



Winter 2000

CHAIR'S REPORT

It is truly a joy to chair this Section of the Bar. Our Committee Chairs and Seminar Chairs have taken the ball and run with it and have been hard at work. We appreciate greatly their efforts on behalf of our Section.

The long awaited report of the Ethical Standards Committee, chaired by Joe Gerstein, is in, and the report is included in this newsletter. Many thanks to Joe and his Committee for their hours of research and deliberation. Now, as Joe says, you will finally know *who* you represent.

Our Legislation Committee, chaired by Melissa Walker, has taken a long, hard look at Georgia's Rule Against Perpetuities statute. As more states repeal their Rule Against Perpetuities statutes, opening the door for trusts to move to jurisdictions that are more favorable to clients' goals and objectives, we must consider this issue. The Legislation Committee has recommended that Georgia adopt legislation similar to the Ohio Model, retaining the Rule Against Perpetuities but allowing trustors to opt out in the trust instruments. The recommendation from the Legislation Committee is being studied by Verner Chaffin, Professor Emeritus, University of Georgia School of Law. He is, as of this writing, still contemplating the best course of action for us. Professor Chaffin will have his recommendation to us shortly, and at that point, we will proceed with our final determination on what to recommend to the State Bar.

The Guardianship Code Revision Committee reported at the mid-year meeting that they had had thirty meetings to date. This Committee faces some very difficult issues, and the time and thought being put into our new Guardianship Code will pay off in the end. The Committee, led by Bill Linkous and Mary Radford, deserves our commendation and appreciation. You've got it!

One of our goals for this year is to look at ways we can involve fiduciary lawyers in smaller towns and

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SECTION NOTES

Ethics Committee Reports

The Section's Ethical Standards Committee, chaired by Joe Gerstein of Doraville, has submitted the final reports of its three subcommittees.

Subcommittee A considered the question of when the attorney-client relationship terminates. Subcommittee B reviewed the standards for joint representation of nonadversarial clients. Subcommittee C asked, "Whom does the attorney represent?" in the context of representation of an estate. Subcommittee C's report was the subject of a workshop conducted by Mr. Gerstein at the 45th Annual Estate Planning Institute in Athens on February 11, 2000.

The three reports are printed in this newsletter beginning on page 6. The Ethical Standards Committee welcomes your comments. Please contact Joe Gerstein, Chair, at 6485 Peachtree Industrial Boulevard, Doraville, Georgia 30360, by telephone at (770) 458-7806, or by fax at (770) 457-6082.

Mid-Year Section Meeting

The annual business meeting of the Fiduciary Law Section was held in conjunction with the mid-year meeting of the State Bar on Friday, January 7, at the Swissôtel, Atlanta.

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Fiduciary Law Section Newsletter

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counties more in the activities of the Section. In order to accomplish this, Randy Williams of Dallas, Georgia, has agreed to chair a Small Counties Fiduciary Lawyers Committee. Randy sent out a questionnaire to all fiduciary lawyers in the State other than those in the metro areas. He has received sixty responses to date. Generally, the small county fiduciary lawyers have indicated that they would like a mentor system so that they have someone to call if they run into technical problems, would like the newsletter to include more information useful in the practice, and would like more

basic courses at our seminars dealing with small estates and problems encountered by lawyers representing them. Randy also suggested that we consider a forms package/disc library for lawyers in smaller counties. We appreciate Randy's hard work and input and look forward to hearing more from him as he explores ways to involve smaller county lawyers. We will make every effort to implement the recommendations of Randy's Committee.

Another one of our goals is to look into how we can involve minorities more in activities of the Section. Adam Gaslowitz is currently chairing a Task Force to guide us. After talking with Professor Jeff Pennell at Emory Law School, Adam feels we should adopt a multi-prong approach beginning at the law school level to deal with this issue.

