnston suggested that:

34. Johnston, *supra* note 21, at 86-87.

35. Johnston, *supra* note 21, at 91.

36. Johnston, *supra* note 21, at 92 (citing N.Y. Comm. on Prof'l Ethics, Op. 481 (1978)).

37. Johnston, *supra* note 21, at 92.

38. 351 N.E.2d 647 (N.Y. 1976).

39. Johnston, *supra* note 21, at 93.

40. Johnston, *supra* note 21, at 93.

41. Johnston, *supra* note 21, at 97.

a lawyer who has been designated as executor or testamentary trustee in a will that he or she has drawn could be required, after [the] death of the testator, to prove that the decedent did in fact request that the attorney-draftsman act in a fiduciary capacity, and that the scrivener did not improperly influence the testator in this regard.⁴²

This would, at a minimum, prevent such an attorney from being appointed in cases where he or she did not know the testator before drafting the will.

Specifically, Professor Johnston would offer beneficiaries the opportunity for input at the initial stages of the probate court proceedings. Even if the beneficiaries did not bring a complaint, the court could take a proactive approach in reviewing the attorney's conduct, as beneficiaries often are not familiar with the process or the issues. As Professor Johnston noted, "an attorney's conduct may be subject to question from an ethical standpoint even though private parties decide not to challenge the appointment."⁴³

Professor Johnston observed that such additional inquiry and procedures on the part of the probate court "may seem inconsistent with the spirit of the Uniform Probate Code with its emphasis on limited judicial involvement and informal probate administration." He argued correctly, however, that it only would apply to draftsmen who name themselves as fiduciaries and, thus, only would affect a small number of wills offered for probate. In conjunction with a re-enactment of the old Model Code's EC 5-6, Professor Johnston saw his two-pronged model as a way to deter attorneys from naming themselves in inappropriate cases.⁴⁴

C. Third Model—Increased Judicial Scrutiny Prior to and After Appointment

As if to buttress Professor Johnston's point from a "real world" perspective, Judge Louis Laurino, a Surrogate (Probate Judge) of Queens County, New York, delivered a scathing indictment of lawyers who act as fiduciaries at a major estate planning institute.⁴⁵ In his remarks, Judge Laurino noted the 1975 ABA Statement of Principles regarding probate practice. In particular, he recited

42. Johnston, *supra* note 21, at 99.

43. Johnston, *supra* note 21, at 99-100.

44. Johnston, *supra* note 21, at 100.

45. Laurino, *supra* note 21, ¶ 1600. The readers should note that some might observe that Judge Laurino is an interested party in the probate process and that probate judges might be expected to prefer more oversight rather than less given their role. While this may be true, it does not mean that such changes may not also be necessary from an objective perspective.

Principle #4, which “sets forth . . . that an attorney may serve both as a personal representative of a decedent’s estate as well as counsel to the personal representative and may receive reasonable compensation for his aggregate services and responsibilities.”⁴⁶ Judge Laurino sharply criticized this rule and stated that it was his opinion that Principle #4 perpetuated the practice of dual roles “for the sake of profit rather than remedy one of the primary causes for justifiable public criticism of the legal profession in the settlement of decedent’s estates.”⁴⁷ He took particular aim at “the attorney who has himself named executor in a will he drafts and thereafter acts as a fiduciary.”⁴⁸

Judge Laurino echoed the alarm at the then newly-revised ABA Model Rules of Professional Conduct, which eliminated EC 5-6. Judge Laurino made it clear that he vehemently disagreed with the ABA Committee that drafted the new Model Rules, when it included a comment that:

the provisions of EC 5-6 regarding the appointment of attorney/fiduciary/draftsman are adequately covered by the general conflict of interest provision of Model Rule 1.7 and the specific provisions of Rule 1.7(a) which provides that a lawyer should not enter into a business transaction with his client unless the transaction is fair and equitable to the client.⁴⁹

Judge Laurino made the point in his speech that he believed that this retrenchment in the Model Rules was a serious mistake.

Judge Laurino, like many other commentators, was struck by the lack of decisional authority on the issue. He said that he had “found little information in the way of hard data concerning the extent to which lawyers serve as executors or administrators” but found the little information available “very enlightening.”⁵⁰ The 1975 American Bar Foundation study on the issue found that:

an attorney served as personal representative or as co-fiduciary in 11 percent of Florida estates, 10 percent of Maryland estates and 10 percent of Massachusetts estates. By contrast, an attorney served as personal representative in only 2 percent of the Texas estates and less than 1 percent of California estates. This stark contrast was attributed

46. Laurino, *supra* note 21, ¶ 1600 (citing 1975 ABA Statement of Principles, Reports of ABA, 1201-1207, 1205 (1975)).

47. Laurino, *supra* note 21, ¶ 1600.

48. Laurino, *supra* note 21, ¶ 1600.

49. Laurino, *supra* note 21, ¶ 1601.1.

50. Laurino, *supra* note 21, ¶ 1601.2.

to the fact that the case law of both California and Texas follow the majority common law rule that in the absence of [a] statute which provides otherwise, an executor or administrator is not generally entitled to extra compensation for legal services rendered by him in connection with the estate. Needless to say, nether Texas nor California have legislation permitting double compensation whereas the laws of Florida, Maryland and Massachusetts do permit it.⁵¹

In his remarks to the institute audience, Judge Laurino made the connection between the double-dipping allowed in some states and the willingness of lawyers to serve as fiduciaries. He rejected the argument that lawyers act as fiduciaries for motives other than money.

Judge Laurino described how he had begun to keep statistics in his own New York courtroom as to how many attorneys were acting as fiduciaries.⁵² His own results comported with those of the American Bar Foundation study. “Ten percent of the probate filings in [his] court involved an attorney/fiduciary/draftsman.”⁵³ Like Professor Johnston, Judge Laurino rejected an absolute prohibition model as the solution to the problem of self-interested attorneys acting out of profit rather than fiduciary concern for their clients.⁵⁴ Judge Laurino embraced a model of “increased judicial scrutiny” at the time of appointment but modified that model by adding a limited amount of continuing judicial scrutiny in terms of such attorneys having to file additional accounts—an “increased judicial scrutiny with teeth” model.

Judge Laurino made the case that, in some instances, the client’s long-time attorney is the best guardian of the client’s interests and is the right choice as fiduciary. However, his experience as a probate court judge had shown him that “the true abuses of professional standards [arise from] the appointment of [an] attorney/draftsman who is otherwise a stranger to the testator, not the friend, relative or long time advisor.”⁵⁵ Judge Laurino noted that in the first forty probates he kept track of in 1984, twenty-four had simple estates with family members who were capable of taking on the role of executor.⁵⁶ Judge Laurino expressed frustration with the fact that he, as a judicial officer, was not able to give the beneficiaries of such estates a good answer to the question of why “the decedent chose to appoint the attorney/draftsman as executor and in seven instances the attorney’s partner as an alternate or co-executor [when there were

51. Laurino, *supra* note 21, ¶ 1601.2.

52. Laurino, *supra* note 21, ¶ 1601.2.

53. Laurino, *supra* note 21, ¶ 1601.2.

54. Laurino, *supra* note 21, ¶ 1601.3.

55. Laurino, *supra* note 21, ¶ 1601.3.

56. Laurino, *supra* note 21, ¶ 1601.3.

family members who were capable of performing the duties] and thus add commissions to the administration.”⁵⁷

Because most estates in his court were settled by means of a “Receipt and Release” (as are probably the majority of estates in the nation’s probate courts), statutory requirements that the court review and set the attorney’s fee were of little practical value in safeguarding against overreaching.⁵⁸ Judge Laurino suggested first and foremost that courts begin to keep statewide records of all appointments of attorneys as executor/administrators. Such record keeping is useful to identify repeat offenders and provide a “chilling effect to future wrongdoers.”⁵⁹

Judge Laurino also required in his court “that the decree appointing the attorney/fiduciary provide that he or she must account within one year after the date of the decree if the size of the taxable estate is below the federal taxable limit and within two years if it is above the federal taxable limit.”⁶⁰ Judge Laurino created this rule on his own. But, in his opinion, “an attorney because of his professional responsibility is under higher duty of care and his performance is subject to closer scrutiny by the court than the ordinary layman.”⁶¹ Therefore, Judge Laurino felt that the compulsory accounting he required was “well within the discretionary power of the court to regulate the performance of its officers, the attorney/fiduciary.”⁶² He viewed it as his “way of insuring that those attorneys who insist on acting as fiduciary will do so properly and expeditiously.”⁶³

Judge Laurino concluded his remarks by offering a model that presumes that:

absent a family relationship, every attorney/fiduciary who is also the draftsman of the will should be under a duty to explain his nomination in a plenary hearing. His refusal or his failure to satisfactorily explain the circumstances and show that the nomination was freely and willingly made, should give rise to a presumption, or at very least, an inference that his nomination was the product of undue influence.⁶⁴

57. Laurino, *supra* note 21, ¶ 1601.3.

58. Laurino, *supra* note 21, ¶ 1601.3.

59. Laurino, *supra* note 21, ¶ 1601.3.

60. Laurino, *supra* note 21, ¶ 1601.3.

61. Laurino, *supra* note 21, ¶ 1601.3.

62. Laurino, *supra* note 21, ¶ 1601.3.

63. Laurino, *supra* note 21, ¶ 1601.3.

64. Laurino, *supra* note 21, ¶ 1601.3.

Judge Laurino acknowledged, however, that the current ethical and doctrinal approach across the country is that “the mere fact that an attorney is designated executor by a will he drafted does not in and of itself give rise to a presumption of undue influence.”⁶⁵ Judge Laurino concluded that:

an attorney draftsman should only serve as fiduciary at the unsolicited suggestion of his client and if he agrees to serve, he should realize that there are grave legal, ethical and practical problems that he may have to overcome in order to perform his duties as a fiduciary and as an attorney.⁶⁶

Some of Judge Laurino’s concerns were addressed in Section 2307-a of the Surrogate’s Court Procedure Act, signed into law on August 2, 1995, by New York Governor George Pataki. That recent statute provides that:

when an attorney prepares a will to be proved in the courts of this state and such attorney or a then affiliated attorney is therein an executor-designee, the testator shall be informed prior to the execution of the will that:

- (a) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as an executor;
- (b) absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor’s statutory commissions; and
- (c) if such attorney or an affiliated attorney renders legal services in connection with the executor’s official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor’s statutory commissions.⁶⁷

The statute also requires that the testator acknowledge receiving this disclosure as to dual compensation in writing.⁶⁸ In connection with state⁶⁹ and local⁷⁰ court rules, this statute goes a long way toward full implementation of a

65. Laurino, *supra* note 21, ¶ 1601.3.

66. Laurino, *supra* note 21, ¶ 1603.

67. N.Y. SURR. CT. PROC. ACT LAW § 2307-a(1)(a)-(c) (McKinney 1997).

68. N.Y. SURR. CT. PROC. ACT LAW § 2307-a (McKinney 1997).

69. N.Y. UNIFORM RULES FOR SURR. CT. § 207.52 (McKinney 2002). In addition, Section 207.52 of the New York Uniform Rules for Surrogate’s Court provides that attorneys who are sole executors and who are also acting as counsel for the estate must file an affidavit that reveals their fees and the commissions paid to them or their firms.

