WALKING THE PLANK WITHOUT FALLING IN THE MUCK: 
Ethical, Malpractice, and Practical Issues  
In Representing Trustees 

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I. INTRODUCTION

A. In General

Attorneys who represent trustees face a gamut of ethical, malpractice, and practical issues. The tangled kitten’s yarn of issues arises because trustees are a peculiar kind of client: they are fiduciaries, subject to a host of duties toward beneficiaries. In addition to fulfilling the professional duties that the attorney has to the trustee-client, the attorney also must be well versed in the duties that the trustee has to the beneficiaries in order to be able to advise the trustee-client.

Adding to the challenge of representing trustees is that the trustees are subject to the highest standard of conduct:

“Many forms of conduct permissible in a workaday world for those acting at arm’s length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd.” (Cardozo, J.) Meinhard v. Salmon 249 NY 458, 164 NE 545 (1928).

This high standard of behavior for the trustee-client may spill over to the attorney. This “spill-over” may create a duty to a non-client in addition to those to the trustee-client for the attorney.

Representing trustees differs from representing other fiduciaries, such as corporate directors or partners. Representing business parties usually allows the attorney to identify the client more efficiently. That is, the attorney usually represents the directors or the corporation or the shareholders (or the partnership, the general partner, or the limited partners). In trust administration, it is easier to blur the line between the parties because they are often related and because the same individual may hold several roles: trustee, beneficiary, shareholder or partner in a family business entity.
Also adding to the complexity of representing trustees is the fact that more than one person may occupy the role of trustee, either concurrently as co-trustees, or consecutively as successor trustees.

Issues facing the attorney representing the trustee-client include:

- Knowing the ethical and fiduciary duties of the attorney, such as the duties of loyalty (duty to avoid conflict of interest), confidentiality, competence, and communication;
- Providing full disclosure and obtaining proper informed consents regarding representation;
- Determining the existence of the attorney-client privilege and protecting it as necessary;
- Counseling the trustee-client regarding the trustee’s duties and responsibilities;
- Practicing “preventively” to avoid trust litigation;
- Practicing defensively to avoid malpractice claims from both clients and non-clients; and
- Being paid.

B. The Relationship Between Ethical, Malpractice and Practical Issues

Often, the ethical, malpractice, and practical issues are not discrete issues that can be parsed out but are more like interwoven threads in the cloth of representing trustees. At each stage of representation, the attorney’s conduct and counsel is shaped by all three concerns.

1. Ethical and Fiduciary Duties of Attorneys

The attorney is a fiduciary and agent of the client. Accordingly, the attorney is subject to the general laws that apply to agents,¹ as well as the ethical rules and fiduciary duties applicable to attorneys in their relationship with clients.

The ethical and fiduciary duties to the client include the following:

- Duty of loyalty
- Duty to avoid conflicts of interest
- Duty of confidentiality

¹ California Civil Code § 2296 et seq. (Law of Agency). All code sections cited in this outline are California statutes, unless otherwise noted specifically.
The ethical standards applicable to attorneys are found in the local rules of professional conduct (e.g. California’s Rules of Professional Conduct (“CRPC”). The fiduciary duties to clients applicable to attorneys are also addressed in the State Bar Act. California Business & Professions (“B&P”) Code § 6000 et seq. The general principles in statutes and case law regarding fiduciary relationships also apply to attorneys. **David Welch Co. v. Erskine & Tulley** (1988, 1st Dist.) 203 Cal. App. 3d 884 [250 Cal. Rptr. 339] (Although This case has been criticized on this point); **Alkow v. State Bar of California** (1971) 3 Cal.3d 924 [92 Cal. Rptr. 278].

“It is well established that an attorney's duties to his client are governed by the [CRPC] rules. (Citations omitted) Those rules, together with statutes and general principles relating to other fiduciary relationships, all help define the duty component of the fiduciary duty which an attorney owes to his client. (Citations omitted).” **Mirabito v. Liccardo** (1992) 4 Cal. App. 4th 41, 46 [5 Cal. Rptr. 2d 571, 573].

“The relation between the attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity – *uberrima fides*.” **Cox v. Delmas** (1893) 99 Cal. 104, 123, 33 P. 836.

“No attorney should be a paragon of candor, fairness, honor, and fidelity in all his dealings with those who place their trust in his ability and integrity, and he will at all times and under all circumstances be held to the full measure of what he ought to be.” **Sanguinetti v. Rosser** (1906) 12 Cal. App. 623, 107 P 560.

“The duty of loyalty forbids any act that would interfere with the dedication of a lawyer’s entire energies to the client’s interests.” **Flatt v. Superior Court** (1994) 9 Cal. 4th 275, 289.

The fiduciary duty to a client includes the duty to represent the client with undivided loyalty. **Cal Pak Delivery, Inc. v. United Parcel Service, Inc.** (1997), 52 Cal. App. 4th 1; **Zador Corp. v. Kwan** (1995) 31 Cal. App. 4th 1285

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2 See CRPC Rule 3-110 Failing to Act Competently. This duty of competence means an attorney must use the diligence, learning and skill, and abilities reasonably required to perform the legal service; Rule 3-400 Limiting Liability to Client; See also ABA MRPC Rule 1.1, Rule 1.3 (in Appendix B of outline); See **Matter of Riley**, (Review Dept. 1994), 3 Cal. State Bar Ct. Rptr. 91; **In the Matter of Nunez** (Review Dept.1992) 2 Cal. State Bar Ct.Rptr. 196, 200; **In the Matter of Bouyer** (Review Dept.1991) 1 Cal. State Bar Ct.Rptr. 404, 415.

3 B&P Code section 6068(m); Rules Prof. Conduct, (CRPR) rule 3-500; See also ABA Model Rules Prof. Conduct (MRPC) Rule 1.4 (in Appendix B of outline); See **Matter of Nunez** (Review Dept.1992) 2 Cal. State Bar Ct. Rptr. 196, 200.

4 California Rules of Professional Conduct are State Bar rules adopted by the Board of Governors of the State Bar of California and approved by the California Supreme Court pursuant to B&P Code §§ 6076 and 6066.