REPRESENTING THE FIDUCIARY: ETHICAL AND PRACTICAL CONSIDERATIONS FOR THE ESTATES ATTORNEY

"No one can serve two masters, for either he will hate the one and love the other,
or he will hold to one and despise the other...."
Matthew 6:24

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Part 1

The conflicts that can arise in the representation of estate or trust fiduciaries are limited only by the imagination of creative counsel. This article will explore some of the conflicts that can arise from the (a) representation of multiple fiduciaries, (b) representation of fiduciaries wearing numerous hats, (c) the duty of impartiality, and (d) self-dealing. Sometimes the conflicts are obvious, sometimes subtle, sometimes apparent from the inception of the relationship, and sometimes they develop over time.

A typical example: You, the estates practitioner, are asked to attend a meeting with the named co-executors and co-trustees under the decedent's will. They want to retain you to handle the probate and administration. However, it soon becomes apparent that there are actual conflicts of interest between the estate and some of them in their individual capacities, and that there certainly are at least potential conflicts between them, which may arise in their fiduciary capacities. Can you represent them as a group, and, if so, how?

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One of the individuals is already your client, and you also represent the closely held corporation of which he is president. One of the assets of the estate is an interest in that corporation. How do you advise this client as to his respective responsibilities to the corporation and to the estate?

Another of these potential clients is the decedent's widow, who is the income beneficiary of a Q-TIP trust created under the will. At least some of the decedent's interest in the corporation will very likely end up in the Q-TIP trust. During the course of the meeting, she asks her brother-in-law, the president of the corporation, when she can expect "distributions" from the corporation. He does not respond. You know for a fact that the corporation is a "C-corporation" which has never declared dividends. There are also potential conflicts with respect to funding, allocation and valuation. What do you do?

These are but a few of the questions that we seek to address in this article. The fiduciary's task of being both faithful and sensible in his stewardship can be very difficult in the face of conflicting loyalties. Representation by the estate attorney in such a case presents similar problems.

The View From the Attorney's Perspective:

Multiple Representation:

Co-fiduciaries have a common fiduciary duty to the estate. In their fiduciary capacity, there is no reason to presume adversity. An attorney counseling multiple fiduciaries may hear different opinions as to how to handle estate matters, but to suggest that such necessarily rises to the level of a conflict barring the attorney's representation under our ethical rules is not supportable.[1] There is no statutory ground of ineligibility of a fiduciary based solely on a potential conflict of interest.[2] As one Surrogate recently held, "[w]here adverse interests are not involved, counsel is free to represent multiple clients (citations omitted)."[3]

Indeed, the principle that while each fiduciary may hire his or her own attorney in the administration, the lawyers, as a whole, will share one reasonable legal fee, certainly provides a financial incentive for having one lawyer represent all fiduciaries, upon their consent.[4] Such "[b]enefits are especially important considerations in the field of trusts and estates, where clients may be better served by retaining counsel to represent the family as a unit, including possible family controlled entities, in the context of estate planning, administration, and even litigation (citations omitted)."[5]

The lack of an obvious conflict between co-fiduciaries led the Appellate Division, Third Department to deny a motion for disqualification in Matter of Dix[6]. There, the co-fiduciaries "consulted the attorneys for their mutual benefit as prospective co-executors and it is difficult to visualize what could possibly have transpired between the parties to create a confidential relationship, one to the other, sufficient in character to call upon the attorneys now to withdraw because of such relationship."

The issue of disqualification in Dix came up in the context of a probate proceeding. The New York State Bar Association's Committee on Professional Ethics was, in 1979, asked to answer the following questions relative to an accounting proceeding:

> A lawyer represents two co-executors, one is a bank and the other is a principal beneficiary of the estate. The bank has allegedly extended the administration long past that period within which it should have been settled and has failed to account. Under the circumstances: (1) May the lawyer institute a proceeding on behalf of the executor-beneficiary to compel the bank to perform it's duties? (2) If the executor-beneficiary retains other counsel to institute such a proceeding, may the lawyer represent the bank in connection therewith? (3) May the lawyer continue to represent the executors in connection with any matters relating to the estate?[7]

In answering these questions, the Committee on Professional Ethics first reviewed Canon's 5, 7 and 9 of the Code of Professional Responsibility. It then concluded that the first two questions had to be answered in the negative and the third could be answered in the affirmative, provided such representation was limited to matters "as to which there is no conflict between the executors". The Committee labeled the prospect of the attorney litigating against either of his former clients as "turncoat representation," "even where there may be no misuse of confidential information".

Both Matter of Dix and Opinion No. 512 were pivotal to the decision in Matter of Hof. There, the decedent's wife and a son from a prior marriage were appointed co-administrators. A falling-out occurred, and the attorney took the son's side against his stepmother in the accounting proceeding. The stepmother moved to disqualify the attorney. Following the Third Department's decision in Matter of Dix, supra, the Surrogate denied the motion. The Second Department reversed and disqualified the attorney, relying in part on Opinion 512, and emphasizing "the mere appearance of impropriety" as well as conflict of interest. In holding that the attorney could not continue to represent either fiduciary, the Court stated:

> The critical issue here, moreover, is not the actual or probable betrayal of confidence, but the mere appearance of impropriety and conflicts of interest (Code of Professional Responsibility, Canon 9).[8]

<u>Who is the Client</u>?

There is no general prohibition against an attorney representing an executor who has a potentially adverse individual interest against the estate.[9] However, in such a circumstance, the attorney must be careful to represent the client in his or her fiduciary capacity alone.[10] This is but an instance of the general proposition that an attorney may not represent two clients with conflicting interests.[11] For example, it has been held that an attorney representing one co-administrator may not also represent that co-administrator's spouse with respect to a claim against the estate.[12]

The responsibilities of an estate attorney are somewhat muddied by the confusion over whether the client is the executor, the estate or its beneficiaries. While euphemistically attorneys regularly say they represent an estate, it is well settled that it is the estate's fiduciaries that they represent.[13] As has been pointed out, "[o]nly persons, natural or legal, can retain an attorney. An estate is a res. An estate cannot enter into retainer contract with counsel. A lawyer cannot communicate with an estate."[14] This is hardly a distinction without a difference, and can lead to some troublesome problems. As Ordover and Gibbs point out, one area of confusion caused by the lack of clarity as to who is the client, the executor or the estate, concerns the attorney-client privilege. Several decisions have held that there is no privilege between the fiduciary and his or her attorney, at least as to beneficiaries, prior to any litigation taking place.[15] As Ordover and Gibbs note, in effect this results in the beneficiary being treated as the client, which "erodes the key relationship between the fiduciary and counsel."[16]

Regardless of the existence of the attorney-client privilege in this context,[17] the lawyer, although representing the executors, still has a duty to serve the best interest of the estate to which their clients owe fiduciary responsibilities.[18] Both the New York State Bar Association Committee on Professional Ethics and the Bar Association of Nassau County Committee on Professional Ethics have rendered opinions on similar questions concerning the duty of a lawyer representing the executor when it comes to his or her attention that there may be wrongdoing or even fraud being perpetuated by the fiduciary.[19] The conclusion of the State Bar Committee's opinion is very significant, particularly in light of the current trend in the case law holding that there is no privilege between the fiduciary and his attorney, except in the context of litigation. The questions posed to the committee were as follows: (1) What are the responsibilities of the attorney for the executor upon learning that the executor plans to breach its fiduciary duties? (2) Does the attorney for an executor have a duty to disclose to the beneficiaries or the court supervising the estate that the executor has taken action in breach of its fiduciary obligations? The Committee's conclusions were:

> For the reasons stated above, we conclude with respect to the first question that in such circumstances the executor's lawyer must request that the executor refrain from breaching its fiduciary duties, decline to assist such misconduct in any way, and consider whether withdrawal as counsel is required or advisable if the executor does not accept counsel's advice.