70. N.Y. QUEENS COUNTY SURR. CT. RULES § 1858.1 (McKinney 2002); N.Y. Published by University of Missouri School of Law Scholarship Repository, 2002

model that discourages dual roles in inappropriate cases while increasing scrutiny of drafting attorneys who name themselves as executors.

Spurgeon and Ciccarello noted that some lawyers have little concern about attorneys acting as fiduciaries, emphasizing that, in an era of tough competition, the number of those Americans needing fiduciaries is increasing and taking on the role of fiduciary is a way to expand one's practice.⁷¹ There are, however, many in the legal profession and in academia who realize that, while the profession should encourage the use of well-trained lawyer/fiduciaries given the increasing demographic and structural needs (due in part to the loss of traditional bank trust services) there must be increased protection for those vulnerable clients who rely on their trustworthiness in doing so. The scent of undue influence hangs heavy over drafting attorneys, in particular, who name themselves in their clients' wills or trusts as the fiduciary. Professor Jeffrey Pennell, of the Emory University Law School, cited an attorney that he greatly admires, Floyd McGown, for the rule of thumb that a smart lawyer should not "accept service as a fiduciary in a trust or will created by a client."⁷² While there may well be appropriate cases, "the practical reality is that being named as a fiduciary or as an attorney for a fiduciary [in the will itself] raises eyebrows; the presumption is that [an] impropriety resulted in the designation unless the attorney can establish otherwise."⁷³

New York Attorney Joshua Rubenstein echoed this sentiment:

[a]ttorneys who have represented individuals and families over a period of many years are frequently uniquely qualified to serve as executors for such individuals. Indeed, it is the norm rather than the exception in England and in certain parts of the United States, in particular the Boston area, for attorneys to serve as executors. In New York, however, the phrase "attorney/executor" or "attorney/fiduciary" might be uttered in the same breath as "carpetbagger" with the result

SUFFOLK COUNTY SURR. CT. RULES §§ 1850.6(b), 1850.10 (McKinney 2002). In Suffolk County and Queens County, the local rules go even further, providing that where the will nominated an attorney as a fiduciary, the attorney must file an affidavit with the probate petition setting forth the testator's reasons for nominating the attorney to serve as fiduciary.

71. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1368 n.47 (citing several articles in which "[s]ome commentators have also pointed out that for business reasons, lawyers should accept opportunities to be a fiduciary, as the changing nature of estate planning law is curtailing the amount of legal work needed in the field").

72. Jeffrey N. Pennell, *Ethics, Professionalism, and Malpractice Issues in Estate Planning and Administration*, SC 75 A.L.I.-A.B.A. 67, 168 (June 14, 1998).

73. *Id.* at 166.

that the nomination of an attorney as an executor is regarded by many as presumptively bad. The fact of the matter is that in no other area of the law is the abuse, and the potential for abuse, so great as in the area of attorney/executors, who have temporary legal title to assets that belong beneficially to someone else.⁷⁴

The profession could allay the public distrust of lawyer/fiduciaries if it embraced either the first model—an “absolute prohibition” on attorney/draftspersons—or a “disclosure” model, which combines the increased judicial scrutiny of the second and third models with the placement of the burden on the drafting attorney to prove disclosure and informed consent. This model would give courts the discretion to order continuing supervision of lawyer/fiduciaries in appropriate cases. However, it would treat drafting attorneys who name themselves as personal representatives differently from those naming themselves as trustees. To achieve the greatest impact in reducing drafting lawyer/fiduciary malfeasance, this embrace of a revised ethical rule in the area should be done in conjunction with amendments to the procedural rules governing the appointment and removal of fiduciaries under the UPC and the UTC. In addition, pursuing legislative change regarding attorney fees in such cases, as well as implementing random audits, improving the safety net for the victims of such attorneys when damage results, and better educating clients, is imperative.

III. REFORMING THE ABA MODEL RULES

Presumably, ethical codes are meant to enforce professional norms and avoid harm to clients or patients. The specific harms to be concerned with in the lawyer/draftsperson/fiduciary context include impinging on client autonomy (and balancing that risk with the preservation of clients’ freedom to contract with a fiduciary of their choice). The harms also include the reputational cost to the legal profession as a whole imposed by systemic failures to protect individual client autonomy. In addition, the monitoring problems with lawyer/fiduciaries are increased when neither family members nor the probate court is given a significant oversight role in the process. The risk of breach of the fundamental fiduciary duty of loyalty and perhaps outright theft are all increased in a system allowing untrammelled freedom to name one’s own fiduciary but lacking disclosure and informed consent as elements of that model.

The ethical rules that govern lawyers frown upon the act of asking one’s client to name one as executor. Historically, the profession’s position was that,

74. Joshua S. Rubenstein, *Compensation of Attorney/Executors: Practitioners Often Caught Between Scylla and Charybdis*, N.Y. L.J., Apr. 29, 1996, at 9.
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“so long as the client originally had the idea for the attorney to serve as fiduciary, then there were no ethical violations.”⁷⁵ The advent of the Model Code of Professional Responsibility—a set of ethical aspirations and prohibitions—in 1969 set the stage for a more precise explication of the profession’s concern about solicitation in this realm. EC 5-6 provided that: “a lawyer should not consciously influence a client to name him as executor, trustee or lawyer in such instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.”⁷⁶ But ethical considerations were not prohibitions—they were merely goals to which lawyers were to aspire.⁷⁷

The more recent ABA Model Rules of Professional Conduct stripped that provision out of the new ethical paradigm. The ABA subsumed the issue under the more general conflict of interest rules in Rules 1.7 and 1.8. An original draft contained a note in the Commentary that a lawyer should not seek to have himself named in an instrument as executor, but the note was dropped from the final rules.⁷⁸ The profession’s ethical rules seem to have retrenched in protecting elderly and otherwise susceptible clients from those few unscrupulous lawyers who might prey upon them by insinuating themselves into their last wills and testaments.

The December 1993 Fordham University School of Law conference was a significant event in terms of the working group reports and the scholarship that came out of the meeting.⁷⁹ Edward D. Spurgeon and Mary Jane Ciccarello’s conference article essentially embraced the third model with improved disclosure

75. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1376. As Spurgeon and Ciccarello have noted, the 1908 Canons of Professional Responsibility, the precursor to the Model Code, were not seen as prohibiting the practice of lawyers acting as executors. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1376. Spurgeon and Ciccarello cite words by Henry S. Drinker and Joseph A. deFuria, both of whom note the lack of concern about lawyers serving as fiduciaries. See Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1375 n.73, 1376 n.74.

76. MODEL CODE OF PROF’L RESPONSIBILITY EC 5-6 (1969), *reprinted in* JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 429 (West Group ed., 1998-99) (1959). Note that this Article focuses on the role of ABA Model Rules, but there are other sources of law that inform the ethical rules in this area, including The American Law Institute’s *Restatement (Third) of the Law Governing Lawyers*. For a list of all these sources, see *Report of the Special Study Committee*, *supra* note 21, at 806-07.

77. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1376.

78. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1377 (citing MODEL RULES OF PROF’L CONDUCT R. 1.8 (Proposed Final Draft 1981)).

79. See Spurgeon & Ciccarello, *Report of the Working Group*, *supra* note 10.

and monitoring safeguards in place.⁸⁰ They endorsed the idea of revising the Model Rules to be more well-defined in this area and to offer more guidance to lawyer/fiduciaries. However, in the midst of a comprehensive review of the oft-criticized Model Rules in this area seven years later, it appears that the Ethics 2000 proposals will not only fail to revive the more specific guidance lost when EC 5-6 was written out in 1983 but may take the Model Rules from an arguably neutral position on the issue to one that expressly allows lawyers to “seek” such appointments.

As the Model Rules no longer specifically address lawyers being named as and acting in the role of fiduciary, the result has been that lawyers now have less explicit guidance about assuming the role of executor or trustee than they did under the Model Code prior to 1983. The major five-year review of the Model Rules by the Ethics 2000 Commission entertained a wide variety of changes to the Model Rules. The Commission issued its four-hundred-page final report on November 27, 2000.⁸¹ While the report suggested hundreds of changes to the Model Rules, none of these changes would replace the language of EC 5-6, deleted from the 1983 Model Rules. In fact, these proposed revisions would raise the serious questions of whether the profession now explicitly permits solicitation of clients by lawyers seeking to be fiduciaries.

In May of 2001, the Author posed a question to members of the Ethics 2000 Commission as to whether any group had proposed reviving the Model Code’s EC 5-6 that “a lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument.” The Reporter for the Commission responded that:

[t]he Commission is recommending that the text of Rule 1.8(c) be amended to prohibit lawyers from soliciting “any substantial gift from a client including a testamentary gift.” A new Comment [8] will provide as follows: “This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client’s estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client’s informed

80. Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1357.

81. James Podgers, *New ABA Model Rules May Be Under Construction in the Next Few Months*, 87 ABA J. 58 (May 2001).

consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.⁸²

Rather than reinstating the explicit prohibition against consciously influencing a client to name one as a fiduciary, the new commentary actually states that "this Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position."⁸³ This is rather remarkable language, as it does *not* prohibit lawyers from *seeking* to have their clients name them as a fiduciary.⁸⁴ "Seeking" is synonymous with "soliciting,"⁸⁵ so the provision may fairly be read to mean that it will be acceptable for a lawyer to suggest that a client name him or her as a fiduciary in the will that the lawyer is drafting. That is contrary to the prior understanding that, while a drafting attorney may serve as a fiduciary, it is not ethical for the lawyer to solicit—read seek—such appointment. (It is in direct contradiction to EC 5-6 as described in a Reporter's Note dropped from the final commentary to Model Rule 1.8 that "EC 5-6 of the Code states that a lawyer should not seek to have himself or a partner or associate named in an instrument as executor of the client's estate.")⁸⁶ While this change in language simply may reflect what many lawyers are actually doing, in practice, such a sea change in the ethical tradition that frowns upon such solicitation only should have been made with a full and open

82. Posting of Professor Nancy J. Moore, nmoore@bu.edu, Boston University School of Law, Chief Reporter, ABA Ethics 2000 Commission (May 18, 2001) during ABA Teleconference on the Ethics 2000 proposed revisions (copy on file with Author) (citing proposed revision to ABA Model Rules of Professional Conduct, *available at* www.abanet.org). In the Reporter's Explanation of Changes, the drafters state:

This new Comment clarifies a present ambiguity by addressing the question of whether appointment of the lawyer or the lawyer's firm as executor constitutes a "substantial gift" within the meaning of this Rule. The commission believes that such appointments are not "gifts" but that they may create a conflict of interest between the client and the lawyer that would be governed by Rule 1.7.

