A. Introduction

1. A lawyer representing a trustee will often find herself dealing with the trust’s beneficiaries—many of whom (rightly or wrongly) may regard the trustee’s lawyer as their own. Although in many cases this confusion will not have any adverse consequences, there is always risk that a conflict may develop between the trustee and beneficiaries. In an instant, questions of confidentiality, identity of the client, fees, duty to withdraw, and even malpractice may loom ominously.

2. A related set of issues arises when the lawyer is jointly representing co-trustees of a trust. This outline provides some practical guidance to minimize these risks, both at the planning stage and during administration.

B. Representing the Trustee

1. Who is the client? The first issue after being retained by a trustee is to determine precisely whom the attorney represents. This seemingly simple question is extremely complex, and the answer differs from state to state (and even occasionally within a jurisdiction). See generally Rust E. Reid, et al., Privilege and Confidentiality Issues When A Lawyer Represents a Fiduciary, 30 Real Prop. Prob. & Tr. J. 541 (1996). Identifying the client is key to understanding to whom, and in what circumstances, the attorney owes his or her duties of loyalty, confidentiality, and competence. (A summary of
these duties is contained in sections D-G of this outline.)

a. The majority view, as stated by the ABA Formal Opinion 94-380, is that the trustee is the sole client of the lawyer. See, e.g., Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994); Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996). Under this view, the trustee’s fiduciary obligations to the beneficiaries do not create an attorney-client relationship between the trustee’s attorney and the trust’s beneficiaries. However, even though the attorney does not have a fiduciary relationship with the beneficiaries, most jurisdictions hold that the lawyer has certain duties to the beneficiaries. Some duties apply uniformly, including the duty not to participate in breaches of trust with the fiduciary and the duty not to permit the beneficiaries to believe that the lawyer is representing them as well as the trustee. Jurisdictions vary, however, on an attorney’s duty to the beneficiaries when the trustee has breached (or is accused of breaching) its duty to the beneficiaries.

i. In jurisdictions following the majority rule, the attorney should nevertheless explain his duties and responsibilities to the beneficiaries in an engagement letter, a sample of which is included in Appendix B.

ii. The attorney should also consider whether a similar letter should be sent to the beneficiaries explaining the limitations on his responsibility toward them. In many instances such a letter will not be practical or warranted, but on occasion might be well advised. See the appendices for three sample letters.

b. The minority view is that the trust is the client, and the trust beneficiaries are derivative clients.

i. The minority view holds that a lawyer retained by a trustee for purposes of trust administration actually represents the trust and its beneficiaries. See, e.g., Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976); Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984); Comegys v. Glassell, 839 F. Supp. 447, 448-49 (E.D. Tex. 1993). In these jurisdictions, the attorney’s ultimate duty of loyalty and confidentiality run to the beneficiaries and not to the trustee. Thus, for example, if a dispute should develop between the trustee and a beneficiary, the attorney-client privilege will not prevent disclosure to the beneficiary of “privileged” communications between the trustee and the attorney. Zimmer, 355 A.2d at 714.

ii. In jurisdictions following the minority rule, the engagement letter should clearly spell out the limits of the attorney’s duty to the trustees. A sample is included in Appendix A.

2. Duty to Nonclient Beneficiaries.

a. Article 4 of the Model Rules contains standards for attorney conduct with nonclients, including, of course, beneficiaries. These include requirements that the attorney shall not make knowingly false statements, Rule 4.1, and that the attorney shall not permit nonclients to believe that the lawyer is representing them, Rule 4.3. ABA Formal Op. 94-380 deals with the question of whether, under the Model Rules, the fact
that a nonclient is a beneficiary to whom a client trustee owes a fiduciary duty affects the attorney’s obligations. The opinion concludes that “[t]he fact that the fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer’s obligations to the fiduciary client under the Model Rules, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties. Specifically, the lawyer’s obligation to preserve the client’s confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.” Thus, the lawyer for a trustee may not disclose breaches of duty by the trustee in any circumstances (unless the breach involves a serious threat of serious injury).

b. This approach is not followed in all jurisdictions. Whether by statute, ethics opinion or case law, in many states attorneys’ obligations to their clients’ beneficiaries are more stringent than to other nonclients.

i. In Massachusetts, a lawyer was permitted to disclose, to the beneficiaries or to the court, that the trustee has misappropriated trust property and intended to file false tax returns. See Mass. State Bar Ass’n, Op. 94-3 (1994).