> With respect to the second question, we conclude that the lawyer should disclose the executor's past misconduct unless such disclosure is prohibited because the information qualifies as privileged or secret; determination of whether the information so qualifies turns on issue of law. In addition, counsel should request the executor to rectify the misconduct, withdraw from the representation of the executor if the executor declines to do so, and not assist in any conduct or communication that is false or misleading.

Self-Dealing:

We discuss below, in the section concerning the fiduciary's perspective, the interdiction against self-dealing. The prohibition also has been extended to the attorney for the fiduciary. Recently, in Matter of Kellog[20] the fiduciary's attorney was also retained as a broker for the sale of the estate's Greenwich Village townhouse. The attorney found a buyer for the property, the sale closed and the broker/attorney received a standard 6% brokerage commission. On the fiduciary's final accounting, a residuary beneficiary objected to the payment. There was no claim made that the property was not sold at fair market value or that the commission was more than a standard commission. Instead, the beneficiary contended that payment of the commission should be disallowed because as attorney for the fiduciary, the attorney engaged in an impermissible conflict of interest when he acted as broker for the sale of an estate asset.

The Surrogate sustained the objection holding that the payment of the commission to the attorney was "self-dealing," the same as if the fiduciary had been the broker and had been paid a commission. Although the Court could have simply based its decision on the line of ethics opinions which hold that an attorney may act a broker in a transaction only where he does not participate in the transaction as an attorney or give legal advice to any of the parties (see, e.g., Nassau Bar Ethics Op. 92-18, NYLJ, Aug 12, 1992 p. 2, col 1), it went further and held that the attorney for a fiduciary has the same obligation as the fiduciary to refrain from self-dealing with trust property:

> Having found that the attorney in this case engaged in self-dealing without the consent of all the beneficiaries the Court need not inquire whether he acted in bad faith or whether the estate incurred damages as a result of his conduct. Citations omitted. The attorney was not entitled to a commission for his services as real estate broker.
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> This rule, although harsh, is based upon the strong policy of this state that attorneys not place themselves in a position that might interfere with their ability to exercise their professional judgment freely or might adversely affect their ability to render legal advice. The facts of this case underscore the importance and value of this policy.
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> It is evident from the record that [the attorney] failed to give [the fiduciary] appropriate legal advice concerning his obligations in selling the real estate. Petitioner's assertion that his fiduciary duty required him to sell the property for "fair market value or more" is not entirely correct. In a case involving self-dealing, an estate fiduciary was found to have the duty to "obtain the best price possible for the sale of decedent's real property." Matter of Stalbe, 130 Misc 2d 725, 729.
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> Here, the conflict of interest is plain. Petitioner had an obligation to sell the property within a reasonable period of time at the highest possible price. It was not in the attorney's interest for the sale to be made to any purchaser other than his own, at any price. Petitioner had a need for maximum exposure to assist him in fulfilling his obligation. The attorney stood to gain only if other brokers were excluded, which he took active steps to ensure.

The decision in Kellogg is in accord with established Court of Appeals precedent which hold that an attorney for a fiduciary has the same duty of undivided loyalty to the cestui as the fiduciary himself.[21] For an excellent discussion of Kellogg and its antecedents, see, Ordover and Gibbs, Duty of Fiduciary's Attorney to Beneficiaries, NYLJ, February 28, 2000, p. 3.

Advice and Direction and Full Disclosure:

There are, thus, three underlying principles which the authors of this article feel must be balanced by the estate practitioner in any case of multiple representation. This balancing is often difficult, because the three principles may be at odds with each other in any given case:

First, Multiple representation is frequently requested of the estate attorney, because such may be advantageous to the fiduciaries, estate, and beneficiaries, who are often from one family.

Second, The attorney must avoid any appearance of “turncoat representation”, maintaining an undivided loyalty to his client or clients.

Third, As counsel for the estate fiduciary or fiduciaries , the attorney also has fiduciary duties running to the beneficiaries and to the estate.

This leads us to the estate of Dr. Arthur M. Sackler. Dr. Sackler’s will named as executors his third wife, his four children, his first wife, and an attorney. From inception it was apparent that there was a multitude of conflicts. On virtually every issue at least some executors, in their individual capacities or through entities which they controlled, had claims at odds with either other executors or with the estate generally. Various law firms were retained to represent the executors in their individual and fiduciary capacities. While each executor had his or her own attorney in both individual and fiduciary capacities, they all recognized the benefit of having a "general counsel" to collectively represent them, solely in their representative capacity, and they therefore retained one firm for this purpose. Wisely, that firm obtained from each individual executor written agreement that the firm would not be conflicted in defending the estate's position and representing other executors against any claim the executor brought against the estate in his or her own individual capacity. Such agreement was consistent with the principle that clients generally may waive their right to conflict free representation upon full disclosure.[22] However, even with full disclosure and informed consents, the firm was concerned, and therefore an application was made to the Surrogate for advice and direction as to the firm's role.

That concern was well placed. Even upon full disclosure and consent, conflicts of interest may be such that a disqualification is still required.[23] A case in point is the estate of Milford E. Abel. There, co-trustees had a difference of opinion as to how to treat the income beneficiary, the decedent's widow. One co-trustee, who had been in a more passive role with regard to administration, sided with objections that had been filed by the income beneficiary. Accordingly, the law firm representing the widow filed a notice of appearance on behalf of the income beneficiary and the co-trustees, after full disclosure and after written consents were obtained from both. Despite such consent and disclosure, the Surrogate disqualified the firm from representing the co-trustee "on the ground of a conflict of interest." The Court went on to hold that "since the firm should have been aware of the situation [conflict of interest] prior to accepting the retainer, no fee can be awarded."[24] Several appellate decisions have likewise held that a firm may not recover legal fees in circumstances where its representation violated the Code of Professional Responsibilities because of particularly egregious conflicts.[25]

Accordingly, to avoid just this kind of dilemma, the law firm in Sackler sought advice and direction. In its application, the firm expressly noted that it would not represent any party against any of the other six executors in their capacities as executors, thus distinguishing Matter of Hof. The Surrogate approved the application, holding that the firm's representation, limited to representing the executors in their fiduciary capacity against the personal claims of the individual executors, would not give rise to an appearance of impropriety and would not result in it representing conflicting interests. The Court cautioned, however, that its "mantle of approval" was not "carte blanche," and the Court would remain sensitive to the need for the firm to retain an uncompromising loyalty to the estate.[26]