ABA Report, *supra* note 5.

83. ABA Report, *supra* note 5.

84. ABA Report, *supra* note 5. Note that the Comment does not specifically apply to drafting attorneys. It seems to allow all lawyers to seek to have themselves named as executor or any other lucrative fiduciary position.

85. ROGET'S 21st CENTURY THESAURUS 713 (2d ed. 1999).

86. *See Report of the Special Study Committee, supra* note 21, at 803 n.14; *supra*

note 76.

identification and discussion of this issue as an important change—standing separately and apart from the issue of gifts to lawyers.⁸⁷

Ethics 2000 did better when it came to the second part of the Comment. The Commission did include a provision that such lawyer/fiduciary appointments are subject to conflict of interest rules under the Model Rules *when* there is a “significant risk that the lawyer’s interest in obtaining the appointment will materially limit the lawyer’s independent professional judgment in advising the client concerning the choice of an executor or other fiduciary.”⁸⁸ The sentence is then linked to the next one, which only requires full disclosure when there is a conflict. However, such appointments are, in essence, always a *per se* conflict of interest when the attorney seeking appointment is also the drafting attorney. The situation is replete with “serious problems of conflict of interest, overreaching, undue influence, and solicitation.”⁸⁹

The Author suggests that: (1) the rule should stand on its own (and not be simply an adjunct to a rule on gifts to lawyers, which is a related but conceptually separate matter); (2) it essentially should specify either in a Rule itself or in a Comment that a drafting attorney seeking such an appointment constitutes a *per se* conflict in this context—in other words, any time a lawyer is drafting the instrument that names him or her as a fiduciary, it is not up to the attorney to decide that there is a conflict, but rather, such a conflict exists in this situation, and there must be mandatory disclosure; and (3) that the phrase “executor” should be changed to “personal representative” in keeping with the modern trend under the UPC.⁹⁰

ACTEC is an organization of lawyers expert in wills, trusts, and estate planning. Over the years, ACTEC has attempted to bridge the gap between the

87. The Author has suggested to the Ethics 2000 Commission that the Comment could be changed to read: “This Rule does not prohibit a lawyer *from accepting an appointment* as executor or other potentially lucrative fiduciary position.” This would still effectuate the Commission’s desire to clarify that such appointments do not constitute “gifts” but still preserve the ethical tradition of not allowing lawyers to “seek” such appointments.

88. ABA Report, *supra* note 5.

89. deFuria, Jr., *supra* note 21, at 299. For an extensive analysis of why a drafting attorney naming himself or herself as fiduciary in the instrument raises all of these issues, see deFuria, Jr., *supra* note 21, at 300-06.

90. As noted above, the Author discussed with the Reporter for the Ethics 2000 Commission, by e-mail, her concerns with the phrase “seek” and offered suggestions for alternative language. However, by the time the Author raised the concern in the Fall of 2001, the proposed Rule 1.8 and Comment (c) already had been approved at the August 2001 ABA Annual Meeting. The Ethics 2000 Reporter was thus understandably reluctant to revisit the issue at the February 2002 mid-year meeting of the ABA House of Delegates when the remainder of the Ethics 2000 proposals were to be debated.

Perhaps this issue could be considered during a future review of the ABA Model Rules. Published by University of Missouri School of Law Scholarship Repository, 2002

Model Rules—written with the zealous litigator in mind rather than lawyers acting in other roles—and the world of trusts and estates lawyers. ACTEC’s comment on Model Rule 1.7, written in 1985, prior to the Ethics 2000 revisions, and its effect on the issue of soliciting appointment as executor is as follows:

An individual is generally free to select and appoint whomever he or she wishes to a fiduciary office (e.g., trustee, executor, attorney-in-fact). None of the provisions of the MRPC deals explicitly with the propriety of a lawyer preparing for a client a will or document that appoints the lawyer to a fiduciary office. As a general proposition lawyers should be permitted to assist adequately informed clients who wish to appoint their lawyers as fiduciaries. Accordingly, a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rules of the MRPC 1.7 . . . and the appointment is not the product of undue influence or improper solicitation by the lawyer.⁹¹

ACTEC goes on to define an informed client as one who is “provided with information regarding the role and duties of the fiduciary, the ability of the lay person to serve as fiduciary with legal and other professional assistance, and the comparative cost of appointing the lawyer or other person or institution as fiduciary.”⁹² The Ethics 2000 Commission should be commended for including language in the new Comment to Rule 1.8(c) that appears to adopt a disclosure requirement similar to that posited by ACTEC as necessary to a “properly informed” client. The language states that:

91. THE AMERICAN COLLEGE OF TRUST & ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT 156 (3d ed. 1999)[hereinafter ACTEC COMMENTARIES], available at <http://www.actecfoundation.org/pdfdocs/commental.PDF>.

92. *Id.* at 155-56. The ACTEC Commentary to Rule 1.7 also notes in the paragraph entitled *Selection of Fiduciaries* that:

The lawyer advising a client regarding the selection and appointment of a fiduciary should make full disclosure to the client of any benefits that the lawyer may receive as a result of the appointment. In particular, the lawyer should inform the client of any policies or practices known to the lawyer that the fiduciaries under consideration may follow with respect to the employment of the scrivener of an estate planning document as counsel for the fiduciary. The lawyer may also point out that a fiduciary has the right to choose any counsel it wishes.

[n]evertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.⁹³

Ethics 2000, in essence, has adopted the caveat, laid out by ACTEC in its Commentaries to the Model Rules, that, when discussing the appointment of a personal representative or trustee, the lawyer should properly inform the client of the issues involved.⁹⁴ The ABA's Section on Real Property, Probate and Trust Law's *Principles for Attorneys Acting in Other Fiduciary Roles*⁹⁵ are similarly aimed at ensuring that attorneys chosen as fiduciaries protect their clients' interests by disclosure. For example, Principle 9, titled *Role of the Attorney in Advising the Client*, emphasized that, "[r]egardless of whether the attorney is named as a fiduciary, it is the responsibility of the attorney to advise the client as to the considerations affecting the choice of an appropriate fiduciary."⁹⁶

While endorsing Ethics 2000's embrace of the duty to disclose, the Author would change the Committee's disclosure provision to mandate that a "lawyer must advise the client," rather than "should" do so if the lawyer is also the draftsman. The Comment also should be made into a free-standing rule and should not be subsumed as a mere Comment to Rule 1.8(c). Finally, it should include a proviso that an attorney who drafts an instrument that names him or her as a fiduciary constitutes a *per se* conflict and that such attorney does not have

93. ABA Report, *supra* note 5.

94. ACTEC COMMENTARIES, *supra* note 91, at 155-56.

95. *Principles for Attorneys Acting in Other Fiduciary Roles*, 1992 A.B.A. SEC. REAL PROP. PROB. & TR. L., cited in Bradley R. Cook, *Principles for Attorneys Acting in Other Fiduciary Roles*, 6 PROB. & PROP., Mar./Apr. 1992, at 6. In an article seeking comments on the proposed Principles by Bradley R. Cook in the "For Your Information" section of *Probate & Property*, Cook stated that, while the Section Council of the American Bar Association Real Property, Probate and Trust Law Section believes that it is appropriate for a drafting attorney to act as an executor or trustee, "performing in such roles carries additional responsibilities and certain risks for the attorney, and no attorney should undertake to serve as an executor, trustee or other fiduciary without being properly trained and equipped to perform all of the associated tasks in a competent and efficient manner." *Id.*

96. *Id.*

the discretion to decide if there is such a conflict sufficient to trigger the mandatory disclosure requirement.⁹⁷ Providing a clear ethical rule that is aimed directly at drafting lawyer/fiduciaries is consistent with a profession that cares about the inherent ethical problems replete in such appointments—solicitation, conflicts of interest, overreaching, and undue influence—all of which are implicated by the financial benefit to the fiduciary in the first place.⁹⁸

Lawyers are often the best choice as personal representative or trustee. Elderly clients often have a long relationship with and great confidence in their lawyer. Given the mobility of families in twenty-first century America, those clients may have tenuous connections at best to their children or siblings in other parts of the country. Certainly lawyers who are well versed in fiduciary responsibilities and who are constrained by ethical rules and malpractice concerns are prime candidates for the job of fiduciary.

The problem is that lawyers work for money—making it hard to separate money as motivation for taking on the mantle of fiduciary from the genuine concern that family or friends might have in taking on the same role. As long

97. The ABA Standing Committee on Ethics and Professional Responsibility (the ABA Committee that issues opinions on ethical issues) is in the process of drafting such an opinion on the topic of “The Lawyer Acting as Fiduciary for the Trust or Estate.” Hopefully, this opinion will make it clear that naming oneself as a fiduciary is a *per se* conflict that requires disclosure and waiver of the conflict by informed consent of the client.

98. Historically, fiduciaries were not entitled compensation for their services. As a comparative law matter, in England, the common law concept of a fiduciary as a person in whom a testator could “impose a purely conscientious obligation, a precatory, moral duty, to confer a benefit upon a third party” still exists. *See de Furia, Jr., supra* note 21, at 305. Professor deFuria stated:

Under normal circumstances, a testamentary fiduciary [in England] is not entitled to remuneration for his services . . . , and this rule extends to “solicitors acting as estate fiduciaries, who are only entitled to out-of-pocket expenses. . . . The reason for the rule is to prevent the inherent conflict of interest and self-dealing that inevitably results whenever a fiduciary profits from his trust. . . . Because of this, the English cases reason that a fiduciary may not be compensated for his time and trouble. However, if the testator specifically directs in his will that the fiduciary is to receive compensation, payment will be permitted. . . . Since it would be improper for an attorney to suggest that his client include a fee payment clause in the will, and since it takes an affirmative act on the part of the client to authorize a fiduciary’s fee, the English rule would appear to reduce somewhat the potential for impropriety whenever an attorney drafts a will that names himself as a testamentary fiduciary.

de Furia, Jr., *supra* note 21, at 305 n.159; *see also In re Duke of Norfolk Settlement Trust Perth (Earl) v. Fitzalan-Howard*, 3 W.L.R. 455 (Eng. C.A. 1981).

as the client understands this, there should be no problem. But, with elderly and infirm clients, there is always an issue of understanding and volitional action.

Clients also should be aware that, in addition to a personal representative, their estate will require an attorney. Counsel for the estate, in fact, requires special legal expertise. When a lawyer is named as the personal representative, he or she is faced with the odd prospect of hiring a lawyer for the estate, and herein lies one of the ethical pitfalls. Can a lawyer/personal representative really make a detached judgment about who is the best lawyer for the job? Is the lawyer really going to hire someone else, or is the lawyer simply going to hire himself or herself to do the second job as counsel for the estate?