I am pleased to report that the Executive Committee of your Section voted to spend \$6,300 of Section funds to assist the Younger Lawyers Division, Elder Law Committee in publishing the Senior Citizens' Handbook. This is a handbook for lay people and includes valuable information for senior citizens on various governmental benefits such as health care, social security, and other retirement benefits, as well as information on elder abuse, consumer fraud and planning for long-term care. Distribution of the handbook is achieved by making it available at county probate courts and public libraries, through the Department of Human Resources and the Georgia Division of Aging Services. We are proud and happy that our Section can be a part of providing this valuable information to the senior citizens in our state. This is one way our Section can be a good corporate citizen. Many senior citizens cannot pay to get this kind of advice, and helping to make it available at no cost to them is certainly a worthy project. We look forward to a continuing working relationship with the Younger Lawyers Division, Elder Law Committee.

I am also pleased to report the following persons have been elected as officers of the Section for 2000-2001, taking office in June, 2000: Lowry Reid, Columbus, Chairman; Jack Sawyer, Atlanta, Vice Chair/Chair-elect; John Spears, Atlanta, Secretary-Treasurer. This outstanding group of new officers will bring us successfully into the new millennium. Congratulations to you all.

If anyone is interested in serving on a Committee, or if you have a Committee you're interested in starting,

STATE BAR OF GEORGIA FIDUCIARY LAW SECTION

Zoe M. Hicks
Section Chair

E. Lowry Ried, Jr.
Vice Chair & Chair-elect

D. Jack Sawyer, Jr.
Secretary-Treasurer

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REVISION COMMITTEE
William J. Linkous, Jr., *Chair*
Mary F. Radford, *Reporter*

ETHICAL STANDARDS
COMMITTEE
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LEGISLATION
COMMITTEE
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MINORITIES IN THE
PRACTICE TASK FORCE
Adam R. Gaslowitz, *Chair*

SMALL COUNTIES FIDUCIARY LAWYERS COMMITTEE
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45TH ANNUAL ESTATE
PLANNING INSTITUTE
Faryl S. Moss,
Program Chair

BASIC FIDUCIARY
PRACTICE SEMINAR
John W. Spears, Jr.,
Program Chair

Fiduciary Law Section Newsletter

Nikola R. Djuric, *Editor*

The editor welcomes submissions of news items, notes on recent legal developments, or articles that would be of interest to members of the Section. Please send all material to Nikola R. Djuric, Editor, by mail to Sutherland Asbill & Brennan LLP, 999 Peachtree Street, N.E., Atlanta, Georgia 30309, by fax to (404) 853-8806, or by e-mail to nrdjuric@sablaw.com.

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please let me know, and we will certainly get you involved. My special thanks to all of our Committee and Seminar Chairs, Task Force Chairs, Members of the Guardianship Code Revision Committee, and all Committee members for your outstanding work. We

appreciate Nick Djuric's efforts to get out this newsletter. It's one of the more labor-intensive jobs of the Section. It is because of you all that we have a great Section.

Zoe Hicks

SECTION NOTES

(continued from page 1)

Zoe Hicks gave a summary of Section activities and reported that membership in the Section had increased in 1999 by ten percent to 859 members. Ms. Hicks also read a report by Randy Williams, who chairs a recently appointed committee on small-county fiduciary lawyers.

The Nominating Committee's report was read and the officers nominated for the 2000-01 term were elected by the Section. The new officers, who will begin their terms in June, are Lowry Reid of Page, Scrantom, Sprouse, Tucker & Ford, Columbus, Chair; Jack Sawyer of The Arden Group Inc., Atlanta, Vice Chair and Chair-elect; and John Spears, Lynch, Spears & Shuman, LLC, Atlanta, Secretary-Treasurer.

Jack Sawyer, Secretary-Treasurer, reported that the Section had a current balance of \$51,292 in its treasury.

John Spears reported for Bill Linkous, Chair of the Guardianship Code Revision Committee. The committee has completed its examination of the entire current guardianship code and is now preparing a draft revised code.

Adam Gaslowitz, Chair of the Minorities in the Practice Task Force, reported on some of the reasons behind the low number of

minorities who practice fiduciary law, which is reflected in the membership of the Fiduciary Law Section.

Fiduciary Law Institute

The Fiduciary Law Institute will be held again this year at The King and Prince Hotel on St. Simons Island, from Thursday, July 13, to Saturday, July 15. As usual, the seminars will fulfill a year's worth of MCLE hours. Watch for mailings from the Institute of Continuing Legal Education for details, or contact the program chair, Lowry Reid of Columbus, at (706) 324-0251.

