

**New Hampshire Bar Association  
Ethics Committee Opinion #2008-09/1**

**Drafting Lawyer Acting as Fiduciary for Client  
May 13, 2009**

**RULE REFERENCES:**

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|-----------------|-----------------|
| *Rule 1.1(b)    | *Rule 1.7(b)    |
| *Rule 1.4(a)(2) | *Rule 1.7(b)(4) |
| *Rule 1.4(b)    | *Rule 1.8       |
| *Rule 1.6       | *Rule 1.8(a)    |
| *Rule 1.7       | *Rule 2.1       |

**SUBJECTS:**

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|--|------------------------|
| *Adverse Effect on Professional Judgment | *Conflict of Interests |
| *Adverse Representation                  | *Consultation          |
| *Attorney-Client Relationship            | *Estates               |
| *Business Activities                     | *Harsh Reality Test    |
| *Client Communications                   | *Independent Judgment  |
| *Competence                              | *Fees                  |
| *Confidentiality                         | *Probate               |
|  | *Wills                 |

**ANNOTATIONS:**

When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b) and that the attorney may continue to exercise independent professional judgment in recommending to the client the best choices for fiduciaries under Rule 2.1. In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the “informed consent” of the client to the selection of the drafting attorney as the named fiduciary.

It is ethically impermissible for an attorney to name that attorney, by default, or require the client to appoint the attorney as a fiduciary, in a document drafted by that attorney.

In the event the drafting attorney actively advertises and solicits clients to consider using the attorney as a nominated fiduciary in documents drafted by the attorney, the relationship that results from such advertisement and solicitation may constitute a

“business transaction with the client” and thereby requires compliance with the more stringent Rule 1.8(a).

**I. QUESTIONS PRESENTED:**

1. May a lawyer who is drafting a will or other estate planning documents, identify the lawyer as the named executor or other fiduciary in the documents, at the request of the client?
2. May a lawyer identify himself or herself, by default, as the executor or other fiduciary in a client’s estate planning documents?
3. May a lawyer solicit and/or require clients to identify the lawyer as a fiduciary in estate planning documents being prepared by the lawyer?

**II. Introduction.** It has been common practice for estate planning attorneys in New Hampshire to act as executors, guardians, trustees, administrators and attorneys-in-fact for clients. This is not surprising when considering the role an attorney plays as a trusted advisor, and the complexity and volume of New Hampshire statutes and regulations that are applicable to fiduciaries, and the administration of estates and trusts. However, the selection of appropriate persons or entities to act as a fiduciary is one of the most important decisions a client makes during the estate planning process.

This Committee’s Formal Opinion #1987-88/9 (“Prior Opinion”) addressed the restrictions on an attorney’s ability to act as both the attorney and a fiduciary for the client, and the fees that may be ethically charged by the attorney in both capacities. Subsequent to the Prior Opinion, New Hampshire’s Supreme Court adopted a total revision of New Hampshire’s *Rules of Professional Responsibility* (where applicable “Rules” or “Rule”); *see*, Order dated July 25, 2007. While the new Rules applicable to the questions posed above are very similar to those that were in effect when the Prior Opinion was adopted, there were significant changes pertaining to what is required for “informed consent” and the necessity that a client’s informed consent be confirmed in writing with respect to potential Rule 1.7 conflicts. Accordingly, this Opinion will examine the questions raised above in the context of the new Rules. Unlike the Prior Opinion, however, this Opinion will **not** address the issue of what fees may be reasonably charged by the drafting attorney, when later acting as a fiduciary resulting from a designation in

the document prepared by the attorney; while the Prior Opinion will still be useful, there have been significant changes that impact such fee issues.<sup>1</sup>

For the purposes of this Opinion, references to the “attorney” or “lawyer” shall be deemed to include all members of the attorney’s law firm as well as the law firm. The term “fiduciary,” includes the following roles typically involved in estate planning documents: (a) an executor, (b) a trustee, (c) an Agent named under either a financial durable power of attorney or health care power of attorney in an Advance Directive, (d) a guardian designated under a Nomination of Guardian pursuant to RSA 464-A:10,II, or (e) a designated agent under a Declaration of Final Arrangements pursuant to RSA 290:17, I. The same ethical analysis would apply regardless of whether the attorney is named as the primary acting fiduciary or as an alternate or successor fiduciary.