Clients should be made aware of this duality of roles and the inherent potential conflicts. They are often under the misimpression that the executor has to perform the legal tasks necessary to probate the estate or manage the trust and do not realize that a sophisticated layperson can hire a lawyer to perform these tasks. However, there is no bright line between an informed client who initiates a discussion about his lawyer becoming his fiduciary and an uninformed client whose lawyer solicits the job. Probing into the murky, gray waters of the decision-making process post-facto is difficult at best. Thus, in conjunction with the overarching ethical model proposed above, this Article submits that concomitant procedural reforms must occur that address the issues of whether disclosure has been properly made and whether the client is actually informed.

Given the increasing graying of the American population, its mobility, and a trend toward bank trust services being consolidated or eliminated altogether, there is a legitimate need for some clients to choose their lawyer as their fiduciary. Thus, the Author would not embrace the absolute prohibition model, which would prevent such cases of conflict of interest but which would be overbroad in terms of preventing appropriate appointments of drafting lawyer/fiduciaries. From a cost/benefit perspective, the benefits of the absolute prohibition model are outweighed by the costs to the public of not having enough well-trained fiduciaries to assist them.⁹⁹ However, the Author acknowledges that the drafting attorney conflict is pervasive and the risk of breach of the duty of loyalty and impaired judgment as to economic benefit to the attorney so likely that those scholars who would embrace such a model are not clearly wrong. It is a close call, and there are strong arguments in favor of adopting that model as the default rule.

Given the "consensus" nature of the Ethics 2000 Commission's activity and the practical obstacles to having states change their procedural rules in the

99. See Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1383 (citing Levin, *supra* note 21, at 50, for the proposition that an absolute prohibition would also cause "serious disruption to the legitimate expectations of the client").

probate and trust areas—especially states with large cities where lawyers routinely act as trustees for long-standing clients¹⁰⁰—the Author believes that a “disclosure” model, rather than an absolute prohibition, is the more politically-saleable model and will meet with more success in implementation—thus engendering more likely reform. The next Part of this Article sketches the parameters of procedural reforms, in the context of the UPC and the UTC, that would provide a mechanism to actually implement and to enforce the ethical reforms discussed in the prior Part.

IV. AN ALTERNATIVE PROCEDURAL MODEL FOR DRAFTING ATTORNEY/FIDUCIARIES: THE UPC AND UTC¹⁰¹

When the American public thinks of probate, it assumes a system that involves the courts and a personal representative of some sort—a personal representative or administrator. This is the only model that most Americans have ever known. The English system of court-supervised administration of estates, inherited by American law, was designed to protect creditors and

100. For example, cities like Boston and Philadelphia, where the “practice of lawyers serving as trustees . . . is common . . . several law firms have sizeable in-house trust departments and individual lawyers have served families as trustees for generations.” Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1373 (“One estimate is that Boston law firms, in the aggregate, have assets under fiduciary management in the range of \$3 to \$4 billion.” (citing Haight, *supra* note 21, at 10)). Spurgeon and Ciccarello note that “virtually the same ethical considerations apply either when a lawyer who has drafted a will is designated as the will’s executor or when a lawyer who prepares an inter vivos or testamentary trust is named to serve as trustee.” Spurgeon & Ciccarello, *The Lawyer in Other Fiduciary Roles*, *supra* note 9, at 1373 n.64 (citing Johnston, *supra* note 21, at 88). The Author also should note that the risk of loss to clients of these larger firms arising from their drafting the instruments in which they are named as fiduciaries is practically less because larger firms tend to have malpractice and/or fiduciary insurance in place and assets that a beneficiary can reach if a victim of malfeasance.

101. Some of the participants in the UTC Symposium would embrace the ethical reforms noted above. They are reluctant to add concomitant procedural changes to the UPC and UTC, seeing these as contrary to the non-interventionist philosophy underlying both Codes. While the Author believes such procedural changes are necessary to give teeth to the ethical rules, and can be done at marginal cost to the overall non-interventionist model, she would suggest that the proposed changes to the statutory section also could be implemented in the Comments. That may allay the concern of some Joint Editorial Board members about putting these procedural changes into the statutes, while still providing a framework for states to adopt in enforcing disclosure requirements.

beneficiaries from untrustworthy executors or heirs. But other models of reallocating wealth at death exist, including the universal succession model extant in the civil law countries of Europe.¹⁰² Under this system, the heirs or beneficiaries take title to the decedent's property automatically, and there is no personal representative to act as an intermediary.¹⁰³

In the 1960s, the National Conference of Commissioners on Uniform State Laws launched a project to create a streamlined, uniform set of probate statutes that states could adopt to modernize and improve their probate procedures. In 1969, this effort resulted in the UPC.¹⁰⁴ That set of laws has been adopted in whole by more than fifteen states, and parts of the UPC have been incorporated by virtually every other state.¹⁰⁵ The promulgation of the 1969 UPC signaled the willingness of some segment of the profession to push for improved procedures in probate and to help the public get through this important process with less pain and expense.

Somewhere between supervised probate administration and universal succession lies unsupervised probate—the modern trend embraced by many American legal scholars and adopted by the drafters of the UPC as its preferred mode of probate administration.¹⁰⁶ The theory underlying unsupervised probate is that, “unless there is a compelling reason, once an executor or trustee is appointed, the court should step back and let the fiduciary administer the estate

102. For a succinct description of the system of universal succession “on the continent of Europe, in Louisiana and in Quebec,” see JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 50 (5th ed. 1995).

103. See UNIF. PROBATE CODE §§ 3-312 to 3-322, 8 U.L.A. pt. II, at 66-75 (1998). But, note that “[n]o state has yet adopted these provisions of the [Uniform Probate Code].” DUKEMINIER & JOHANSON, *supra* note 102, at 51 (citing Eugene F. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371 (1983)).

104. See Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 896 (1992).

105. See UNIF. PROBATE CODE tbl. of jurisdictions, 8 U.L.A. pt. I, at 1 (1998 & Supp. 2001).

106. See UNIF. PROBATE CODE art. III general cmt., 8 U.L.A. pt. II, at 26, 28 (1998). This general comment states that:

Overall, the system accepts the premise that the Court's role in regard to probate and administration, and its relationship to personal representatives who derive their power from public appointment, is wholly passive until some interested person invokes its power to secure resolution of a matter. The state, through the Court, should provide remedies which are suitable and efficient to protect any and all rights regarding succession, but should refrain from intruding into family affairs unless relief is requested, and limit its relief to that sought.

UNIF. PROBATE CODE art. III general cmt., 8 U.L.A. pt. II, at 26, 28 (1998).

and close it without court intervention.”¹⁰⁷ Academics, some judges, and many members of the profession have moved toward this position in large part as a response to the public’s feeling that probate equals delay and, thus, cost.¹⁰⁸ The movement also reflects the growing importance of nonprobate assets in the lives of many Americans, and it attempts to pull the probate process into closer conformity with the transfer of nonprobate assets like joint property, living trusts, and life insurance.

This academic and legislative response to the real and perceived problems in American probate is laudable as it actually attempts to bring real-world solutions to real people. The problem is that—as always—there is more than one public interest at stake in the probate process. While a minimalist approach to judicial intervention in the probate process is responsive to the broad public concern about court intervention causing expense and delay, there is a competing concern illustrated by the discussion above when a drafting attorney names himself or herself as the fiduciary. For those clients, there well may be a need for more intervention rather than less.

How can the two policy concerns be reconciled? The answer may lie in an alternative model of probate for some cases that involve drafting attorney/fiduciaries—carving out a dual track that allows the court to require continuing supervision when such a drafting lawyer is acting as a personal representative and cannot meet the burden of proving disclosure and informed consent. This heightened level of intervention and scrutiny is not completely without support in the literature. Louis Laurino has written a powerful brief for justifying a higher level of scrutiny for lawyers when they petition for probate and appointment. Judge Laurino was a Surrogate of Queens County, New York, for a number of years when he wrote:

In my opinion an attorney because of his professional responsibility is under a higher duty of care and his performance is subject to closer scrutiny by the court than the ordinary layman. Therefore, the compulsory accounting which I insist on is well within the discretionary power of the court to regulate the performance of its officers, the attorney/fiduciary. It is my way of insuring that those attorneys who insist on acting as fiduciary will do so properly and expeditiously.¹⁰⁹

107. UNIF. PROBATE CODE art. III general cmt., 8 U.L.A. pt. II, at 26, 28 (1998).

108. Richard V. Wellman, *Georgia Lawyers Revise Their Probate Code*, 13 GA. ST. U. L. REV. 783, 783-84 (1997).

109. Laurino, *supra* note 21, ¶ 1601.2.

Judge Laurino also required that the decree appointing such an attorney/fiduciary include a requirement that the attorney account to the court within one year if the estate is below the federal exemption equivalent and within two if it is above. He acknowledged that he made no similar requirement of non-lawyer fiduciaries but makes the “officer of the court” argument in favor of this treatment, which might be perceived as “discriminatory.”

The UPC’s overall ethos is that the state only should act in probate matters when called upon by the interested parties.¹¹⁰ It does provide for a supervised administration option when a single proceeding, with official court adjudication of all important administrative decisions, is the desired forum.¹¹¹ Nevertheless, the thrust of probate reform under the Code is that most estates will not require this supervised process. Nonetheless, there is an argument that more intervention—not less—is the better approach in the case of drafting lawyer/fiduciaries. The UPC should take a page from existing New York rules in this area and build in a judicial inquiry at the time of appointment if the petitioner for appointment as personal representative is the drafting attorney. The drafters should place the burden of proving disclosure and informed consent on the drafting attorney when petitioning for appointment as personal representative. If the drafting attorney fails to meet this burden, the judge would have the discretion either to refuse appointment or to invoke supervised administration. The number of such cases is small and the period of probate fairly short; thus, the increased systemic economic and efficiency costs of supervised administration are worth the benefits to the beneficiaries of such added supervision.

The Uniform Surrogate’s Rules in New York and the local rules in Suffolk and Queens Counties provide a model for the UPC in this regard.¹¹² The Uniform Surrogate’s Rules in New York “[r]equires [the] filing of a statement at the time of probate disclosing whether . . . [the] named fiduciary is an attorney, whether [the] attorney will be estate counsel, and whether [the] attorney was the [drafter].”¹¹³ The Rules also address the concern about fees that such an appointment raises, mandating that sole lawyer/fiduciaries who are also counsel to the estate file an affidavit regarding their fees and commissions within twelve months of their appointment.¹¹⁴

In Suffolk County, New York, there is a local rule, which provides that:

110. UNIF. PROBATE CODE art. III general cmt., 8 U.L.A. pt. II, at 26, 28 (1998).

111. UNIF. PROBATE CODE § 3-501, 8 U.L.A. pt. II, at 105 (1998).

112. Wood, *supra* note 21, at 206-07.

113. Wood, *supra* note 21, at 206 (citing N.Y. UNIFORM RULES FOR SURR. CT. § 207.19(g) (McKinney 2002)).

114. Wood, *supra* note 21, at 206 (citing N.Y. UNIFORM RULES FOR SURR. CT. § 207.19(g) (McKinney 2002)).

in all probate proceedings where the purported will and/or codicil of the deceased nominates an attorney as a fiduciary or co-fiduciary, there shall be annexed to the probate petition an affidavit of the testator setting forth the following:

1. That the testator was advised that the nominated attorney may be entitled to a legal fee, as well as to the fiduciary commissions authorized by statute;
2. Where the attorney is nominated to serve as a co-fiduciary, that the testator was apprised of the fact that multiple commissions may be due and payable out of the funds of the estate; and
3. The testator's reason for nominating the attorney to serve as fiduciary.