Basic Fiduciary Practice Seminar

The popular Basic Fiduciary Practice Seminar will be held this year on Friday, March 10, at the Marriott Gwinnett Place Hotel, Atlanta. For more information, contact the Institute for Continuing Legal Education at (800) 422-0893 or the program chair, John Spears of Atlanta, at (770) 491-2090. Here is a list of the topics and speakers at this year's seminar:

"Basic Will Formats"

Bertram L. Levy, Arnall Golden & Gregory, LLP, Atlanta

"Estate Tax Issues"

R. Mark Williamson, Alston & Bird LLP, Atlanta

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“Planning with Retirement Assets”

Stephen E. Parker, Lefkoff, Duncan, Grimes & Miller, P.C., Atlanta

“Disability and Long-term Care Planning”

Ira M. Leff, Ira M. Leff & Associates, Atlanta

“Planning with Life Insurance”

J. Warren Ott, Law Office of J. Warren Ott, Atlanta

Panel Discussion: “Ethical Issues in Estate Planning”

Gail Brannock, Smith, Gambrell & Russell, Atlanta, *Judith M. Becker*, Becker & Fortune, Norcross, *Arnold L. Feinstein*, Alston & Bird LLP, Atlanta, *Frank S. McGaughey III*, Powell, Goldstein, Frazer & Murphy LLP, Atlanta

“Everything You Always Wanted to Know About Administering an Estate but Were Afraid to Ask”

Rees M. Sumerford, Gilbert, Harrell, Gilbert, Sumerford & Martin, Brunswick

Legislation Committee

At the mid-year meeting of the Section, Melissa Walker reported on the Legislation Committee’s study of proposals to repeal Georgia’s Rule Against Perpetuities. The committee, which conducted a workshop on the issue at last year’s Fiduciary Law Institute,

has proposed that Georgia adopt the “Ohio model” for repeal of the Rule. Under Ohio’s new law, the traditional Rule is retained, but testators and settlors are permitted to “opt out” of the Rule by specific language in the instrument creating the trust.

The following is the basic provision of Ohio Rev. Code Ann. § 2131.09(B)(1):

(B)(1) No rule of law against perpetuities or suspension of the power of alienation of the title to property, any other existing law against perpetuities, or any law restricting or limiting the duration of trusts shall apply with respect to any interest in real or personal property held in trust if the instrument creating the trust specifically states that the rule against perpetuities . . . shall not apply to the trust and if either the trustee of the trust has unlimited power to sell all trust assets or if one or more persons, one of whom may be the trustee, has the unlimited power to terminate the entire trust.

The Legislation Committee is also studying a possible legislative response to the Supreme Court’s decision in *Linkous v. Candler*, 270 Ga. 284 (1998), on the acceleration of a remainder interest after the renunciation of the preceding life interest.

NOTICES

Office Space Available

The Trust Building
545 North McDonough Street, Decatur

On the square in downtown Decatur. Great location directly across from the DeKalb County courthouse and adjacent to MARTA. SunTrust Bank located on the first floor. Ideal for attorneys specializing in probate practice and estate planning. For more information, contact Bob Stringer at (770) 955-7007.

National Guardianship Association

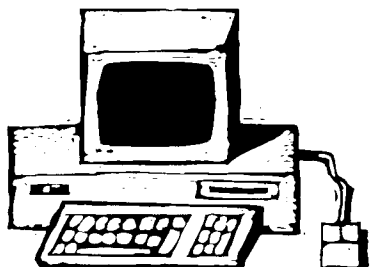
Atlanta attorney Gary D. Zweifel has been elected as a member of the Board of Directors of the National Guardianship Association. Founded in 1988, NGA is comprised of more than 500 individuals in public and private, for-profit and not-for-profit agencies and organizations, as well as concerned individuals. NGA provides its members with education and training, networking opportunities, and the opportunity to set a

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national agenda to ensure standards of excellence for persons serving as guardian.