### **III. Attorney Becoming a Designated Fiduciary at the Client’s Request.**

When an attorney has a long-standing relationship with the client or the client’s family, and is a trusted friend and professional, it is not uncommon for the client to request that the attorney serve in one or more fiduciary capacities in the client’s estate planning documents. In fact, it is not unusual for clients to believe, incorrectly, that they **must** name an attorney as the executor or trustee. However, the designation of the attorney as a fiduciary raises potential conflicts of interest, along with certain other ethical questions. The ABA’s Formal Opinion No. 02-426 (“ABA Opinion”) provides a comprehensive analysis of this issue, under ABA’s current Model Rules (upon which the New Hampshire Rules are based in large part).

**A. *Requisite Competency.*** No matter how a client may initiate the request, before the attorney can begin drafting a document that names the attorney as a fiduciary, the attorney must first have the requisite knowledge and experience to be able to satisfy the Competence requirements of Rule 1.1(b). Given the increasing complexity of the rules and procedures

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<sup>1</sup> With respect to the executor and administrator fiduciary role, subject to the jurisdiction of the Probate Court, there has been a significant change resulting from *In Re Estate of Rolfe*, 136 N.H. 294 (1992). Also, in the event the estate planning process involves flat fee charges, the drafting attorney need be mindful of the change in Rule 1.15(d) requiring that withdrawal of client funds may occur “only as fees are earned or expenses incurred”; see *New Hampshire Comment* for Rule 1.15.

involved in estate and trust practice and administration, this initial ethical inquiry should not be taken lightly by the attorney.<sup>2</sup>

**B. Discussion of Options.** When a client asks an attorney to serve in the role of fiduciary, the attorney must comply with Rule 1.4(a)(2) and Rule 1.4(b).<sup>3</sup> The attorney must frankly discuss all available options pertaining to the selection of fiduciaries for the client's documents, and during this discussion may disclose to the client the attorney's availability to serve as the fiduciary, ABA Opinion, at pages 2-3. The attorney and client should discuss whether or not the client's goals will be better served with the attorney serving as a fiduciary rather than the client's family, friends or a professional fiduciary, and the relative skills and experience each may have to assist in the performance of the fiduciary's duties. The discussion should include a disclosure that the professional fiduciary is typically fully bonded, and whether or not an attorney who will act as a fiduciary will be covered by errors and omissions insurance. The attorney should specifically discuss the relative costs of having the attorney or others serve as a fiduciary, as well as how the attorney will charge for the fiduciary services, depending upon the expected complexity or simplicity of the plan and the client's family's dynamics. "When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject

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<sup>2</sup> The minimum requirements for legal competence under Rule 1.1(b) include:

- (1) specific knowledge about the field of law in which the lawyer practices;
- (2) performance of the techniques of practice with skill;
- (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
- (4) proper preparation; and
- (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest."

<sup>3</sup> Rule 1.4. Client Communications provides as follows:

- (a) A lawyer shall:
  - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter.
  - (4) Promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.

to statutory limits or court approval, and how the compensation will be calculated and approved.” ABA Opinion, page 4. Discussing the option of appointing the attorney as a co-trustee, along with a family member, to assist with the growing technical complexities of trust administration, may also be warranted. The discussion should also address the fact that appointed professional fiduciaries, family members, or friends, as well as the named attorney, may retain an attorney to advise and assist them, as needed, to properly perform their fiduciary duties.

**C. *Independent Professional Judgment.*** During the initial discussion with the client pertaining to the fiduciary selection process, the attorney must not “allow his potential self-interest [in serving as a fiduciary] to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries.” *ABA Opinion*, at page 3. *See also* Rule 2.1.<sup>4</sup> The attorney’s discussion must also address possible limitations that could result from the attorney serving as fiduciary. For example: if later faced with the client’s potential incapacity and/or involuntary placement, the attorney will be unable to serve as the client’s attorney and may become an adverse witness, potentially placing the attorney and client at odds over the issue. Similarly, the attorney will probably also be unable to represent the proponent of the document in question in any proceeding adjudicating the capacity of the client. Clarifications or corrections of scrivener’s errors in the relevant documents may also become problematic.

**D. *Conflict of Interest.*** After considering Rule 1.7, the drafting attorney must evaluate whether the attorney’s appointment as a fiduciary in a document drafted by the attorney, at the voluntary choice of the client, presents “a significant risk that the representation of ...[the client] will be materially limited ... by a personal interest of the lawyer”, and therefore triggers application of Rule 1.7.<sup>5</sup> The attorney who is named as a fiduciary in the document is clearly

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<sup>4</sup> Rule 2.1., “Advisor” provides as follows:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.”