Failure to submit an affidavit of this nature may warrant the scheduling of a hearing in order to determine whether the appointment of the attorney as fiduciary was procured by the exercise of fraud and/or undue influence upon the decedent.¹¹⁵

Queens County is similar and requires an account from a lawyer/fiduciary within twelve months of appointment (or twenty-four months if a federal estate tax return is required) regardless of whether there is another lawyer serving as counsel to the estate. Unlike most cases where beneficiaries are allowed to waive the account if they are comfortable, when the lawyer is also the fiduciary, no waiver is allowed. The Queens County Court is even more specific than the Suffolk County Court in its rule about affidavits, requiring the affidavit to contain:

[(1)] the length and nature of the attorney's association with [the] testator prior to [the date of the] will[; (2) the] reasons the decedent gave for selecting the attorney as fiduciary[; (3)] conversations between the testator and the attorney-draft[er] re[garding] fees and commissions[; (4)] whether [the] attorney-fiduciary or h[er] firm [will] also [serve as the] estate attorney, and if not, why not . . .[; and (5) the] attorney must attach h[er] drafting notes, including next-of-kin data.¹¹⁶

These New York probate rules provide a useful prototype for developing a model that builds in a more proactive judicial inquiry at the time of

115. Wood, *supra* note 21, at 207-08 (citing N.Y. SUFFOLK COUNTY Surr. Ct. Rules §§ 1850.6(b), 1850.10 (McKinney 2002)).

116. Wood, *supra* note 21, at 207 (citing N.Y. QUEENS COUNTY Surr. Ct. Rules § 1858.1 (McKinney 2002)).

appointment and the possibility of supervised administration when attorneys fail to meet that burden.¹¹⁷ The UPC is the effective vehicle for implementing such a model and the one best positioned to have a national impact.

◦ *A. Drafting Attorneys as Personal Representatives*¹¹⁸

Sections 3-301¹¹⁹ and 3-402¹²⁰ of the UPC provide for the contents of the application for informal and formal probate, as well as the request for appointment of the personal representative.¹²¹ These Sections essentially require certain statements be contained in the petition. The drafters of the Code might consider inserting an additional requirement that the petitioner must disclose in the application if he or she was also the attorney who drafted the will.

The inclusion of this information would trigger an inquiry by the court at the hearing provided for in Section 3-403¹²² as to whether the drafting attorney in fact made full disclosure to the client and whether the client gave informed

117. The Author thinks it is important to give judges the discretion to trigger supervised administration because, for many years after such reforms would be implemented, there would be cases of drafting attorney/fiduciaries who would not be able to meet the burden simply because the will was drafted prior to disclosure becoming mandatory. In such cases, the judge could review the affidavit and decide for herself whether there was the “scent” of undue influence or overreaching. If not, giving the judge the discretion to order supervised probate would not defeat the intent of the testator but, rather, would serve to solve some of the monitoring problems inherent in such appointments. It also raises the cost of naming the lawyer as fiduciary and might act as a disincentive for such appointments in the future in inappropriate cases—cases that lack adequate disclosure and informed consent—as information trickles down to attorneys and testators.

118. When a court appoints a lawyer as a personal representative in an intestacy situation, there is a strong argument that supervised administration should be mandatory. This is particularly true in a case where the court appoints an administrator for an intestate decedent’s estate because there are no close relatives and the only takers are more distant kin out of state. The lawyer in the case has had no dealings with the decedent, and the decedent has shown no preference for the lawyer. However, the Author leaves this issue for another article. Note, however, that there is deep concern among some in the legal community about how such appointments are made. See *Special Committee on Fiduciary Appointments Created*, 43 N.Y. STATE BAR NEWS, Jan.-Feb. 2002, at 1. “In early 2000, the chief judge [of New York State] appointed both a commission and a special inspector general to examine the system of fiduciary appointments, which critics call rife with cronyism.” *Id.*

119. UNIF. PROBATE CODE § 3-301, 8 U.L.A. pt. II, at 55-56 (1998).

120. UNIF. PROBATE CODE § 3-402, 8 U.L.A. pt. II, at 79 (1998).

121. UNIF. PROBATE CODE §§ 3-301, 3-402, 8 U.L.A. pt. II, at 55-56, 79 (1998).

122. UNIF. PROBATE CODE § 3-403, 8 U.L.A. pt. II, at 80-81 (1998).

consent to the nomination of the drafting attorney as the personal representative. The standard for full disclosure and informed consent could be the ACTEC standard articulated in its Commentaries or that contained in the new Comment 8 of the Ethics 2000 revisions to Model Rule 1.8. The proof might include a form of written disclosure similar to that provided by the Georgia Supreme Court in their Formal Advisory Opinion No. 91-R1, which states:¹²³

A testator's or settlor's freedom to select an executor or trustee is an important freedom, and it should not be restricted absent strong justification. For a variety of reasons, the attorney may be the most appropriate choice of fiduciary for the client. The risk that some lawyers may take advantage of a lawyer-client relationship to benefit themselves in a manner not in the client's best interest should not outweigh that freedom.

The risk of self-dealing instead creates the need for restrictions that offer assurance that the naming of the lawyer as executor or trustee is the informed decision of the testator or settlor. An attorney's full disclosure is essential to the client's informed decision and consent. Disclosure requires notification of the attorney's potential interest in the arrangement; *i.e.*, the ability to collect an executor's or trustee's fee and possibly attorneys fees. Unlike a real estate transaction where an attorney has a personal interest in the property, being named as executor or trustee does not give the attorney any personal interest in the estate or trust assets other than the fee charged. Waiver of State law fiduciary requirements in the document is permissible as long as waiver is ordinary and customary in similar documents for similar clients that do not name the attorney as fiduciary.

In the light of the above, full disclosure in this context should include an explanation of the following:

1. All potential choices of executor or trustee, their relative abilities, competence, safety and integrity, and their fee structure;
2. The nature of the representation and service that will result if the client wishes to name the attorney as executor or trustee (*i.e.*, what the exact role of the lawyer as fiduciary will be, what the lawyer's fee structure will be as a lawyer/fiduciary, etc.);
3. The potential for the attorney executor or trustee hiring him or herself or his or her firm to represent the estate or trust, and the fee arrangement anticipated; and

123. Supreme Court of Georgia, Formal Advisory Op. 91-1 (1991) (on file with the Missouri Law Review). The Author would like to thank Professor Anne Emmanuel for bringing the Georgia Advisory Opinion to her attention.
<https://scholarship.law.missouri.edu/mlr/vol67/iss2/6>

4. An explanation of the potential advantages to the client of seeking independent legal advice.

These disclosures may be made orally or in writing, but the client's consent or the attorney's notice to the client should be in writing.

The client's consent could be obtained by having the client sign a consent form that outlines the information described above.¹²⁴

That form and notification and consent letter covers the issues of other candidates for the position and double-compensation as well as a statement of the client that the choice is voluntary, that the conflicts were disclosed, and that the opportunity for independent legal advice was provided. The drafters should make clear that the burden is on the attorney to prove disclosure and informed consent.

At the hearing, the court would have to decide whether the attorney met the burden, in which case the appointment could proceed without further court intervention. If the attorney failed to meet the burden, the court could choose to refuse appointment or order supervised administration under Section 3-501. The rationale for giving the court discretion at this juncture is to confer on the court some deference in deciding whether this particular case involves undue influence or overreaching (in which case a refusal to appoint would be appropriate), or whether the attorney knew the client for a long time, there is little risk of undue influence, and the attorney simply drafted the will prior to mandatory disclosure rules being enacted or was sloppy in documenting the decision-making process. Obviously, as the years proceed after enactment of the disclosure model, judges

124. The Form of Consent Offered in the Georgia Advisory Opinion reads: I, _____ (Client) _____, have voluntarily named as executor and trustee in my will and trust, _____ (Attorney) _____, who prepared the instrument in his/her capacity as my attorney. Mr./Ms. _____ (Attorney) _____ did not promote himself/herself or consciously influence me in the decision to name him/her as executor and trustee. In addition, Mr./Ms. _____ (Attorney) _____ has disclosed the potential conflicts which he/she thinks might arise as a result of his/her serving as both executor and trustee and as attorney for the estate and trust. An explanation of the different roles as fiduciary and attorney, an explanation of the risks and disadvantages of this dual representation, an explanation of the manner in which his/her compensation will be determined, and an opportunity to seek independent legal advice were provided to me prior to my signing this consent.

Date _____ (Signature)

Supreme Court of Georgia, Formal Advisory Op. 91-1 (1991) (on file with the Missouri Law Review).

should be more and more reluctant to forgive a lack of documented disclosure and informed consent.

Section 3-501 of the Code and the Sections that follow allow the court to impose supervised administration on a particular estate. Section 3-501 defines supervised administration as:

a single *in rem* proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the Court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding.¹²⁵

Section 3-502 allows the court to approve a petition for supervised administration if: (1) the will directs it, unless circumstances have changed and it is no longer necessary; (2) the will directs unsupervised administration but the court feels that there is a real need to protect the beneficiaries; or (3) the will is silent and "the Court finds that supervised administration is necessary under the circumstances."¹²⁶

Shifting some drafting attorney cases to the supervised track is appropriate in that most lawyer/fiduciaries take on the mantle of fiduciary as a business matter. They also may be doing it to accommodate the client or the court. This, however, does not diminish the fact that they are essentially professional fiduciaries. While supervised administration may cost the decedent's estate more, perhaps this added cost is a small price to pay to prevent abuse of the fiduciary role. The profession may have to choose between being more interventionist and minimizing cases of lawyer/fiduciary ethical and financial abuse, and being more laissez-faire but living with the costs of more of these cases. The inherent risks of breach of traditional trust and agency rules in terms of the duty of loyalty and conflicts of interest are so great as to warrant the economic and efficiency costs in terms of a few estates being put on a supervised track. Such a rule indeed would shift those additional costs to clients who might well have a firm desire for their lawyer to act as fiduciary. But this particular allocation of costs seems appropriate in light of the increased protection for all vulnerable clients that such a model would yield. Adopting this model would go a long way toward assuring the public that the profession is actively discouraging attorneys from taking advantage of their elderly clients.