ii. Rule 1.6(c) of the Washington Rules of Professional Conduct permits an attorney for a fiduciary to disclose a breach of the client’s fiduciary responsibility to a tribunal.

iii. In several jurisdictions, the attorney is considered to owe a fiduciary duty to the beneficiaries, even though there is no attorney-client relationship with the beneficiaries. Thus, in Washington state, the Supreme Court concluded that the attorneys breached their fiduciary duty to the beneficiaries by failing to seek an appropriate rate of return for an investment and for charging for excessive amounts of time spent in investing the estate’s assets. See In re Estate of Larson, 694 P.2d 1051 (Wash. 1985). Similarly, in Florida, the court refused to disqualify the attorney retained by an estate’s personal representative who had taken a position adverse to the estate’s beneficiaries. The court found that the attorney owed a fiduciary duty to the beneficiaries, but that there was no attorney-client relationship. See In re Estate of Gory, 570 So. 2d 1381 (Fla. Dist. Ct. App. 1990). See also In re Estate of Halas, 512 N.E.2d 1244 (Ill. 1988) (executor’s attorney breached derivative and independent fiduciary duty to beneficiaries); Charleson v. Hardesty, 839 P.2d 1303 (Nev. 1992) (trustee for attorney owes duty of care and fiduciary duty to beneficiaries).

iv. In Hoopes v. Carota, 531 N.Y.S.2d 407 (N.Y. App. Div. 1988), aff’d 544 543 N.E.2d 73 (N.Y. 1989), the court concluded that, even if there was an attorney-client relationship between the trustee’s attorney and the trust’s beneficiaries, there was sufficient cause to overcome the claimed privilege. The New York Ethics Committee considered separately the attorney’s obligation in the face of a proposed fiduciary lapse and an actual one. In the former case, the Committee concluded that the attorney’s obligation is to counsel the fiduciary to act in the best interests of the estate, and if the advice is not followed, the attorney may withdraw. In case of an actual breach, the attorney should attempt to persuade the fiduciary to rectify the misdeed. If that attempt is unavailing, the attorney should only disclose the breach if such disclosure would not run
afoul of attorney-client privilege. The Committee considered the scope of the privilege to be outside its jurisdiction. *N.Y. State Bar Ass’n Op.* 649 (1993).

v. *The Law Governing Lawyers* §51(4) provides that a lawyer owes a duty of care to a nonclient as follows: (1) The lawyer’s client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient; (2) The lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting in the breach; (3) The nonclient is not reasonably able to protect its rights; and (4) Such a duty would not significantly impair the performance of the lawyer’s obligations to the client.

3. Joint fiduciaries.

a. For trusts with co-fiduciaries, it is common for one attorney to be retained to represent all fiduciaries jointly. It is usually anticipated that co-fiduciaries will confer with each other during the administration of the estate or trust. In fact, each fiduciary owes a duty to the estate or trust and its underlying beneficiaries to supervise the administration process and keep informed. Section 184 of the *Restatement (Second) of Trusts* (American Law Institute 1959) states that “[i]f there are several trustees, each trustee is under a duty to the beneficiary to participate in the administration of the trust….” What that means is another matter, and safely managing active, passive and delegated co-management calls for clear definition at the outset.

b. Co-fiduciaries and their attorneys should recognize the potential ethical concerns of a conflict of interest when there is a joint representation of co-fiduciaries. However, absent circumstances to the contrary, joint representation of co-fiduciaries does not present an inherent conflict of interest. See *In re Flasterstein’s Estate*, 210 N.Y.S.2d 307 (N.Y. Surr. Ct. 1960) (no inherent conflict of interest where attorney represented co-fiduciaries who were also residuary legatees); *ACTEC Commentaries* at 176.

c. In many ways, joint representation of co-trustees is no different from representing a husband and wife jointly for estate planning: in both cases, all clients must be informed of the advantages and the limitations of a joint representation. A statement of the advantages and disadvantages of the joint representation arrangement should be included in the engagement letter to the joint fiduciaries, for example:

If both trustees choose to retain us, our representation of you would be “joint”; that is, we would treat you both as a single client. This provides obvious efficiencies and cost savings. The possibility always exists in a joint representation, however, for conflicts of interest, although there is no reason to expect any such conflict to arise in this case.

If you agree to a joint representation, there can be no confidences among the trustees regarding trust matters. Information shared by one trustee with respect to trust matters will be shared with the other trustee. If a dispute were to develop among you, we would not be able to advocate one position over the other, but could only assist with