The focus of the Surrogate in Sackler on the undivided loyalty of the firm is consistent with DR 5-105, which is the most important ethical rule governing conflicts of interest. In particular, subdivision C of this rule provides: "[a] lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved." The requirement that the lawyer can "competently represent" the "interest" of each client is clearly what prompted the Surrogate in his decision in Sackler to caution that it was not providing care blanche approval for multiple representation. Presumably, it is this requirement that also prompted the Surrogate to disqualify the attorneys in Matter of Abel, the primary distinction being that in Abel the attorneys were representing a claimant individually, as well as a co-trustee, whereas in Sackler the law firm stated that in no event would it ever represent an executor individually in a claim against the estate.[27]

In Matter of Roccesano[28], a law firm which had represented seven objectants in a probate contest moved for leave to withdraw from the representation of one, when it learned of a potential conflict among the seven in the event that the probate contest was successful. A cross-motion was made to disqualify the law firm based on the alleged imparting of confidential information by the one. Since there was no proof of the imparting of any such information the Court rejected this claim and held that since the cross-movant was an attorney who was aware of the potential conflict from the outset of the representation, there was no basis for disqualification of the firm under DR 5-105, subd. C, which permits representations of multiple clients where the client consents to a waiver of the conflict.

Presumably, written consents for multiple representation would be contained in the retainer letters signed by the clients.[29] What should the informed consent for multiple representation of co-fiduciaries contain? The following suggestions from one authority are helpful:

> The disclosure [signed by each of the common clients] should include such things as:

- the advantages and risks of multiple representation;
- the situations that might cause the interests of one client to diverge from the interest of another client and how likely those situations are to occur;
- the harm it may cause to the various clients if the lawyer is forced to withdraw from the representation (including delay, increased expense, and the probable lack of any attorney-client privilege among the clients in the prior, joint representation);
- the effect on the attorney-client privilege if the clients get into a dispute with each other in the future.[30]

Your authors would recommend that some or all of the following be included in a consent/disclosure letter in cases of representing multiples fiduciaries:

1. Inform each potential client of his or her right to separate counsel, in both individual and fiduciary capacities. In certain instances the estate attorney might insist that before signing a retainer letter the potential client be represented individually.

2. Specify in the retainer letter the capacity of representation, i.e., as a fiduciary, not as a beneficiary or individually. Emphasize in this regard that counsel will not represent the client individually against the estate.

3. The clients should waive any future claims of conflict arising from the multiple representation, including a statement that the lawyer would not be conflicted out in defending the estate against any claim that the client might bring against the estate in his or her own individual capacity. In the event that one of the clients determines in the future to retain separate counsel in his or her fiduciary capacity, the

consents could also include a waiver of any claim at that point that counsel cannot continue to represent the other fiduciaries.

4. The consent disclosure should spell out with specificity all potential areas of potential conflict.

5. The letter should describe the advantages and risks of multiple representation, emphasizing the latter, particularly if disqualification is necessary in the future, resulting in the need to hire new attorneys.

6. Include a provision indicating that where there is litigation brought by one client in his or her individual capacity against the others in their fiduciary capacities, the attorneys' communication with the latter regarding same will be privileged and not subject to disclosure, as will the attorneys' work product.

7. Have a provision explaining that the attorney/client privilege will not only not apply generally between the co-clients, but also as to beneficiaries, at least when there is no litigation.

8. Consideration might be given to having a provision stating that in the event the Court determines that there is a conflict, and disqualifies the attorney, and also holds that the estate is not obligated for the attorney's services, then, in that event, the clients are individually responsible for fees.[31]

Some of these provisions might seem onerous, possibly causing the clients not to hire the attorney. However, that is precisely the point; the estate attorney should approach any multiple representation with a great deal of caution. Further, multiple representation where there are actual conflicts of interest should be avoided assiduously. Additionally, with the above being both discussed and put in writing in the retainer letter, the clients can make an educated decision whether to proceed with one attorney.

Returning then to the examples given at the beginning of this article, we submit that the attorney could represent all the individuals as co-executors, provided no actual conflicts are apparent, and provided further that the decedent's widow is separately represented. The retainer letter should include the above suggested provisions, with written consents and full disclosures being obtained from each client. Full disclosure should also be made to the board of directors of the corporation in which the estate has an interest, and in no event should the attorney participate in any litigation between the estate and the corporation. For that they must retain separate counsel. Full disclosure should be made as to the varying interests and decisions that the fiduciaries will have to make, with respect to matters such as allocation, funding, evaluation and distribution. For that reason, the attorney should insist that decedent's widow have independent counsel representing her as a co-executor and individually, albeit with the understanding that the consulted attorney can still represent her in fiduciary matters unrelated to the Q-TIP. Finally, as an extra caution, an application to the Surrogate might be considered.

Part 2

The View From the Fiduciary's Perspective:

The point we made in the beginning of Part I of this article must be repeated here: the conflicts of interest that can arise in the course of administration are limited only by the imagination of creative counsel. In Part I of this article we examined, from the attorney's perspective, some of the numerous conflicts of interest that can arise in the representation of fiduciaries and beneficiaries. In Part II we will examine, from the fiduciary's perspective, some of the more common conflicts of interest that can arise because of the fiduciary relationship. Early recognition and treatment of such conflicts can avoid later problems and expensive litigation.

Multiple Fiduciaries:

Before we examine some of the legal and ethical considerations involved where there are multiple fiduciaries, it is helpful to understand the basic principles of law governing the relationship between and among fiduciaries.

As codified in EPTL §10-10.7, in important matters, fiduciaries act by majority rule:

> Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment, conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary.

> Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his dissent is expressed promptly in writing to his co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

The statute draws a distinction between the exercise of "joint" and "several" powers, without defining them. "Several" powers are those that are purely ministerial in nature and do not involve the exercise of fiduciary discretions. The cases hold that matters such as collection of estate assets, paying debts, compromising a claim, selling personal property at fair market value and payment of funeral expenses are ministerial in nature and may be exercised by a single fiduciary.[32]

Since most powers exercisable by a fiduciary involve the exercise of discretion (e.g., investment decisions, the sale of real property, tax elections; see, EPTL §11-1.1), they are joint powers and are subject to the EPTL §10-10.7 mandate that the majority rules. Since fiduciaries can be held responsible for the action of their co-fiduciaries, e.g., Estate of Rothko, 84 Misc. 2d 830, 379 N.Y.S.2d 923 (Sur. Ct. New York Co. 1975), modified, 56 A.D.2d 499, 392 N.Y.S.2d 870 (1st Dep't 1977), aff'd, 43 N.Y.2d 305, 372 N.E.2d 291, 401 N.Y.S.2d 449, (1977) on remand, 95 Misc.2d 492, 407 N.Y.S.2d

954, (1978), it is imperative that if you are representing a fiduciary who disagrees with the action proposed to be taken by the majority, that you advise your client to express her dissent in writing to her co-fiduciaries. If she does, she "shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided."[33] In other words, if you think that the proposed conduct would be a breach of fiduciary duty, or is tainted with fraud or gross negligence, in addition to dissenting in writing, the fiduciary should take affirmative action and seek instructions from the court. Otherwise, if you've guessed wrong and it is later determined that the proposed action was a breach of duty, the written dissent will not be worth the paper that it is written on.