Supervised administration under Section 3-502 does not bring with it a requirement that the personal representative check in with the court prior to every action. To accomplish this, the personal representative's letters of

125. UNIF. PROBATE CODE § 3-501, 8 U.L.A. pt. II, at 105 (1998).

126. UNIF. PROBATE CODE § 3-501, 8 U.L.A. pt. II, at 105 (1998).

appointment must be marked or “endorsed” to indicate to third parties, like banks or brokerage houses, that he or she needs permission from the court to take action, like buying or selling securities.¹²⁷ The drafters of the UPC should consider amending Section 3-504 to require such restrictions on the power of a drafting lawyer who has not met the burden of disclosure and informed consent but who has been allowed to proceed under supervised administration. This would help prevent the misuse of liquid assets in bank accounts or brokerage accounts by drafting lawyer/fiduciaries that often occurs in cases of lawyer/fiduciary abuse. Other restrictions may be appropriate, as well.

In addition to the revisions outlined above, the drafters might well consider making the drafting attorney’s posting bond and filing accounts mandatory acts not subject to waiver by the testator or the beneficiaries. Section 3-603 provides that the court may require bond unless the will waives the requirement.¹²⁸ Such a waiver should be disallowed in the case of drafting attorneys. This would add a layer of protection for the beneficiaries. Informed consent or not, the practice is so replete with conflicts and lack of oversight that bond should be made mandatory in such cases.

Waiver of accounts by naive beneficiaries is another problem in many cases of lawyer/fiduciary abuse. In Section 3-1001, the drafters could add a proviso that a drafting attorney closing an estate must file an accounting, thus preventing waiver of such by consent of the beneficiaries.¹²⁹ While making accountings mandatory deprives the beneficiaries of the choice to make the administration less costly, that restriction must be weighed against the benefit of preventing future cases of drafting attorney abuse.

The costs to the overall probate system of such revisions to the Code are minimal. They will not affect estates that do not have drafting lawyers petitioning to be personal representatives—which are the vast majority. Admittedly, these changes will impose a marginally greater cost on that small percentage of cases that involve drafting lawyer/fiduciaries, but those costs will be well worth the benefits of increased court oversight of lawyers who have enormous power over the assets of decedents. This proposal thus minimizes the costs to the overall system as much as possible by targeting a narrow group of cases that the legal profession can regulate and has an interest in overseeing—probate matters in which lawyers are accepting appointments as fiduciaries in their professional capacities. The bench and the bar have a significant self-interest in making sure that such fiduciaries act in the most ethical manner possible.

127. UNIF. PROBATE CODE § 3-504, 8 U.L.A. pt. II, at 108 (1998).

128. UNIF. PROBATE CODE § 3-603, 8 U.L.A. pt. II, at 115 (1998).

129. UNIF. PROBATE CODE § 3-1001, 8 U.L.A. pt. II, at 288 (1998).

*B. Drafting Attorneys as Trustees*¹³⁰

Part IV, A, above, endorsed a model for the appointment of drafting attorneys as personal representatives that would give the court the authority either to refuse to appoint the petitioner or to put him or her on a supervised track. As personal representatives serve for a relatively short period and their duties are fairly discrete, this seems an appropriate response to the ethical problems of drafting attorney/fiduciaries in the probate context. When it comes to trusts, however, the duties of trustee generally last much longer. Supervised administration seems too burdensome to impose on the system in this context because the supervision would have to go on for a very long time.¹³¹

130. Article VII of the Uniform Probate Code (“UPC”) attempts to harmonize the treatment of such trusts within the system of wealth transfer and to streamline the procedures for administering them and providing a forum for disputes. *See* UNIF. PROBATE CODE art. VII general cmt., 8 U.L.A. pt. II, at 483 (1998). The Uniform Trust Code (“UTC”) essentially replaces Article VII. For a discussion of the UTC’s provisions, see David M. English, *Is There a Uniform Trust Act in Your Future?*, 14 PROB. & PROP. 25 (Jan./Feb. 2000).

131. Note that the Section of the UTC that governs judicial proceedings makes clear the preference for a minimalist approach to judicial intervention or continuing supervision of trusts. *See* UNIF. TRUST CODE § 201 (2000) [hereinafter UTC], which provides as follows:

- (a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.
- (b) A trust is not subject to continuing judicial supervision unless ordered by the court.
- (c) A judicial proceeding involving a trust may relate to any matter involving the trust’s administration, including a request for instructions and an action to declare rights.

The Comment to Section 201 provides:

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by [§] 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute. Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court’s intervention will normally be confined to the particular matter brought before it.

UTC § 201 cmt.

The court should be required to make the same sort of inquiry as to whether an

contained in such instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and such intent is not the product of fraud, menace, duress, or undue influence.

(Name of attorney)

(Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(C) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(7) For other good cause.

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.

CAL. PROB. CODE § 15642 (West 2000); *see also* CAL. PROB. CODE §§ 21351(a), 21355 (West 2000) (providing that a gift to a drafting attorney is invalid if the drafting attorney is not a relative of or cohabitant with the testator, or if another independent attorney has not executed a certificate of independent review or a court does not determine there was no undue influence).

attorney who is the sole trustee of the trust drafted the instrument in question. If he or she did, the court would have the power to inquire as to whether there was appropriate disclosure and informed consent. If the drafting attorney/trustee meets his or her burden of proving such disclosure and informed consent, the attorney would continue on as trustee. If the attorney fails to meet that burden, however, the court would have to remove the attorney from his or her role, thus making such lack of disclosure a grounds for removal under Section 706. The court would not have the discretion, in this case, to supervise the administration of the trust as such supervision might go on for a long time, thus shifting the balance in terms of the cost/benefit to the overall wealth transfer system. A new trustee would have to be found—admittedly thwarting the intent of some settlors but, on balance, ensuring the integrity of the overall systems of trust administration and attorney ethics. One might argue that a lack of disclosure and informed consent in this context essentially renders the settlor's intent to choose that particular trustee defective. It was not an intent formed with the full information and, thus, given American courts' historical focus on the settlor's intent in trust law, should be viewed as a failure to form proper intent. This may be a removal rationale that is conceptually consistent with the jurisprudential tradition in the trust law area.

Even if the drafting attorney meets his or her burden of proving disclosure and informed consent, the drafters might consider building in an added layer of beneficiary protection by making the obligation to post bond under Section 702 mandatory and the duty to inform and report under Section 813 mandatory.¹³⁴ This would protect unknowing settlors and beneficiaries from waiving important protections.¹³⁵

All of the changes proposed are based on the premise that it is the unusual case where a testator or settlor would use a lawyer as the fiduciary. Thus, the increased costs of judicial intervention and mandatory bond and accountings affect only a small number of cases in which there is a significant underlying risk of unethical behavior.¹³⁶ The specific changes are certainly open to debate among those in the profession, but there is no doubt that a failure to shine a

134. Note that the drafters of the UTC stated that the provisions in Article 8 are default rules, most of which may be superseded by the trustee—except the duty to notify beneficiaries and to respond to their requests in certain circumstances. See UTC § 105(8)-(9). To add teeth to the mandatory bond requirements, the drafters might consider making this provision a “non-default rule” in Section 105(b) not subject to waiver in the trust when the drafting attorney is the sole trustee.

135. See CAL. PROB. CODE § 16062(e) (West 2000) (stating “any limitation or waiver in a trust instrument of the obligation to account is against public policy and shall be void as to any sole trustee who is a disqualified person as defined in Section 21350.5”).

136. For a similar argument, see deFuria, Jr., *supra* note 21, at 275.

brighter light on drafting attorney/fiduciary cases will result in additional headlines about “bad” lawyers who have abused their clients’ trust. That cost to the profession and the victims of these lawyers is incalculable.

V. ADDITIONAL STRUCTURAL REFORMS

There are additional mechanisms that would minimize the risk of inappropriate use of drafting attorney/fiduciaries. In states that allow “double-dipping,” *i.e.*, payment to a lawyer for his or her work as executor plus payment for his or her work as lawyer for the estate, lawyers act as executors in about ten percent of the cases probated.¹³⁷ In states that frown on such “double-dipping,” only one percent or two percent of the estates have attorney/executors.¹³⁸ Given these statistics, it is pretty clear that money is a primary motivation for taking on the duties and liabilities posed by acting as the fiduciary rather than just as the fiduciary’s lawyer.

This monetary incentive and the close relationship between elderly client and savvy lawyer is ripe for potential abuse. Removing the incentive to do both jobs should reduce the temptation to solicit the nomination as executor, and the statistics indicate that it does. The profession has taken some steps to remove the financial incentive for attorneys to act as fiduciaries as well as taking on the role of attorney for the estate or trust. In some states, attorneys have been allowed to “double dip”—or to be paid for their work in both capacities. The more recent trend has been away from “double dipping,” in large part as a response to the public’s perception that it again takes advantage of the client for the lawyer’s benefit. Two of the largest and most legally influential states have been the battlegrounds where this issue has been fought out during the past decade. California and New York have hosted legislative battles over the issue of “double dipping” with very different results.

California is a “statutory fee schedule” state in which both the executor and the basic attorney’s fee are not based on the actual amount of work done for the estate. Rather, they are a percentage of the probate estate itself, and the same percentage is given to both the executor and the attorney. New York is a “statutory fee schedule” state with regard to executor’s fees, and lawyers may also collect fees for their legal services in addition to their executor’s fees, when acting in both capacities.¹³⁹

137. Laurino, *supra* note 21, ¶ 1601.2 (describing a 1975 American Bar Foundation comparative study of estate administration in the United States).

138. Laurino, *supra* note 21, ¶ 1601.2 (describing a 1975 American Bar Foundation comparative study of estate administration in the United States).

139. CAL. PROB. CODE § 10800 (West 2000); N.Y. SURR. CT. PROC. ACT LAW § 2307 (McKinney 1997). A majority of states allow double-dipping according to Laurino, <https://scholarship.law.missouri.edu/mlr/vol67/iss2/6>

The legislative push to address executor compensation in California was a direct result of the fallout from the *Gunderson* case in Orange County.¹⁴⁰ Prior to the changes in the California law, case law alone indicated that an attorney who acted as both an attorney and an executor should not be allowed to take the full amount of both fees.¹⁴¹ However, in the wake of *Gunderson* (in addition to several other important legislative changes), the California Assembly responded to the public outcry by codifying the prohibition on “double dipping,” creating a clear statutory bar against the practice.¹⁴²

While the California Assembly grappled with the issue, a New York Advisory Panel chaired by two judges proposed legislation to address the problem. During the debate on the proposed bill dealing with “double-dipping” in New York, lawyers and bar associations fell on both sides of the issue. One of the chairs of the Advisory Committee on the proposed legislation said that concern about lawyer/executors appeared to be “very widespread,”¹⁴³ particularly in New York City where as many as twenty-five percent of estates had executors who also served as the attorney for the estate.¹⁴⁴ The Advisory Committee proposed a bill that it said would “‘reduce the potential for abuse’ and ‘overreaching by lawyers.’”¹⁴⁵ The Advisory Committee bill would have cut the executor commission in half unless an attorney disclosed the dual compensation and obtained a written waiver from the client. Facing vigorous opposition, the sponsors of the package dropped this piece in July 1993.¹⁴⁶

While the New York State Bar’s Trusts and Estates Law Section endorsed the bill, the powerful Association of the Bar of the City of New York and the New York County Lawyer’s Association spoke adamantly against the limit on executors’ commissions. Their position was that lawyers should be entitled to

supra note 21, ¶1600.