Senior Citizens Handbook

The seventh edition of the *Senior Citizens Handbook*, revised in December 1999, has now been published. The *Handbook*, which is written by the Elder Law Committee of the Younger Lawyers Division of the State Bar, is a compendium of information on laws and programs affecting senior citizens in Georgia.



News About www.gabar.org

The State Bar of Georgia is proud to announce a new area of the Web site specifically designed for Sections. This new area can be found by going to the State Bar's Home Page and selecting clicking on the "Attorney Information" button on the home page. This new area expands the sections' presence on the Web to include a separate page for each section, a page for section meeting notices, information about joining a section, and notes from Section Liaison, Lesley Smith. In addition, each section has its own Forum on the Discussion Board that can be used to share ideas, discuss important topics, or broadcast messages to other section members. If you have ideas or suggestions concerning new content you would like to see on the site, please contact your section leadership.

Make sure to check out the article about the redesigned State Bar of Georgia Web site in the '99 August issue of the *Georgia Bar Journal*. The article details many of the site's features, and answers questions that newcomers might have.

Please feel free to drop me a line with your comments at caroline@gabar.org.

Enjoy!

Caroline M. Sirmon

Internet Coordinator, State Bar of Georgia

Fiduciary Law Section Newsletter

MEMORANDUM

To: Joe Gerstein, Chairman, Ethical Standards Committee of
the Fiduciary Law Section

From: Subcommittee A (Termination of Lawyer/Client Relationship)

Date: July 9, 1996

The subcommittee reviewed the following standards, rules and commentaries:

Georgia Disciplinary Standards.

Standard 44: A lawyer shall not without just cause to the detriment of his client in effect wilfully abandon or wilfully disregard a legal matter entrusted to him.

ABA Model Rules.

Rule 1.6 (Declining or terminating representation).

Basically this states that a client may discharge the lawyer or the lawyer may withdraw from representing the client. The lawyer may withdraw if withdrawal can be accomplished without material adverse effect on the interest of the client of the client. A lawyer may also withdraw in certain other enumerated cases. Upon termination of representation, the lawyer shall take steps to the extent reasonably practical to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Rule 1.9 (Conflict of interest: former client).

Basically this states that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interest of the former client unless the former client consents after consultation. The rule also prevents a lawyer who has formerly represented a client from using information relating to the representation to the disadvantage of the former client.

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ACTEC Commentaries on Model Rules of Professional Conduct.

There is a commentary on MRPC 1.9. Example L represented H and W jointly in connection with estate planning matters. Subsequently H and W were divorced. Unless W consents, MRPC 1.9 would prevent L from representing H in a matter substantially related to the prior representation in which H's interests are materially adverse to W's, such as an attempt to modify or terminate an irrevocable trust of which W was the beneficiary. Also L could not use on behalf of one of W's creditors information that L obtained regarding W's financial condition or ownership of property.

There is an ATEC commentary on MRPC 1.4 (communication). The following paragraphs (summarized below) are of interest:

Dormant representation. Representation may become dormant, for example, when estate planning documents are signed and related transfers are made. Although the lawyer remains bound to client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished. In the absence of an agreement to the contrary, the lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs, although the lawyer may do so as a service.

Termination of representation. A client whose representation by the lawyer is dormant becomes a former client if the lawyer or the client terminates the representation. For example, the lawyer may notify the client by letter that the relationship is terminated or the client may inform the lawyer that another lawyer has undertaken to represent the client in trust or estate matters or the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

The subcommittee believes that it would be helpful to have a consensus on the committee and ultimately in the section to the following effect:

In the absence of an agreement to the contrary, the lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs, although the lawyer may do so as a service.

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M E M O R A N D U M

TO: Joe Gerstein, Chairman
Ethical Standards Committee of the Fiduciary Law Section

FROM: Subcommittee B on Joint Representation of Nonadversarial
Clients

DATE: January 1, 1998

The Subcommittee has reviewed the following standards, rules, and commentaries:

State Bar of Georgia, "Ethics and Discipline" (Canons of Ethics, Discipline, Standards of Conduct, and Advisory Opinions).

"ACTEC Commentaries on the Model Rules of Professional Conduct" (ABA Real Property Probate and Trust Journal, Vol. 28, No. 4 (Winter 1994)).