A case in point is that of the Estate of Florence Murphy. Mrs. Murphy named her four children as co-executors. Three of them were represented by one attorney, and the fourth by a second attorney. From the inception of the administration, it was clear that on most issues the fiduciaries were split, three to one. Despite being aware of their ability to override their sister by majority vote, the majority was reluctant to sell any of the decedent's real estate without the consent of their sister, the fourth co-executor. They were afraid of claims later being brought by their sister. Even the Surrogate seemed to fall in with this way of thinking, holding that all four must agree on sales and sale prices, and if they did not, the Public Administrator would be appointed for the purpose of selling the real estate. As a result of this impasse, no real estate was sold for several years. The issue was resolved by the Appellate Division which held in unequivocal terms that EPTL

§10-10.7 applied and that the majority decision governs.[34] The real estate was thereafter promptly sold.[35]

Although majority rule is the norm, the governing instrument can provide otherwise. In Matter of Winston, NYLJ, December 24, 1990, p. 33, col. 3 (Sur. Ct. Westchester Co. 1990), the trustees of Harry Winston's estate fought over the meaning of a will provision, which read:

> If at any time a dispute shall arise in respect of the administration of any Trust created by this Will I direct my Trustees to take such action with respect to the matter in dispute as my son, * * *, while serving as a Trustee hereunder, shall determine * * * .

In upholding the son's construction that the clause meant what it says, Surrogate Brewster held that the clause "is a valid direction by testator for the fiduciaries, in the event of a dispute, to take such action as [his son] may direct provided such directed action is made in good faith and is not in violation of a fiduciary duty, or tainted with fraud or gross negligence, in which event the dissenting fiduciary is required to seek instructions from the court."

Designation clauses similar to the one used in Winston have repeatedly been upheld by the Courts.[36]

In Matter of Riker, supra, the decedent appointed his wife, son and daughter as his fiduciaries and directed that:

> [I]n the event that the Executors and Trustees cannot agree on any matter, then, the decision of [MY WIFE] shall prevail and be binding upon the remaining Executors and Trustees.

Surrogate Lambert gave effect to the plain and everyday meaning of the words and held that the clause meant exactly what it said, viz., that the testator "[i]ntended to give his wife the authority to bind the other fiduciaries even if those fiduciaries reach a conclusion contrary to that of the wife." The Surrogate rejected the arguments that (i) the clause was invalid as a matter of law and (ii) the clause only applied when there was a difference of opinion among the three fiduciaries.

Similarly, in Matter of Langdon, supra, the decedent appointed both an individual and a corporate fiduciary. His will provided: [I]n the event of a difference of opinion between the executors and trustees in the interpretation and carrying out of the provisions of this my Will, it is my wish and I hereby direct that the preference of my sister or my nephew shall prevail. The Surrogate held that the clause meant what it said, "[i]n the event of a difference of opinion between the executor trustees herein regarding the affairs of the estate, the decision should be made by the sister * * *."

In Matter of Rubin, supra, the will provided that in the event of a dispute between the fiduciaries, two non-fiduciaries were designated by the decedent as the arbiter of such disputes. This provision was enforced, as written, by Surrogate Radigan, who held that this was a valid limitation on the power of his fiduciaries, citing, Matter of Langdon, supra.

Regardless of whether the fiduciaries' action is governed by a majority vote or by the testator's designation of a "deadlock breaker", the majority may not act without consultation with and in disregard of the minority. Although the EPTL is silent on the issue, case law makes it clear that there must be a reasonable effort to reach accommodation; in sum, there should be joint meetings and joint consultations. The majority may not seize control and act without regard for the voice of the minority. The minority is entitled to air its views and attempt to persuade and make other proposals. The continued disregard of the minority and the subversion of majority power may be redressed by the Surrogate.[37]

The issue of how to resolve an impasse created when there could be no "majority vote" since there were two fiduciaries and the will did not contain any direction for breaking deadlocks between fiduciaries was addressed by Surrogate Roth in Matter of Duell, NYLJ, July 23,1996, p. 23, col. 1 (Sur. Ct., New York Co.), who fashioned a creative solution. The initial dispute between the co-executors concerned a distribution of the estate and whether it should be made fractionally, in various properties owned by the estate, or by way of outright ownership of individual buildings. Because the executors could not agree, the Surrogate appointed a well-known estate attorney as a special co-fiduciary with the limited authority to either resolve the deadlock, or to make an alternate recommendation to the Court. However, it soon became apparent that there were too many disputes to be addressed, and that the appointment of the attorney as a third fiduciary (an administrator, c.t.a.), would have to be made "to resolve deadlocks and avoid the expense and delay of repeated application to this court for relief." The administrator was directed “to participate in the administration of the assets of this estate at such time as the co-executors are unable to agree.”[38]

Each fiduciary may retain counsel and obtain reimbursement for reasonable counsel fees. In Matter of Schwarz, 240 A.D.2d 268, 660 N.Y.S.2d 107 (1st Dep’t 1997) an individual and a corporate fiduciary disagreed about use of estate funds to commence certain litigation. The individual fiduciary, who wished to pursue the litigation, moved for summary judgment granting him mutually exclusive signature powers to estate accounts held by the corporate fiduciary. The Surrogate denied the motion, relying on the general rule that litigation expenses are paid initially by each party and, at the conclusion of the proceeding, the court may order that costs and allowances be paid either by a party personally, from estate assets, out of any person's share or interest, or from the foregoing in such proportion as justice requires.

The First Department reversed stating that a fiduciary is unilaterally empowered (i.e., without the consent of a co-fiduciary -- a several power) to contest claims or settle claims in favor of the estate and to pay administration expenses including reasonable counsel fees, and that by virtue of his office, each fiduciary is entitled to the custody of the assets of the estate or fund. Accordingly, the individual fiduciary was held to have as much right to pay administration expenses as the corporate fiduciary. The Court noted:

> There is no legal authority that bars a fiduciary, who is also a legatee, from using estate funds to administer the estate in his or her discretion. The fact that Mr. Schwarz may benefit personally from, inter alia, the re-litigation of the Erbschein, the

> prosecution of the claims against the widow in Florida and the successful challenge to the Bank's account claims is not relevant. Nor is it relevant that he may be able to recover the costs of these proceedings pursuant to SCPA 2301, 2302[2] and 2110[1]. Mr. Schwarz is a fiduciary and should be able to use estate funds to cover administration costs (EPTL 11-1.1[b][22]; Matter of Rubin, supra). The litigation costs at issue herein are such administration costs since they are related to the recovery of estate assets.