140. For a description of the high-profile *Gunderson* case, see Davan Maharaj, *Leisure World Lawyer Heir to Clients’ Millions; Estates: James D. Gunderson, Who Prepared Wills for Thousands of Retirees, Vigorously Denies Wrongdoing*, L.A. TIMES, Nov. 22, 1992, at A1. See also *Estate of Merrill A. Miller v. James D. Gunderson*, No. A-166214 (Orange County Super. Ct. Apr. 22, 1998) (No. G016789 consolidated with No. G017879) (on file with Author).

141. Similarly, case law discouraged gifts to drafting attorneys prior to the California Assembly’s enactment of a specific probate code section on the matter. See *Magee v. State Bar of Cal.*, 374 P.2d 807, 810-13 (Cal. 1962).

142. CAL. PROB. CODE § 10804 (West 2000).

143. Gary Spencer, *Opinion Divided on Changes to Surrogate’s Act*, N.Y. L.J., May 26, 1993, at 1.

144. *Id.*

145. *Id.*

146. Gary Spencer, *County Lawyers Suggest Measure on Executor Fees*, N.Y. L.J., Aug. 6, 1993, at 1.

full executors' commissions and should be given "reasonable compensation" for attorney services based on the work done.¹⁴⁷ Jerome Solomon, on behalf of the New York County Lawyers, took the position that the bill was "an unwarranted attack upon the integrity of the bar as a whole" and that "[t]here [was] no empirical evidence of widespread abuses and, to the extent that there are abuses, there are adequate policing measures in place."¹⁴⁸ Even before the bill was passed, a practice had developed among New York's surrogate judges to reduce the legal fees of attorney/executors to half the amount of the executor's commission.¹⁴⁹

After two years of debate, a much-watered-down version that "inverts the presumption"¹⁵⁰ in the Committee's bill was passed. It provided that a full commission would be paid unless the disclosure requirement was violated "rather than limiting payment to half the statutory rate unless the client consents to more."¹⁵¹ The Advisory Committee, while defeated in its efforts for stricter legislation, announced the final bill would increase disclosure and enhance client understanding of the dual compensation issue—one of the Advisory Committee's main concerns.¹⁵²

The EPTL Advisory Committee drafted its reduced commission proposal in 1993, responding in part to public complaints about the growing cost of administering estates and the duplication of costs when attorney-executors are paid full commissions and legal fees for duties that sometimes overlap. Since many clients could be expected to balk at authorizing a full commission if a half-commission was the statutory standard, its bill sought to discourage attorneys from taking dual roles by reducing the financial incentive.¹⁵³

The New York proposal:

took a middle course between recent statutes enacted in other states. California was more stringent on attorney-executors, allowing them a full commission but no legal fees without prior court approval. At the other extreme, Florida allows them full commissions and attorney's

147. Spencer, *supra* note 143.

148. Spencer, *supra* note 143.

149. Spencer, *supra* note 143.

150. Gary Spencer, *Bill Seeks Limit on Lawyer Fees on Estate Work*, N.Y. L.J., June 21, 1995, at 1.

151. *Id.*

152. *Id.*

153. *Id.*

fees, which consist of regular hourly rates plus 1 to 2 percent of estate assets.¹⁵⁴

The New York law applied to wills executed after January 1, 1996, and decedents dying after December 31, 1996, regardless of when their will was executed.¹⁵⁵

The opponents of completely eliminating any chance of “double dipping” without court approval prevailed in New York, unlike in California. The recent New York law was designed to address situations:

where the client may think or presume that naming his or her attorney as executor will reduce the commissions and/or legal fees charged to the estate. In the past, lawyers who failed to address this issue in the will drafting process were open to criticism by disgruntled heirs or the courts.¹⁵⁶

The statute only applies to lawyers who actually draft the will in which they are named executor and does not apply to the trustees of inter vivos (revocable or irrevocable) or testamentary trusts—thus, perhaps, “serv[ing] to encourage [the] increased use of revocable inter-vivos trusts.”¹⁵⁷ The New York legislation that finally passed was, in essence, a disclosure statute—it did not prohibit “double-dipping,” it merely required that the lawyer disclose this possibility and the right of the client to negotiate a fee prior to death. It keeps with the spirit of the Ethics 2000 proposal regarding the lawyer “advising the client concerning the nature and extent of the lawyer’s financial interest in the appointment.”¹⁵⁸

Presumably, each of these new statutory schemes will discourage lawyers from taking on the role of fiduciary simply for monetary gain. The California approach will do much more in this regard, but both are useful efforts at limiting the number of lawyer/fiduciaries to those cases in which the client needs the lawyer’s particular expertise.¹⁵⁹

154. *Id.*

155. *Id.* The bill, N.Y. Senate No. 3195-A, became N.Y. S.U.R.R. CT. PROC. ACT LAW § 2307-a (McKinney 1997). Spencer, *supra* note 150.

156. Gerald I. Carp & Sanford J. Schlesinger, *Disclosure Requirements for Attorney Serving as Executor*, N.Y. L.J., Sept. 14, 1995, at 1.

157. *Id.*

158. ABA Report, *supra* note 5.

159. For a review of how courts have implemented Section 2307-a in New York, see Ilene Sherwyn Cooper, *Rehashing Disclosure Requirements of Attorney Fiduciaries*, N.Y. L.J., June 15, 2001, at 3. Note also that the California legislation also invalidated gifts to drafting attorneys and facilitated the removal of drafting attorneys who named themselves as the sole trustee of a trust. CAL. PROB. CODE §§ 15642, 21355 (West 2000).

A. Deterrence, Detection, and Compensation

In addition to the ethical reforms suggested in the last Part and the procedural reforms outlined in this one, the legal profession can do much more to prevent the cases of lawyer/fiduciary misconduct that may result from a drafting attorney naming himself or herself as a sole, unsupervised fiduciary. The inherent conflicts *may* make such eventual misconduct more likely.¹⁶⁰ These first group of reforms: (1) deter lawyers from abusing their fiduciary duty; (2) detect lawyers who are doing so earlier; and (3) increase the amount of compensation available to victims of these lawyers. The second group of suggested reforms aims to improve the quality of the actors and the institutions in the system through better training of lawyers and judges and by increasing the resources available to probate courts.

The first group of reforms is directed at increasing deterrence—discouraging lawyer/fiduciaries from engaging in misconduct in the first place. The ethical and procedural reforms discussed previously should go a long way toward deterrence; if the lawyer has a clear ethical guideline and knows that there may be mandatory supervision of his or her actions, lawyers bent on misconduct may avoid the role of fiduciary. In addition, increasing the frequency of bar disciplinary proceedings and criminal prosecutions will have a deterrent effect on such lawyers. This may be more effective than increasing the severity of the punishment in the cases in which lawyers are caught. Harsher penalties may be disregarded by lawyers inclined to misconduct because such lawyers seem to gauge the risk of being caught as low. Increasing the chances of being punished may do far more to deter them from such behavior than strengthening the penalties received by the few lawyers who are disciplined or prosecuted.

In addition to punishing lawyers, more pervasive efforts to intervene in cases in which lawyers are substance abusers or demonstrate addictive behavior will have a deterrent effect on lawyers. Increasing the funding for effective lawyer assistance programs will help identify problem lawyers early, and encouraging other lawyers to suggest that their colleagues in need seek help to

These changes were aimed at preventing another “*Gunderson*” scenario from happening in the future. *See* Conservatorship of Bryant v. Brown, 52 Cal. Rptr. 2d 755, 762 (Ct. App. 1996) (“The report of [James] Gunderson’s self-dealing and extensive fraud was the catalyst for Assemblyman Umberg to introduce Assembly Bill No. 21, December 7, 1992. . . . Assemblyman Umberg’s office stated ‘the primary purpose of A.B. 21 is to strictly forbid attorneys from drafting (or causing to be drafted) wills that leave themselves, or relatives or business partners, any gifts.’”).

160. The Author admittedly does not have empirical evidence of this proposition but anecdotal evidence suggests embezzlement and similar behavior is certainly facilitated if the drafting attorney is also the sole fiduciary.

get the problem under control would all go a long way toward preventing cases of lawyer/fiduciary misconduct.¹⁶¹

Getting lawyers to report misconduct by other lawyers will increase deterrence, as well as detection.¹⁶² In many cases of lawyer/fiduciary misconduct, there are other lawyers who suspected or outright knew that the lawyer/fiduciary was engaging in misconduct but did not comply with their ethical obligations to report that behavior to the bench or bar. Improving enforcement of the whistle blower rules under the Model Rules will help courts identify these cases earlier. If such lawyers know their colleagues are likely to blow the whistle, it will deter at least some of them from engaging in the conduct in the first place.

Random audits by the bench and bar are another mechanism for improving the detection of misconduct by lawyer/fiduciaries.¹⁶³ The Virginia Bar Commission recommended random audits after one high-profile case in the state.¹⁶⁴ Random audits have proven effective in ferreting out misconduct not only in probate matters but also in lawyer thefts from client security funds. New York has had some luck with its “bounced check” rule that flags lawyers who write bad checks from client trust accounts.¹⁶⁵

161. See generally Rick B. Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?*, 31 CREIGHTON L. REV. 265 (1997).

162. See *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (an attorney was disciplined for failing to report the unethical behavior of another attorney). But see *In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317, 318-19 (R.I. 1993), cited in ACTEC COMMENTARIES, *supra* note 91, at 147-48, which stated:

A lawyer to whom former lawyer for client confessed embezzlement from client may not report misconduct by former lawyer without client's consent. The information was learned during the course of representing the client, which is within the scope of Rhode Island version of [Model Rules of Professional Conduct] Rule 1.6 The Advisory Panel asks the Supreme Court Committee to study the rules . . . and to consider amending Rhode Island's version of Rule 1.6 to deal with this type of anomalous situation.

163. Some participants in the UTC Symposium would embrace the ethical reforms purported above combined with random audits and improvements in the post-facto remedies, like client protection funds, as sufficient measures to address the problem of drafting attorneys. They would not endorse the procedural changes to the UPC and UTC suggested above because they move in a more interventionist direction—contrary to the underlying philosophy of the Model Codes. The Author feels that the procedural reforms are also necessary to give teeth to the ethical rules and can be made with little cost to the overall non-interventionist principle of the UPC and UTC.

164. Special Committee on Lawyers Serving as Fiduciaries, *Report to the Council of the Virginia State Bar, Recommendations in Favor of a Program of Random Reviews* (June 1, 1993) (available from the Virginia State Bar).

