

MSBA Probate & Trust Law Section Newsletter

A Publication of the Minnesota State Bar Association Probate & Trust Law Section

In This Issue

A Uniform Act to Consider <i>John Simshauser</i>	5
Technology: Tools for the Mobile Lawyer <i>Richard Bunin & Derrick Doerr</i>	7
Top Five “Take-Aways” From Judge Quam’s Reflections On His First Thirty Days <i>Crystal Patterson</i>	9
Tips on Best Practices for Fiduciary Due Diligence <i>Margaret A. Reisdorf, J.D., LL.M.</i>	11
The Fiduciary Exception: When the Attorney-Client Privilege Is Not Yours <i>W.T. Roberts III (Trey) and David A. Snieg</i>	14
Probate & Trust Section Council Members	19

Editors:

Catherine Clifford- clif3256@stthomas.edu

Chad Bigalke- chad.bigalke@securian.com

If you have any questions about the publication or would like to submit an article for a future issue, please contact Catherine Clifford or Chad Bigalke.

MSBA



www.mnbar.org

Wills for Heroes

Congratulations and great job volunteers!!! After only three years, the Wills for Heroes Program and its volunteers have provided over 3,000 first responders and their spouses/partners with Wills, Health Care Directives, and Powers of Attorney. With events now booked every Monday night through 2013 (!), MN Wills for Heroes will continue to help those who, everyday, make it their profession to keep Minnesota and its citizens safe.

If you are interested in becoming a volunteer attorney or volunteer data entry personnel, please visit the program website at <http://www2.mnbar.org/willsforheroes/index.asp>, contact Susan Link at susan.link@maslon.com or Andrea Bischoff at andrea.bischoff@maslon.com, or you can call the Wills for Heroes number at 612-672-3493.

Litigation Committee

Alan Silver and Bridget Logstrom Koci are co-chairs of the Litigation Committee. In addition to sponsoring one or more presentations each year on trust and estate litigation topics, Al and Bridget would like to expand the membership of the Litigation Committee. Their goal is for the Litigation Committee to become more of a working committee in order to provide assistance and advice to other Probate and Trust Law Section committees, including the Legislation Committee. If you are interested in becoming a Litigation Committee member, please contact Ashley Hacker at the MSBA (ahacker@statebar.gen.mn.us).

In addition, if you have any noteworthy trust and estate litigation matters that you feel would be helpful to highlight in future

newsletters, please contact either co-chair.

Alan Silver

alans@bassford.com

Bridget Logstrom Koci

logstrom.koci.bridget@dorsey.com

Tips and Traps

- To avoid conversion software hackers, a document sent via email should be scanned rather than converted into a pdf.
- If you have clients who will be away from home for an extended period of time (such as a vacation) and will be leaving minor children behind with family members or friends, your clients may want to consider executing a parental power of attorney. Under Minn. Stat. § 524.5-211, the parents of a minor child may delegate powers regarding care, custody, or property of the minor to another, subject to limitations pertaining to marriage and adoption. The appointment is immediately effective upon execution and is valid for no more than one year.

Gene Daly Award

The Gene Daly Award is periodically awarded to Section members who have made a strong and positive impact on the estate planning practice in Minnesota.

If you would like to nominate someone for the award, please contact Andrea Breckner at (612) 455-1002 or abreckner@olsonbreckner.com.

Greater Minnesota Study Group

The Greater Minnesota Study Group meets by phone once each month to discuss estate planning, trust and estate topics of interest to the members. The members are lawyers from outstate communities. Usually five to eight members of the Probate and Trust Law Section participate in the calls. Bradley Hanson, of the Quinlivan firm in St. Cloud, sets up the monthly call and leads the discussion. This study group provides both the opportunity for mentoring as well as the challenge of analyzing complex legal issues.

JoEllen Doebbert

joellen@doebbertlaw.com

Legislative Update

The Section's Legislation has been signed by the Governor. The text of the legislation was recorded as Session Law 334, S.F. No. 2427. The details of the Bill will be covered in the Legislative Update Session at the Probate and Trust Conference on Monday, June 7. The Bill includes changes to the Uniform Principal and Income Act, the Uniform Probate Code, new conservatorship provisions, a construction statute for documents that reference the temporarily repealed sections of the Internal Revenue Code, technical changes to the Minnesota estate tax statute, and a Minnesota QTIP provision for estates that are not required to file a federal estate tax return. To keep the Legislation revenue neutral, the Department of Revenue drafted the QTIP provision so that a decedent's taxable estate could be reduced to no less than \$3.5 million.

The Legislative Update will also include legislation of interest to our Section proposed by the real property, business law, and tax law sections, and technical changes to last year's guardianship/conservatorship legislation. Additional final legislation of interest to our members will be covered.

For the 2011 Legislative Session, our committee will be reviewing the (1) Uniform Multiple Persons Accounts Act, (2) Uniform Transfer of Real Estate at Death Act, (3) Uniform Power of Attorney Act, (4) Uniform Probate Code, (5) Uniform Disposition of Community Property Rights at Death Act, and (6) Uniform Principal and Income Act. We also will have task forces reviewing the law governing the descent of cemetery lots, and issues that have been raised regarding health care directives.

36th Annual Probate and Trust Law Section Conference

<http://www.minncle.org/SeminarDetail.aspx?ID=105111001>

June 7 & 8, 2010

Probate & Trust Annual Meeting: June 8, 2010, 8:00 a.m.