The Court did caution the individual fiduciary that:

> **[**t]o the extent that such costs do not constitute administration costs, or if [the individual fiduciary], in his capacity as fiduciary, uses the funds to the disadvantage of any person interested in the estate, then, as the Surrogate's Court aptly indicated, he "acts at his peril", exposing himself to liability (Matter of Leopold, supra; Matter of Rubin, supra). Accordingly, to the extent that Mr. Schwarz uses estate funds to pursue an action against the widow, which appears likely, and to the extent that such action infringes on her rights under the will, he can be held accountable. Indeed, if the widow, or any other legatee, can show that Mr. Schwarz is mismanaging or misusing estate funds, he may be removed as a fiduciary (see SCPA 711). Further, to the extent that the Bank, as co-administrator, disagrees with petitioner's use of estate funds, it may petition the court for direction (SCPA 2102[6]; Matter of Rubin, supra).

Attorneys representing separate fiduciaries should agree upon a division of services, a division of fees and a joint application. Separate tax returns should not be filed unless agreement cannot be reached. Separate accountings should not be submitted unless claimed errors and omissions cannot be effectively handled by objections to the account. Common sense and good judgment should prevail in reaching reasonable accommodation. We suggest meetings of the executors at regular intervals at mutually convenient locations. If your efforts to reach accommodation do not meet with success be sure to keep a detailed record of what you have done. One of the better ways of maintaining a log is by letters to your co-executors (or their counsel) with respect to all of your proposals and confirmation of all telephone calls.

If your efforts to reach accommodation are ignored and common sense does not prevail, you must seek redress from the Surrogate.[39] In 1993, SCPA §2102, Subd. 6, was broadened and now authorizes a proceeding to require a fiduciary "[t]o comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate." [40]

As a practical matter, your application to the court should be limited to specifics such as the failure to vote estate stock, to keep you fully informed, to meet and discuss estate matters, to exchange data in respect of estate assets and a refusal to agree on a united course of action. The moving papers should contain a factual presentation and should be devoid of personal attacks and apoplectic arguments. Just recite the chronology of your efforts, attach copies of the correspondence that you sent and submit a log of your telephone calls. If the conduct of the co-fiduciary went beyond mere lack of cooperation and was hostile and intransigent, consider seeking removal. The expenses and attorneys' fees incurred by the fiduciary in the defense of the hostile and intransigent conduct may be charged against the fiduciary personally.[41]

Self-Dealing:

Self-dealing is forbidden. It is dealt with severely and with rigidity. The question of personal gain or loss of the fiduciaries is not reached. Fairness or adequacy of consideration are not germane. The inquiry stops and the sanctions are imposed upon the discovery of the self-dealing. The benefit or gain to the estate is of no moment.[42]

Perhaps the most well known contemporary case of self-dealing involved the estate of Mark Rothko, the famous abstract expressionist painter.[43] One of the arguments made against surcharge in that case was that while there was a conflict of interest, there was no showing of self-dealing, and, absent self-dealing, it was argued that "a challenged transaction must be shown to be unfair."[44] The Court of Appeals answered this argument by pointing out that there was more than sufficient evidence in the record to support the findings that had been made of self-dealing and unfairness. Nonetheless the point is well taken that every conflict of interest does not necessarily involve actual transactions of self-dealing. Often, a fiduciary is able to maintain a balance between his or her competing loyalties and the various hats being worn.

However, if self-dealing is found, and there is no exoneration clause in the will and no consent by those affected, the courts will apply a "no further inquiry" rule, ignoring "whether the deal was fair or the price adequate or whether the fiduciary had any personal gain."[45] The paramount need for a fiduciary to maintain undivided loyalty, and not be guilty of self-dealing, regardless of the circumstances, has resulted in the courts holding that if you are in violation, the transaction is void, and you will be liable for any damages, including lost profits.[46] In effect, there is a form of strict or absolute liability. An example is Matter of Hirschhorn, NYLJ, April 29, 1998, p. 30, col. 3 (Sur. Ct. Nassau Co.). There, the co-trustees lent trust funds to a corporation in which they and the trusts had an interest. The Surrogate, in surcharging the co-trustees, made the following cogent comments:

A trustee cannot properly lend trust funds to himself or herself (IIA, Scott, Trusts [4th ed], 170.17; Bogart, Trusts and Trustees [2d ed] 543[J]). Such a loan is improper even where the terms of the trust give the trustee the widest power of investment (Carrier v. Carrier, 226 NY 114). Such a loan is also improper where the trustee has a substantial personal interest in the loan such as being a partner in the partnership to which the trust lends money (Matter of Myers, 131 NY 409). It is therefore long and well settled law that for a trustee to lend trust funds to a corporation which he owns all or a substantial part of the shares or to a corporation [in] which the trustee is a principal officer is improper (Matter of Keane, 95 Misc. 25; Matter of Rowe, 42 Misc. 172; see generally, III Scott, Trust, supra at 227.8; Uniform Trust Act 3). This is particularly egregious where the loans are made without any security for the trusts.

* * *

Having stated these fundamental principles of a trustee's duty, the trustee, . . . defends his actions on the basis of mistake of law and reliance on the advice of counsel. Simply his defense appears to be that he did not know he could not make loans from the trusts to Standard Steel Sections and other entities. It is clear however, that where a trustee fails to perform the duties imposed upon a fiduciary, it is no defense that the failure was due to a mistake of law if the trustee was negligent in making the mistake (III Scott, Trusts, [4th ed],). Moreover, where a trustee makes a mistake of law as to the extent of his powers or duties as a trustee, it is no defense that he relied upon the advice of an attorney, even though the attorney was competent. (Matter of Rothko, 84 Misc. 2d 830, Aff'd 56 A.D.2d 499, Aff'd 43 NY2d 305). The subjection of a trustee to absolute liability in these circumstances where he might not be actually at fault because of non-negligent ignorance and mistaken legal advice is harsh but required because he can escape liability by submitting the matter to a court for advise and direction (City Bank Farmers Trust Co. v. Smith, 263 N.Y. 292).

* * *

Under any standard of care, the transactions of these trustees were conflict ridden, smacked of self-dealing and are permeated with the breach of the duty of undivided loyalty (Matter of Schulman, 165 AD2d 499). Persons who accept the role or office of trustee must be assumed to accept it with the

> responsibility for acting with ordinary care and prudence. No matter how well intentioned a trustee, it will not excuse him or her from the required amount of diligence and prudence. The conduct of these trustees while perhaps acceptable in the marketplace is not sufficient for a trustee (Meinhard v. Salmon, 249 NY 458, 464).

A “no further inquiry” rule may be harsh, resulting in absolute liability, despite good intentions, and perhaps what might otherwise be considered a reasonable and fair transaction. The solution, as pointed out by the Surrogate in Hirschhorn, is to bring an advice and direction proceeding. Another solution, when possible, is to have all those concerned approve of the transaction in writing, after being fully informed as to the transaction and their rights and remedies.[47] This requires that the persons interested are adult and competent, otherwise a court proceeding will be required.