165. Jill Schachner Chanen, *Keeping a Lid on Illegal Takings: Commonsense* Published by University of Missouri School of Law Scholarship Repository, 2002

In addition to random audits, making accounts mandatory will help increase detection of lawyer malfeasance. More importantly, improving the courts' and beneficiaries' ability to review these accounts, as well as quick penalties for failure to file them on time, are essential to improving the chances of identifying and stopping lawyer/fiduciary misconduct in its tracks. The rise of the Internet offers the resources needed to facilitate these kinds of reforms. Probate records and accounts now can be made available on-line, with less expense, and computerization of records, in general, will make it easier for both court personnel and beneficiaries to monitor fiduciary behavior as it occurs.

No system is perfect, and, even if all of these reforms were implemented, there would be cases that slip through the cracks. Thus, there is a crying need for a better safety net or system of compensation for the victims of lawyer/fiduciaries whose behavior causes damage to their clients or their heirs and beneficiaries. There are three areas that can be strengthened to accomplish this result. The first of these is ensuring that lawyer/fiduciaries post bond. The second is adequate funding of state client protection funds.¹⁶⁶ These are sorely in need of more funding if they are to be serious mechanisms for compensating the victims of intentional misconduct on the part of lawyer/fiduciaries. In many cases of lawyer/fiduciary misconduct, the state client protection fund has fallen far short of fully compensating the needy victims of lawyer malfeasance.

The third and final element of a viable safety net for the victims of lawyer/fiduciary misconduct is to consider implementing mandatory malpractice or fiduciary insurance as a condition of being a licensed attorney or attorney/fiduciary. While intentional misconduct is often excluded from such policies, other misconduct of a lawyer/fiduciary is often covered. The legal profession, as a whole, would do well to consider following the example of Oregon and of foreign countries that require lawyers to have some coverage in the event of malpractice.¹⁶⁷ The American public—if it fully understood the

Procedures Can Keep Employees' Hands out of the Cookie Jar, 85 A.B.A. J. 74, 75 (June 1999) ("Twenty-six states now have mandatory overdraft protection for client trust accounts. Banks are required to notify the state lawyer disciplinary agency when those accounts are overdrawn.").

166. See generally Harriet L. Turney & John A. Holtaway, *Client Protection Funds—Lawyers Put Their Money Where Their Mouths Are*, 9 PROF. LAW. 18 (Feb. 1998).

167. Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1726 (1994). The Illinois State Bar Association is also planning to send a recommendation to the Illinois Supreme Court to ask that the court implement a mandatory malpractice insurance rule like Oregon has. Molly McDonough, *Push for Mandatory Coverage: Illinois Bar Wants to Make Malpractice Insurance the Law*, ABA J. EREPORT, Jan. 11, 2002. Note that many other countries mandate minimum limits for professional liability insurance as a condition of practicing law. According to studies conducted in 1995, England, France, Germany, Australia, Belgium, the Netherlands,

Sweden, British Columbia, Ontario, and Quebec were among the countries, along with Canadian provinces, that required some form of malpractice insurance. *LIABILITY OF LAWYERS AND INDEMNITY INSURANCE 75* (Albert Rogers et al. eds., 1995) [hereinafter *LIABILITY OF LAWYERS*]. Solicitors in England were required to carry at least the equivalent of \$1.5 million in insurance. *Id.* at 118. This coverage derives from solicitor taxes that are paid into the Solicitors' Compensation Fund maintained by the Law Society. *Id.* at 114.

In France, attorneys were required by law (Law no. 71-1130) to carry the equivalent of at least \$400,000 in insurance. *Id.* at 127. Certain bars, such as the Paris Bar, have insurance policies that their members must purchase; other bars allow attorneys to select their own policies. *Id.* In 1995, when malpractice claims against attorneys were on the rise, the bar councils were considering a country-wide system with uniform insurance requirements depending on firm size. *Id.*

German attorneys were required by the BRAO (*Bundesrechtsanwaltsordnung*) to carry at least the equivalent of \$375,000 in insurance with an aggregate no lower than \$1,428,000. *Id.* at 131. Attorneys are also "obliged to render proof to the local bar that [they are] properly insured." *Id.*

For most states in Australia, the amount of malpractice insurance required was the equivalent of \$820,600 per claim, which can be purchased using the Australian legal profession's malpractice insurance plans. *Id.* at 77-78.

"The Belgian Bars take out collective insurance policies for their members" and pay the insurance premiums with part of the attorneys' annual bar dues. *Id.* at 84. The bar policies provide coverage up to the equivalent of \$500,000 for contractual claims, up to the equivalent of \$8 million for "bodily damage," and up to the equivalent of \$800,000 for "other damage." *Id.*

In the Netherlands, the Dutch Bar Association "is charged with ensuring a guarantee to the public that each lawyer has made adequate provision to meet claims arising from his professional liability." *LAW WITHOUT FRONTIERS: A COMPARATIVE SURVEY OF THE RULES OF PROFESSIONAL ETHICS APPLICABLE TO THE CROSS-BORDER PRACTICE OF LAW 116* (Edwin Godfrey ed., 1995) [hereinafter *LAW WITHOUT FRONTIERS*]. Though the Bar does not offer an insurance plan, attorneys must obtain malpractice policies providing coverage for at least the equivalent of \$570,000 per claim with an aggregate of the equivalent of \$1.1 million. *LIABILITY OF LAWYERS, supra*, at 171-72.

Attorneys in Sweden were required to carry insurance in an amount equivalent to \$415,000 per claim. *LIABILITY OF LAWYERS, supra*, at 226. Bar dues are used for the Swedish Bar Association's insurance plan for its members. *LIABILITY OF LAWYERS, supra*, at 226.

In British Columbia, Canada, both a statute and the Law Society require that attorneys carry malpractice insurance in an amount equivalent to \$1 million per claim. *LAW WITHOUT FRONTIERS, supra*, at 189. Attorneys pay an annual fee to the Law Society's insurance plan. If an attorney does not pay the fee and is uninsured, the attorney "is prohibited from practicing law until the fee is paid." *LAW WITHOUT FRONTIERS, supra*, at 189.

The Law Society in Ontario, Canada, has a malpractice insurance plan that provides coverage up to the required amount for attorneys, which is the equivalent of \$736,700. Published by University of Missouri School of Law Scholarship Repository, 2002

situation—would be justifiably angry that lawyers who must obtain a license from the state to practice law, and, thus, have a monopoly on providing those services, do not have a concomitant obligation to ensure there is insurance available to compensate the victims of their negligence. Short of mandatory malpractice for all attorneys, or mandatory disclosure that an attorney does not carry malpractice insurance,¹⁶⁸ lawyer/fiduciaries should be required to carry “liability insurance in an appropriate amount for the purposes of protecting the estate, trust or other account and its beneficiaries from any misappropriation or misapplication of fiduciary funds or other insurable loss.”¹⁶⁹

B. *Improving the Actors and the Institutions*

The central actors in the probate process—lawyers—are run through a rigorous, three-year post-graduate education. This education suffers from a number of systemic flaws that should be addressed in order to produce lawyers better suited to taking on the mantle of fiduciary. More specific curricular focus on those skills needed to be an effective and honest fiduciary, as well as more attention to the alternative kind of judgment that fiduciaries must exercise, as opposed to that used by lawyer/advocates, would go a long way toward improving service to the those clients who choose to name lawyers as their fiduciaries.¹⁷⁰

LIABILITY OF LAWYERS, *supra*, at 93. Attorneys pay an annual fee that is used for insurance purposes. LAW WITHOUT FRONTIERS, *supra*, at 172.

Attorneys in Quebec, Canada, are required by statute to carry malpractice insurance with the Quebec Bar Insurance Fund, unless their practice “does not represent a risk to the public.” LIABILITY OF LAWYERS, *supra*, at 95. The plan’s coverage totals about the equivalent of \$720,000 per claim. LIABILITY OF LAWYERS, *supra*, at 95.

168. “The ABA’s Standing Committee on Client Protection, which once promoted making malpractice insurance mandatory, is now proposing a new Model Rule based on the South Dakota Model.” Mark Hansen, *Under Covered: Proponents Say Fewer Lawyers Will Go Bare If Forced to Disclose Their Insurance Status*, 87 A.B.A. J. 46, 47 (Nov. 2001). South Dakota (as well as Ohio and Alaska) mandates that lawyers must disclose to their clients the fact that they do not carry malpractice insurance. See McDonough, *supra* note 167.

169. See Cook, *supra* note 95.

170. The Fordham Conference Working Group concluded its recommendations with the following final component: “Lawyers should be trained in the social sciences relative to older persons. Thus, programs that will educate lawyers representing older persons in the range of social sciences as they affect older persons should be developed with a focus on the decision-making capacity of older persons.” *Recommendations of the Conference*, *supra* note 10, at 1001; see also Monopoli, *supra* note 15 (laying out new curricular paradigm for training law students to be more conscious of and skilled in the lawyer’s role as fiduciary in addition to that of zealous litigator).

Improvements in the training of probate judges and the development of their professional and managerial skills would help minimize the chances for cronyism and mismanagement of cases that result in lawyer/fiduciary misconduct going undetected or unaddressed by the courts for months and years.¹⁷¹ State budgets should include increased funding to improve judicial education, as well as to enhance the courts themselves through the addition of probate staff, the implementation of computerized records, and the more rapid movement of cases through the system.

Finally, but not unimportantly, is the education of consumers of probate and trust services. The bar should resist efforts to minimize the amount of information on the wealth transfer system that is available to consumers.¹⁷² The Internet and related technological advances will help develop more sophisticated clients and beneficiaries. In the end, that is the most effective defense against a lawyer/fiduciary who is engaged in misconduct. It is also a critical element in improving the overall reputation of the bench and bar in this country—a goal all members of the profession should share.

VI. CONCLUSION

There is little question that lawyers will continue to be appointed as fiduciaries given the graying of the American population, the mobility of American families, and the transfer of trillions of dollars in wealth from the World War II generation to their Baby Boom offspring. There always will be clients without family or friends to take on the role of administering and distributing their estates or managing their assets. Given the transformation of the banking industry and the reduction in the number of trust departments that offer personal service, lawyers are well-positioned to fill this gap. They should be encouraged and trained to become competent, ethical fiduciaries.¹⁷³ As United States Supreme Court Justice Felix Frankfurter said:

[Lawyers act] in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that

171. The National College of Probate Judges is an organization dedicated to improving the training and professionalism of probate judges and probate courts. The organization's home page is <http://www.ncpj.dni.us/NCPJ/>.

172. *See, e.g.,* Unauthorized Practice of Law Comm'n v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999) (per curiam).

173. The Author thanks Professor John Langbein for his insights on this issue during the UTC Symposium on February 15, 2002.

have, throughout the centuries, been compendiously described as moral character.¹⁷⁴

With a clear ethical framework and substantive procedural reform, lawyer/fiduciaries will be able to serve the American public well, while adhering to the high standards articulated by Justice Frankfurter.

174. *Schwartz v. Bd. of Bar Exam'rs of the State of N.M.*, 353 U.S. 232, 247 (1957)

(Frankfurter, J. concurring)