Hazard: "Conflict of Interest in Estate Planning for Husband and Wife" (ACTEC 1994).

Pennell: "Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counselling" (1991 Institute on Estate Planning, (Matthew Bender, 1991), Chapter 18.)

Recommendations: The Subcommittee recommends as follows:

An attorney's representation of spouses who consult with an attorney for advice respecting, and/or for the preparation of documents in furtherance of, a common estate plan shall be deemed to be "joint representation." (Note: The term "attorney" as used herein shall include members of the same law firm.)

All confidences expressed to the attorney by either spouse in a joint representation shall be presumed to be capable of being shared with the other spouse unless, in the considered judgment of the attorney, the confidence is deemed to be trivial or else irrelevant to the common estate plan. (As an example, if the husband were to confide that he once had a casual affair, that confidence would ordinarily not require the attorney to divulge the confidence to the other spouse. But if that affair produced a child unknown to his spouse, the confidence would have to be discussed with her because of a potential claim.)

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TO: Joe Gerstein, Chairman
Ethical Standards Committee of the Fiduciary Law Section
PAGE: - 2 -
DATE: September 29, 1997

The attorney should make every effort to persuade the confiding spouse to divulge the confidence to the other spouse. If, despite the attorney's contrary urgings, the confiding spouse demands that the confidence not be so divulged, the attorney may elect to divulge a confidence to the other spouse or to withdraw from representing both spouses with respect to their estate plan.

Although not to be encouraged, the only circumstance under which an attorney may represent both spouses in estate-planning work and not be required to divulge a confidence of one to the other is where the spouses, after due explanation by the attorney, shall have mutually waived the right to receive any information regarding the estate plan of each other. However, even under that circumstance the attorney must withdraw and refrain from drafting any estate-planning document or otherwise from representing both clients with respect to their estate plans if the attorney has received pertinent and material information from either of them that, in the attorney's considered judgment, is actually or potentially adverse to the interests of the other spouse.

The principles above stated in regard to spouses may, if the circumstances warrant, apply as well to the representation of certain other related parties who employ an attorney to prepare a family's common estate plan. For this purpose, a family's common estate plan is one that involves planning and/or the preparation of documents that arise from and rest upon a comprehensive and consistent design for the devolution of assets of closely related family members (e.g., where a widow or widower and that person's only child consult with an attorney with respect to their integrated estate planning). However, although joint representation is normally presumed with respect to spouses who engage the same attorney for that service, no such presumption arises as to non-spouses (even though close relatives) in the absence of adequate evidence that the attorney so identified the services in question, explained in advance the consequences of such representation, and secured the acquiescence of both clients.

JRF/jsb

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Fiduciary Law Section Newsletter

M E M O R A N D U M

TO: Joe Gerstein, Chairman
Ethical Standards Committee of the Fiduciary Law Section

FROM: Subcommittee C on Scope of Representation (Who does the attorney represent - fiduciary? beneficiaries? estate?)

DATE: July 15, 1999

The Subcommittee has reviewed the decisional law of Georgia and the following standards, rules and commentaries:

State Bar of Georgia, "Ethics and Discipline" (Canons of Ethics and Standards of Conduct)

Link, "Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct," 26 R. PROP. PROB AND TRUST J. 1 (Spring, 1991)

ACTEC Foundation, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT, 2d ed., adopted March, 1995.

The Law in Georgia

No Georgia Court has ever directly addressed this question. However, the few cases in which any mention of the issue occurs evidence an apparent assumption that the attorney represents "the estate." Examples include the following:

1. Ringer v. Lockhart, 240 Ga. 82 (82) (1977). Case involved efforts by son (beneficiary under father's Will) to set aside year's support award to widow on basis of fraud. Lower court(s) had granted summary judgment for widow, and Supreme Court reversed. In finding that there was a genuine issue of material fact with respect to fraud, the Court commented (in a footnote) that the executrix and years support applicant were the same, and were represented by the same attorney. That footnote ends with the rhetorical question: "Whose interest was represented, the widow's or the estate's?" 240 Ga. at 352, fn. 1.) [Emphasis supplied.]