Self-dealing may be authorized by the court. This might eventuate in the situation where the executor may be the sole market or is willing to pay the highest price for an asset or interest of the decedent’s estate. The court, upon a proper showing, including a full and complete disclosure of all relevant information by the fiduciary, may permit the executor to purchase an estate asset.[48] In Scarborough, the Court held that:

> [T]he rule against self-dealing has not been applied, and does not apply, to interdict the purchase of trust property by a trustee where the court, after conducting a full adversary hearing at which all interested parties are represented, approves and authorizes the sale [citations omitted].[49]

The decedent, may authorize self-dealing and may dispense with the rule of undivided loyalty by express language and in some cases by implication.[50]

> No doubt, the rule of undivided loyalty due from a trustee (citations omitted) may be relaxed by a settlor by appropriate language in the trust instrument in which he, either expressly or by necessary implication, recognizes that the trustee may have interests potentially in conflict with the trust (citations omitted); at least, our courts under these conditions enforce the desire of the settlor to secure the services of a person to act as trustee in whom he has confidence, when, without the existence of exculpatory provisions, the trusteeship would be declined by the designee (citations omitted). That is not to say that the settlor's directions allow the trustee free rein to deal with the trust; the law interposes to require that the trustee always exercise good faith in his administration (citations omitted). 'No matter how broad the provision may be, the trustee is liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust' (3 Scott on Trusts (3rd ed.), s 222.3, p. 1777). Moreover, the language limiting the general rule is strictly construed so that the trustee's actions will not be approved if he trespasses outside the boundaries of the powers granted (citations omitted).[51]

While such an exoneration clause in a will or trust, permitting self-dealing transactions, in “explicit, clear, and unmistakable” language may be the safest path, it does not give the fiduciaries a license to self-deal.[52] Even with strong and unambiguous exoneration language, the fiduciary who self-deals must always act in good faith and with care as to the interest of the beneficiaries.[53] Further, more than mere general exoneration language is required.[54] If you do not have clear language in your will, and you do not have the consents of the parties affected, you must seek approval from the Surrogate, if the transaction is not to be voided and the fiduciary surcharged for damages, which can include loss of profit.[55]

<u>Distributions from the Estate</u>:

Conflicts of interest often arise in the context of distributions to beneficiaries. In Matter of Rappaport, 121 Misc. 2d 447, 467 N.Y.S.2d 814 (Sur. Ct. Nassau Co. 1983), the Surrogate was asked for advice and direction where the co-executors were divided on whether administration expenses should be taken as a fiduciary income tax deduction or an estate tax deduction. The will provided for an outright fractional marital deduction formula bequest, stated in terms of one-half the adjusted gross taxable estate, with the second part of the residuary going in equal shares to his three children. If the very large litigation fees were taken as income tax deductions, the adjusted gross estate would increase and the marital deduction would grow by fifty percent of those expenses. Such a choice would virtually eliminate that portion of the residuary for the children. On the other hand, taking the deduction on the income tax return would result in payment of more taxes.

The Surrogate balanced various fiduciary duties, including the duty to minimize the tax burden on the estate and its beneficiaries, the duty of impartiality, and the duty to abstain from self-dealing. The Court was particularly concerned that a fiduciary who is also a beneficiary should not make " a tax election unfairly favoring his beneficial interest over that of another beneficiary."[56] The Court held that all administration expenses should be taken on the estate tax return, with the petitioning children of the decedent placing a sum in escrow for the purpose of reimbursing the estate for "the total tax savings which could have been realized by deducting administration expenses on the fiduciary income tax return."

Where distributions are made pro rata to legatees, pursuant to the will, new appraisals at the time of distribution would not be required. However, non-pro rata distributions are frequently authorized by instruments, and are expressly authorized under EPTL §11-1.1 (b)(20). In such an instance, the fiduciaries, to avoid a charge of unfairness, should generally obtain new appraisals so that fair market valuations are utilized at the time of the distribution.[57] However, new appraisals are not always required. For example, in Matter of Lawrence, NYLJ, November 2, 1998, p. 30, col. 4 [Roth, S.], the Court concluded that appraisals should not be required, despite non-pro rata distribution, because the appraisals alone would cost "some ten million dollars."

In another case, the will provided that the property to go to the wife "shall have an aggregate fair market value fairly representative of the appreciation or depreciation value to the date or dates of each allocation of all property then available for allocation. Any property so allocated for such purpose shall be valued at the value as finally determined for federal estate tax purposes." One of the issues on the accounting was whether distribution to the spouse of the decedent's interest in a leasehold could help satisfy the bequest to the spouse, and if so, what was its value. The Surrogate concluded that there were issues of fact, stating that the terminology in the will "suggested that the final federal determination is a starting point, the basis used to determine the value at the time of distribution." The Court also expressed concern that "assignment of the leasehold interest may implicate the fiduciary's duty of impartiality to all beneficiaries."[58]

The Fiduciary as Corporate Director or Officer:

The responsibilities of a fiduciary when he or she is also an officer or director of a corporation in which the estate has an interest pose special problems. The vulnerability of the fiduciary extends to the conduct of a corporation, the stock of which is controlled by the estate.[59] He may not purchase estate assets for his personal use. He may not borrow estate funds. He may not pay fees to an accounting or legal firm of which he is a member without court approval; the concealment of self-dealing by the use of dummies will not be countenanced.[60]

The fiduciary's conduct in the managing of the corporation may be oppressive and constitute overreaching as applied to the estate's beneficiaries. Thus, in one instance, the Appellate Division removed a trustee, where he had used his control of the corporate stock to make himself president and paid himself a large salary to the detriment of the beneficiaries who were dependent upon the income received from the stock for their support.[61]

In what circumstances does the fiduciary's duty to account extend not only to the estate or trust, but also to the corporation in which the estate or trust has an interest? The answer is that it depends. In one recent case, the trustee argued that he was not accountable for his actions in his capacity as president of a corporation, since the trust held less than a majority of the corporation's outstanding shares. Both the Surrogate and the Appellate Division disagreed, since the trustee "exercised working control of the corporation, such that he is accountable in the Surrogate's Court for any breach of trust, fraud or self dealing which injures the trust (citation omitted)."[62] At the very least, even if a full accounting from the corporation is not required, inquiry may be made of the fiduciary with respect to his or her conduct as an officer of the corporation, to ascertain whether his or her conduct as such was motivated by self interest, to the injury of the trust beneficiaries.[63]

It should not, however, be concluded that because the Surrogate's Court may inquire as to a trustee's actions as a corporate officer, it necessarily follows that the Surrogate can also compel the declaration of dividends by the corporation. The Second Department, recently held that the inquiry into the trustee's role in managing the corporation "is limited to the issues of whether there was a breach of trust or negligence, and whether a surcharge should be imposed on the trustee (citations omitted)."[64] The Appellate Division went on to suggest that the Surrogate might have authority to require the declaration of dividends, where the corporation was entirely owned by the trust. However, in all other cases, "the issue of whether dividends should be paid by the corporations and the amount of those dividends is generally determined by corporate directors in their discretion, and the court is not justified in interfering absent evidence of bad faith, fraud, clear abuse of discretion or dishonesty on the part of the directors (citations omitted). Moreover, a cause of action to compel the declaration of a dividend is of a derivative nature, belonging to the corporation (citations omitted)."[65]

<u>Investment Decisions</u>:

Co-fiduciaries may disagree on investment policy. An example might be where one co-trustee is an income beneficiary, and seeks to promote investments yielding high income, while the other trustee wishes to encourage growth, for the benefit of the remaindermen. Just such a case was Matter of Iskyan, NYLJ ,October 12, 1994, p. 28, col. 3 (Sur. Ct. Nassau Co.). There, the individual co-trustee refused to approve an investment by the corporate co-trustee of some portion of trust funds to protect the remaindermen. The Surrogate held that under EPTL §10-10.7, "[t]he duty to invest funds is one which requires the exercise of judgment and discretion and, accordingly, requires that the trustees act jointly [and, in this case, unanimously because there were only two] in selecting investments (cite omitted)." The Court noted that it had authority to intervene, because of the individual co-trustees' refusal to participate, and if the facts supported the corporate co-trustee's contentions, the Court could direct the individual to join with her co-trustee and to exercise the power. The Court also noted that not only did the corporate co-trustee have the authority to come to the Court to solve the problem, but that indeed it had a "duty to apply to the court for directions."