<sup>5</sup> Rule 1.7., “Conflicts of Interest” provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

acquiring a possible and lucrative financial interest in that client's future estate or trust. This Committee, however, does not reach the conclusion that a "concurrent conflict of interest" under Rule 1.7(a) **always** exists in these situations that would trigger having to confirm the client's informed consent in writing, as provided in Rule 1.7(b). Instructive on this issue is the following excerpt under the header "Appointment of Scrivener as Fiduciary", ACTEC Commentaries on the Model Rules of Professional Conduct (4<sup>th</sup> Ed., 2006), at page 95:

"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 MRPC 1.7, and *the appointment is not the product of undue influence or improper solicitation by the lawyer.* [emphasis added]"

Similarly, the ABA Comment 8, to Rule 1.8. while implying that being named as a fiduciary does not constitute a "business transaction with the client" under Rule 1.8, nevertheless cautions that the situation may require a conflicts disclosure under Rule 1.7.<sup>6</sup> There is some confusion now caused by the Ethics Committee Comment to Rule 1.8, which states in part that "[i]n New Hampshire, Rule 1.8(a) applies to a lawyer's advice as to, or preparation of, an instrument designating or appointing a lawyer ... as executor, trustee or other fiduciary position ...." The Committee notes that this statement is erroneous and may simply be the result of a

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(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

<sup>6</sup> Comment 8 of the ABA Model Rules, Rule 1.8, provides as follows:

"[8] This Rule [Rule 1.8] 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 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."

scrivener's error (which should have read "Rule 1.8(a) *may* apply"). The Committee is in the process of revising this Comment in a manner consistent with this Opinion.

There may also be other circumstances that further complicate this ethical analysis. As an example, situations where the attorney represents other family members will add additional potential conflicts that must also be considered. This is accentuated in family situations where the client is seeking to intentionally disinherit another family member who is also a client of the drafting attorney; this may, in certain situations, well prevent the attorney from ethically accepting being named a fiduciary, especially if for confidentiality reasons the attorney is prohibited from obtaining required informed consent by multiple clients. For example, ABA Formal Opinion 05-434 discusses the implications of the attorney drafting a will for one client that disinherits a beneficiary whom the lawyer also represents on unrelated matters, concluding while generally there would be no prohibition, there may be other circumstances that could trigger a prohibited conflict of interest. Ethical dilemmas faced in the representation of multiple family members was also addressed in ABA Formal Opinion 02-428, discussing issues surrounding representation of a testator at the request of and paid for by an intended beneficiary who is a client of the attorney, that concludes that the Rules "do not prohibit multiple representation of family legal interests as long as the lawyer's independent professional judgment is maintained, the lawyer complies with the rules on client confidences, and any conflicts of interest are resolved under the applicable rules." The drafting attorney, therefore, must be extremely vigilant and properly examine all potential other conflicts that may impact upon this fiduciary selection issue.

The attorney must be mindful that a Rule 1.7 analysis will typically only take place, in hindsight, after something has gone dreadfully wrong, and that the facts will be viewed objectively by other disinterested lawyers. Illustrative of such a possible retroactive review of the attorney's actions is New Hampshire's application of its "harsh reality test" *after* an attorney has determined that it is appropriate to request a client's consent to a conflict of interest under Rule 1.7(b).

“[I]f a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney’s requesting the client’s consent to this representation *or question whether there had been full disclosure to the client prior to obtaining the consent*. If this ‘harsh reality test’ may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney’s firm should decline representation ...” [emphasis supplied]. New Hampshire Comment to Rule 1.7

Written confirmation of the client’s informed consent of a concurrent conflict of interest under Rule 1.7(b)(4) is not required under all circumstances when documents name the drafting attorney as a fiduciary. Clearly, however, the better practice would be for the drafting attorney to always provide such written confirmation of the client’s decision. The written confirmation should document the disclosures and discussions mandated under Rule 1.4. and, if applicable, Rule 1.7, and the client’s selection of the attorney to act as fiduciary. See Rule 1.0(c) for a definition of “informed consent”.<sup>7</sup>

*E. Confidentiality.* The attorney must analyze and discuss with the client the effect that Rule 1.6. (“Confidentiality of Information”) may have upon the attorney, when acting in the fiduciary capacity as appointed in the client’s documents.<sup>8</sup> The client must understand that the attorney may intentionally or inadvertently use or rely upon intimate details relating to the creation of estate planning documents that would not be available to other fiduciaries during the

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<sup>7</sup> “Informed Consent” as defined under Rule 1.0 (e) “denotes the agreement by a person to a proposed course of conduct [nominating the client’s attorney to act as a fiduciary in the client’s document] after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” If a client’s informed consent is confirmed in writing, it should include the substance of that discussion regarding fiduciary choices, and the ultimate selection by the client of the attorney, as is required under Rule 1.4, and discussed above.