2. Womble v. Womble, 228 Ga. 10 (1971) Holds that the attorney "who is paid to represent the estate" cannot (with the consent of the administratrix) sue the estate for money judgments for the administratrix (and others) personally. [Emphasis supplied.] Attorney was disqualified.

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Report of Subcommittee C on Scope of Representation
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3. Ansley v. Sunbelt Investments Realty, Inc. 176 Ga. App. 693 (1985) In a case basically dealing with title to an automobile, the Court notes in footnote one that original counsel had withdrawn upon a finding that there was a conflict of interest in representing both the corporate appellees and the estate of an interested party.

4. Ray v. Beneventi, 229 Ga. 209 (1972) In suit against executrix both individually and as executrix for mismanagement and wrongful conversion of assets, it was held that both the executrix and her attorneys were disqualified from representing the interests of the estate in the litigation.

The problem with this view is that the estate is not in and of itself a legal entity. This fact has been expressly recognized by the Georgia courts. See Voyager Life Insurance Co. v. Estate of Frank G. Bagley, 165 Ga. App. 12 (1983), dismissing suit because brought by party not a legal entity, rev'd sub nom Block v. Voyager Life Insurance Co., 251 Ga. 162 (1983), allowing amendment to substitute personal representative, who had always prosecuted the action, as plaintiff. If there never was a personal representative, such a substitution cannot be made, and "the estate," as such, cannot be sued. Estate of Albert Norton v. Hinds, 182 Ga. App. 35 (1987).

The Nature of the Problem

In order to correctly apply and follow the Code of Professional Responsibility, an attorney must know the identity of his or her client. To whom does the attorney owe a duty of loyalty? Whose communications must he keep confidential, and from whom? The general authorities discuss three possible "clients" in the estate context: (1) the personal representative, (2) the "estate" itself, and (3) the beneficiaries or heirs at law.

Cases in other jurisdictions which have addressed this question go all across the map. For example:

1. Goldberg v Frye, 266 Cal. Reptr. 483 (Cal. App. 1990), holding the attorney represents the personal representative, not the estate.

2. Elam v. Hyatt Legal Services, 541 No.E.2d 616 (Ohio, 1989), allowing a beneficiary with best interest in estate to sue the executor's attorney for malpractice.

3. Copenhaver v. Rogers, 384 S.E.2d 593 (Va., 1989), intended beneficiaries do not have claim against the attorney.

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Report of Subcommittee C on Scope of Representation
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There are potential problems with each approach. Some of the questions which could arise include:

1. If the attorney represents the beneficiaries, DR 5-105 requires "full disclosure" of possible effects of representation on his exercise of professional judgment on behalf of each. Informed consent to this multiple representation may be difficult if not impossible in light of some of the complex tax elections which must be made. If the beneficiaries are the clients, must the attorney share all correspondence with all of them? What if the fiduciary acknowledges to the attorney that he has done something improper, and is taking steps to rectify the situation? Would the attorney then be forced to tell all the beneficiaries?

2. If the entity approach is adopted, there is the problem discussed above that an estate, unlike a corporation, is NOT a legal entity. Further, most of the ethical rules dealing with entity representation deal with corporate/business entities, and assume a common business purpose that transcends the individual interests. That is not the case in the estate context, where each beneficiary has his or her own separate interest. One authority suggests that if beneficiaries are considered as a group with potential adverse interests, the attorney's role becomes that of an "intermediary." This role is addressed in the Model Rules; the closest equivalent in the Code appears to be that of "mediator." How does that work when there is no overt conflict between the beneficiaries?

3. The prevailing general view appears to be that the attorney represents the fiduciary, in his or her fiduciary capacity only. The traditional view appears to be that advising the fiduciary how to perform his or her duties is in the best interest of "the estate."

Conclusion and Recommendation

There is no clear authority under existing Georgia law concerning the identity of the client(s) in the estate context, and no consensus in the laws of other jurisdiction. The ethical rules, which do not apply precisely to the estate context in any event, are even more difficult to apply when the attorney cannot clearly identify his or her client. An Advisory Opinion should be sought clarifying the identity of the client. The simplest approach, and the one which appears to be in line with the majority, would be to make it clear that the client is the fiduciary, in his or her representative capacity.