The use by fiduciaries of an investment advisor is clearly appropriate, and in many instances, the wisest course. As with all complicated estate matters, the utilization of experts will often pay dividends when it comes to defending your or your client's conduct on a contested accounting. Showing the prudence in the choice of the investment advisor in the first instance, and then the thorough job done by both the advisor and the fiduciary in determining investments, sales, purchases, etc., can only help where there are objections to investment performance.[66] The Prudent Investor Act EPTL §11-2.3 expressly permits the delegation of investment powers, but, of course, the fiduciary must exercise prudence in the selection of his or her advisor.[67]

A fiduciary has general authority of a fiduciary to employ agents. While EPTL §11-1.1 provides no explicit authorization for hiring agents, and of course a fiduciary may not delegate his or her discretionary authority, “there is no prohibition against delegating to others the power to act upon decisions he has made.”[68] As one Court held, “[a] fiduciary can employ agents to do work he legitimately cannot do himself . . . . the facts in each estate will determine whether or not the retention of agents is warranted.”[69]

As with the investment advisor, the employment of other professionals as to complicated or technical matters may serve the estate well, and assist in protecting the fiduciary in the event of a contested accounting.

Moreover, it is the authors’ experience that, at times, the employment of agents by multiple fiduciaries who find themselves unable to agree is helpful in easing the administration of the estate. For example, if the estate owns commercial real estate, a professional managing agent may not only be necessary because of the nature of the assets, but such may also help avoid conflicts between the fiduciaries. Of course, care must be taken by the fiduciaries to stay involved and to avoid any over-delegation of authority which might amount to an abdication of fiduciary responsibility.

Conclusion:

It has been asked, perhaps rhetorically, “Who then is the faithful and sensible steward . . .?”[70] Judge Cardozo gave one, now classic, answer: “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate."[71]

Stating these principles and applying them are of course two different things. For the fiduciary with multiple hats, or in conflict with other fiduciaries, or in estates with beneficiaries who have very differing interests, and for the attorney called in to assist in such cases, applying these principles requires a particular sensitivity. The fiduciary or attorney should always err on the side of caution and be willing, if necessary, to decline qualification or turn down the representation. When in doubt, apply to the Court for assistance!

1. See, e.g., Matter of Flasterstein, 27 Misc. 2d 326, 210 N.Y.S.2d 307 (Sur. Ct. Kings Co. 1960).

2. Matter of Marsh, 179 A.D.2d 578, 578 N.Y.S.2d 911 (1st Dep't 1992); see, generally, Warren's Heaton on Surrogates' Courts, §33.02[5][I].

3. Matter of Brandman, NYLJ, November 15, 1999, p. 29, col. 3 (Sur. Ct. Kings. Co. 1999).

4. See, e.g., Matter of Mergentime, 155 Misc. 2d 502, 503, 588 N.Y.S.2d 736 (Sur. Ct. Westchester Co. 1992).

5. Matter of Brandman, supra. NY State Bar Association, Committee on Professional Ethics, opinion No. 512.

6. 11 A.D.2d 555, 199 N.Y.S.2d 958 (3d Dep't 1960).

7. NY State Bar Association, Committee on Professional Ethics, opinion No. 512.

8. Matter of Hof, 102 A.D.2d 591,478 N.Y.S.2d 39 (2d Dep't 1984).

9. Matter of Flasterstein, supra.

10. See Matter of Birnbaum, 118 Misc. 2d 267, 460 N.Y.S.2d 706 (Sur. Ct. Monroe Co. 1983).

11. See Green v. Green, 47 N.Y.2d 447, 418 N.Y.S.2d 379 (1979).

12. Matter of Belfer, NYLJ, March 12, 1985 (Sur. Ct Nassau Co.) (citing EC 5-15).

13. See Matter of Schrauth, 249 App. Div. 847, 292 N.Y.S. 925 (2d Dep't 1937) ["there can be no such retainer as an attorney for an estate"]; Matter of Scanlon, 2 Misc. 2d 65, 69 150 N.Y.S.2d 511 (Sur. Ct. Kings Co. 1956).

14. Ordover and Gibbs, Fiduciaries, Attorneys and Duty to Beneficiaries, NYLJ, February 25, 1999, p. 3, col 1.

15. See, e.g., Matter of Community Service Society, NYLJ, November 14, 1997, p. 26, col. 2 (Sur. CT. New York Co.); Matter of Baker, 139 Misc. 2d 573, 528 N.Y.S.2d 470 (Sur. Ct. Nassau Co. 1988).

16. Cf., ACTEC, Commentaries on the Model Rules of Professional Conduct [3d Ed.], (1999), p. 57, which provide: "The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them .... Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary."

17. Abolition of the so-called attorney/fiduciary exception to the attorney/client privilege is the subject of proposed legislation, sponsored by, among others, the New York State Bar Association.

18. See, New York State Bar Association, Committee On Professional Ethics, Opinion No. 512, supra.

19. New York State Bar Association, Committee on Professional Ethics, Opinion No. 649 (1993); Bar Association of Nassau County Committee on Professional Ethics, Opinion No. 97-10.

20. NYLJ, Dec. 30, 1999, p. 25, col. 4, (Sur. Ct. New York Co. 1999).

21. Matter of Clarke, 12 N.Y.2d 183, 237, 188 N.E.2d 128, 237 N.Y.S.2d 694 (1962); Matter of Bond & Mortgage Guarantee Co., 303 N.Y. 423, 103 N.E.2d 721 (1951).

22. Matter of Abrams, 62 N.Y.2d 183, 199, 476 N.Y.S.2d 494 (1984).

23. See Matter of Kelly, 23 N.Y.2d 368, 378, 296 N.Y.S.2d 937 (1968).

24. Matter of Abel, NYLJ, October 23, 1992, p. 26, col 3. (Sur. Ct. Nassau Co.).

25. See Matter of Winston, 214 A.D.2d 677, 625 N.Y.S.2d 927 (2d Dep't 1995) ["An attorney who engages in misconduct by violating the Disciplinary Rules is not entitled to legal fees for any services rendered."]; Matter of Klenk, 204 A.D.2d 640, 612 N.Y.S.2d 220 (2d Dep't 1994).