<sup>8</sup> Rule 1.6., “Confidentiality of Information” provides as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another; or
  - (2) to secure legal advice about the lawyer’s compliance with these Rules; or
  - (3) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
  - (4) to comply with other law or a court order.

estate or trust administration process. If there is a will contest or a question as to either the interpretation of the document drafted by the attorney/fiduciary or the intent of the client, the drafting attorney may be the primary witness, and may be precluded from handling any litigation involving the particular document or the estate. While having the intimate knowledge and confidential information of the client may aid considerably in the ultimate realization of client objectives, there may be situations where it could possibly complicate the fiduciary's role. Further complicating the issue is that the fiduciary has the authority to waive attorney-client privilege, thereby giving the attorney/fiduciary the power to waive the privilege with respect to the client's communications with the attorney.

**IV. Drafting Documents Naming the Drafting Attorney as the “Default” Fiduciary.** The second question presented involves the “default” designation of the attorney to serve as a fiduciary in the documents drafted by the attorney. This question presumes that this practice occurs **prior** to there being any discussion with the client concerning the designation of appropriate fiduciaries, or should the attorney require the client to use the attorney as a fiduciary. Based upon the above discussions, this Committee concludes that such a “default” designation is ethically prohibited under the current Rules. The Committee also believes that this practice could not be properly “cured” by subsequent client discussions and disclosure.

**V. Drafting Attorney Soliciting Use of Fiduciary Services.** The third and final question presented, involves the active solicitation of the client to use the services of the attorney as a fiduciary in one or more of the client's estate planning documents. All of the ethical disclosure requirements previously reviewed apply. This question raises the additional question of whether or not the law firm's active solicitation of fiduciary services creates a “business interest” that would also trigger the application of a Rule 1.8 disclosure. The ABA Opinion specifically allows the lawyer “to disclose his own availability to serve as a fiduciary” when discussing fiduciary selection options (at page 3). This question, however, presumes a greater level of solicitation of services by the drafting attorney. Such a determination will depend upon the specific facts involved in any given situation. For example, if the lawyer (1) advertises fiduciary services, and (2) actively solicits its clients consider selecting the lawyer as the fiduciary in the documents drafted by the lawyer, it would be difficult to argue that such solicitation does not

transform the fiduciary selection by the client into a “business transaction with a client.” If such practice is determined to involve a “business transaction with a client”, then compliance with Rule 1.8 (a) would be required.<sup>9</sup> The more stringent Rule 1.8(a) conflict compliance requires (1) informed consent in writing *that must be signed by the client*; and (2), that the client must be advised in writing by the attorney “of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction”. The attorney is further cautioned that, in certain circumstances involving concurrent conflicts of interest, the attorney may need to comply simultaneously with **both** Rule 1.8(a) and Rule 1.7(b).

It is beyond the scope of this Opinion as to whether or not, and/or how the law firm may ethically establish a fiduciary services law-related business separate and apart from its legal practice, in compliance with Rule 5.7, “Responsibilities Regarding Law-Related Services.”

## **VI. Summary.**

When drafting various estate planning documents, New Hampshire attorneys are frequently requested by their clients to act in one or more fiduciary roles. The drafting attorney may, at the request of the client, be inserted as a fiduciary in the document or documents being drafted by that attorney, provided that: (1) there has been adequate disclosure of information to the client, as required under Rule 1.4; and (2) the attorney makes a determination as to whether the personal interest of the attorney in being a fiduciary would require compliance with Rule 1.7(b). In order to document compliance with these Rules, it would be the best practice for the attorney to confirm in writing the “informed consent” of the client to the selection of the drafting attorney as the named fiduciary.

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<sup>9</sup> Rule 1.8(a) provides as follows:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.

It is ethically impermissible for an attorney to name that attorney, by default, or require the client to appoint the attorney as a fiduciary, in a document drafted by that attorney.

In the event the drafting attorney actively advertises and solicits clients to consider using the attorney as a nominated fiduciary in documents drafted by the attorney, the relationship that results from such advertisement and solicitation may constitute a “business transaction with the client” and thereby requires compliance with the more stringent Rule 1.8(a).