26. Matter of Sackler, NYLJ, May 16, 1989 (Sur. Ct. Nassau Co.)

27. See also, Matter of Brandman, supra, which held that if a conflict is actual and not just potential, and if it is of a substantial nature, "dual representation is prohibited even if the parties consent ..."

28. NYLJ, June 11, 2001, p. 34, col. 1 (Sur. Ct. Nassau Co. 2001)

29. See ACTEC, Engagement Letters; A Guide for Practitioners (June, 1999).

30. Simon's NY Code of Professional Responsibility Annotated, [1998 ed.], DR 5-105, p. 238.

31. This particular recommendation is problematic, as is the second recommendation in item 3. The authors believe that such should be enforceable, at least in most cases.

32. See Matter of Leopold, 259 N.Y. 274 (1932); Matter of Bulova, 60 Misc. 2d 151, 301 N.Y.S.2d 1008 (Sur. Ct. New York Co. 1969).

33. EPTL §10-10.7

34. Matter of Murphy, 185 A.D.2d 819, 587 N.Y.S.2d 846 (2d Dep't 1996).

35. As anticipated, the fourth co-executor did seek to surcharge her co-executors as a result of the sales which did take place. See Matter of Murphy, NYLJ, September 15, 1999, p. 32, col. 5 (Sur. Ct. Richmond Co.)

36. See, e.g., Matter of Riker, NYLJ, March 10, 1982, p. 12, col. 5; Matter of Langdon, 154 Misc. 252, 277 N.Y.S. 581 (Sur. Ct. Westchester Co. 1935); see generally, Roth, Multiple Fiduciaries And Their Powers, NYLJ, April 25, 1982, p. 1, col. 1; Cf., Matter of Rubin, 143 Misc. 2d 303, 540 N.Y.S.2d 944 (Sur. Ct. Nassau Co. 1989).

37. Cf., Matter of Martin, 29 Misc. 2d 271, 215 N.Y.S.2d 278 (Sur. Ct. Kings Co. 1961).

38. Matter of Duell, supra.

39. See Matter of Martin, 29 Misc. 2d 271, 215 N.Y.S.2d 278 (Sur. Ct. Kings Co. 1961); Matter of Philippe, 37 Misc. 2d 893, 235 N.Y.S.2d 594 (Sur. Ct. New York Co. 1962).

40. Formerly this subdivision only authorized a proceeding where the dispute concerned the custody of money or other property of the estate committed to them.

41. Matter of De Beixedon, 262 N.Y. 168 (1933).

42. Matter of Ryan, 291 N.Y. 376, 52 N.E.2d 909 (1943); Meinhard v. Salmon, 249 N.Y. 458 (1928).

43. See Matter of Rothko, 43 N.Y.2d 305, 401 N.Y.S.2d 449 (1977).

44. Matter of Rothko, supra, at 318.

45. Turano & Radigan, Estate Administration, p. 406.

46. Matter of Rothko, supra.

47. See Birnbaum v. Birnbaum, 117 A.D. 2d 409, 503 N.Y.S.2d 451, (4th Dep't 1986).

48. Matter of Scarborough Properties, 25 N.Y.2d 553, 307 N.Y.S.2d 641, 225 N.E.2d 761 (1969).

49. See Matter of Tuttle, 4 N.Y.2d 159, 173 N.Y.S.2d 279, 149 N.E.2d 715 (1958) [court-approved payment of accounting fees to executor/trustee]; In re Rosenberg's Will, 165 Misc. 92, 2 N.Y.S.2d 300 (Sur. Ct. Richmond Co. 1937) [removal denied where trustees relied on informal advice of Surrogate in exceeding their investment powers]; IIA Scott on Trusts §170.7 (4th ed. 1987); Bogert, The Law of Trusts and Trustees, §543 (rev. 2d ed., 1991 cum. pocket part at 55) ["Court approval of an otherwise disloyal transaction will relieve the trustee of liability"].

50. Matter of Ridings, 297 N.Y. 417, 79 N.E.2d 735 (1948); Matter of Durston, 297 N.Y. 64, 74 N.E.2d 310 (1947); Matter of Roche, 259 N.Y. 458 (1932); Matter of Lonas, 197 Misc. 678, 93 N.Y.S.2d 115 (Sur. Ct. Broome Co. 1949).

51. O'Hayer v. de St. Aubin, 30 A.D.2d 419, 293 N.Y.S.2d 147 (2d Dep't 1968).

52. Baron, Self-dealing Trustees and the Exoneration Clause: "Can Trustees Ever Profit from Transactions Involving Trust Property?, 72 St. John's L. Rev. 43.

53. O'Hayer v. De St. Aubin, supra, citing, Scott On Trusts (3rd ed) § 222.3, p. 1777; See Matter of Lawrence, 242 A.D.2d 416; 662 N.Y.S.2d 36 (1st Dep't 1997).

54. Matter of Amaducci, NYLJ, November 2, 1999, p. 36, col. 4 (Sur. Ct. Westchester Co.).

55. Matter of Rothko, supra; Matter of Hirschhorn, supra.

56. Matter of Rappaport, supra at 451.

57. See Matter of Blazer, NYLJ, July 22, 1992, p. 26 col. 3 (Sur. Ct. Nassau Co.).

58. Matter of Allen, File No. 284129, Dec. No. 733, October 7, 1999 (Sur. Ct. Nassau Co.).

59. Matter of Soss, 71 N.Y.S.2d 23, 1947 N.Y. Misc. Lexis 2498 (Sur. Ct. New York Co. 1947).

60. Matter of Tuttle, 4 N.Y.2d 159, 173 N.Y.S.2d 279 (1958).

61. Matter of Hirsch, 116 A.D. 367, 101 N.Y.S. 893 (1st Dep't 1906).

62. Matter of Scuderi, 247 A.D.2d 392, 667 N.Y.S.2d 913 (2d Dep't 1998); see also Matter of Steinberg, 153 Misc. 339, 274 N.Y.S. 914 (Sur. Ct. Kings Co. 1934).

63. Matter of Shehan, 285 A.D. 785, 141 N.Y.S.2d 439 (4th Dep't 1955).

64. Matter of Goerler, 227 A.D.2d 479, 642 N.Y.S.2d 923 (2d Dep't 1996).

65. Matter of Goerler, supra at 480-481; see also Matter of Cashman, 14 N.Y.2d 426, 252 N.Y.S.2d 447 (1964).

66. See, e.g., Matter of Marshak, NYLJ, August 11, 1994, p. 23, col. 4 (Sur. Ct. New York Co.).

67. See Matter of Younker, 174 Misc. 2d 296, 663 N.Y.S.2d 946 (Sur. Ct. New York Co. 1997); see also Matter of Axe, 132 Misc. 2d 137, 502 N.Y.S.2d 943 (Sur. Ct. Westchester Co. 1986).

68. Warren's Heaton on Surrogates' Courts, §61.01[5].

69. Matter of Grace, 62 Misc. 2d 51, 57, 308 N.Y.S.2d 33 (Sur. Ct. Nassau Co.1970), aff'd, 35 A.D.2d 783, 315 N.Y.S.2d 816 (2d Dep't 1970).

70. Luke 12:42, New American Standard Bible.

71. Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).