St. Paul RiverCenter

Cost: \$495 MSBA members / \$495 paralegals / \$595 standard rate

10.5 standard CLE credits. Additionally, Minnesota CLE has applied for **2.0 elimination of bias credits for the Bonus Session** on Day 2.

New This Year – Free Bonus Session!

A 2-hour Elimination of Bias session is offered on the afternoon of day 2, free to all Probate & Trust Conference attendees. In order to ensure a lunch, please let us know if you plan on attending this session. If you register by phone, please let us know if you plan to attend this session. If registering online, please indicate by email at registrar@minncle.org whether or not you will be attending this bonus session.

Featuring:

Eugene F. Maloney

Fiduciary Duties and Regulatory Update

Professor Jeffrey N. Pennell

Federal Developments

Changing Demographics

Conrad Teitell

Fearless Public Speaking

Charitable Life-Income Planning

Professor Linda S. Whitton

Uniform Power of Attorney Act

Powers of Attorney – Empowerment or Exploitation

Sessions include: All-new state and federal law, fiduciary standards, Section 2053 regulations, new IRS procedures, new income tax developments, Roth-IRA conversions, modifying irrevocable trusts, trust administration issues, working with multiple advisors, choosing corporate trustees, incentive/disincentive trust provisions, exiting the FLP, planning for disabled beneficiaries, forensic accounting, cross-border planning and preventing crimes against the elderly.

A Uniform Act to Consider

John Simshauser

INTRODUCTION

During the 2010 legislative session Minnesota is once again “considering” the adoption of the Uniform Power of Attorney Act (UPOAA)(H.F. 1228, S.F. 0369). Controversy surrounds the UPOAA in Minnesota, which explains the lack of movement through the committee process. What are the differences and what would be the effect of Minnesota adopting the UPOAA? The differences are readily identifiable; their effects are not easily quantifiable.

THE RISE OF THE UNIFORM POWER OF ATTORNEY ACT

The Uniform Power of Attorney Act (UPOAA) was promulgated in 2006, is currently the law in five states, and is being considered for adoption in five others. The UPOAA is the result of national concern over the divergence of uniformity between state power of attorney (POA) statutes. The first uniform power of attorney act was promulgated in 1979 but by 2002 only thirteen (13) of the original forty-five (45) adopting jurisdictions continued to be completely faithful to its provisions.

With such deviation the environment was favorable for a new uniform act. In 2002 the Uniform Law Commissioners surveyed 371 interested parties from 44 jurisdictions to ascertain the prevailing views of legal, banking and governmental entities involved with the daily use of powers of attorney. The

results showed a 70% consensus on many of the subject areas not addressed in the previous uniform act. One overarching theme was clear and it became the goal of the UPOAA. Powers of Attorney should seek to, “preserve a principal’s freedom to choose both the extent and scope of the agent’s authority while safeguarding an incapacitated principal from abuse and exploitation.” As demonstrated below, controversy concerning the UPOAA does not stem from radical provisions but from differences of opinion about how to balance the previously mentioned inherently competing objectives.

SIMILARITIES AND DIFFERENCES

The UPOAA possesses many identical or substantially similar concepts when compared with Minnesota’s POA statute. Identical areas include; the automatic revocation of a spouse’s designation of Attorney-in-fact (AIF) upon the commencement of proceeding to dissolve or annul a marriage to the principal, the appointment of co-agents, and the circumstances where an AIF must disclose information about actions taken to a third party or court.

Minnesota’s POA statute and the UPOAA also include many substantially similar, although not identical, treatments of specific policy issues. These provisions provide; guidance as to how and whether co-agents may act jointly or independently, clarity as to mandatory and default duties of agents, a

definition of liability imposed on agents who violate the AIF duty, a list of the circumstances under which a third party may legitimately refuse to accept a POA, sanctions for unlawful refusals, and the general and specific powers that are electable by the principal at the time of execution.

In spite of these similarities there are significant differences between Minnesota's current POA statute and the UPOAA that will warrant extensive discussion. Core differences are in the areas of;

- (1) ***Fiduciary standards of care*** - the UPOAA uses a substituted judgment standard whereas Minnesota predominantly uses a common negligence standard.
- (2) ***Springing powers*** - the UPOAA supports springing powers statutorily in the short form whereas Minnesota currently supports springing powers only via common law POA.
- (3) ***Gifts and general power of appointments to an attorney-in-fact*** – the UPOAA removes restrictions on gifting powers to an AIF if that person is an ancestor, spouse, or descendant of the principal, and the principal grants the AIF gifting authority. Current Minnesota law limits such gifts to \$10,000.
- (4) ***Estate planning*** - both the UPOAA and Minnesota statute grant an AIF the ability to represent the principal in matters regarding trust administration, a probate estate, guardianship, conservatorship, escrow, custodianship, or qualified benefit plan. The UPOAA however goes a step further and at the specific direction of the principal allows the AIF to alter inter vivos trusts, rights of survivorship, beneficiary designations, and other significant rights.
- (5) ***Durable as the Default*** - a POA drafted under Minnesota law is not durable unless specifically elected by the principal. The

UPOAA reverses this assumption in favor of durability.

- (6) ***Acceptance of a non-original or non-certified copy*** – under the UPOAA a photocopy or electronic copy of a POA has the same authority as an original or certified copy. Currently in Minnesota, only an original or certified copy of a POA are valid proofs of an AIF's power.
- (7) and others.

Many practitioners agree that Minnesota's POA statute is due for an update. The UPOAA provides, at minimal, a foundation for this discussion. On the other hand, UPOAA proponents argue that it is a well-researched, timely compromise to the tension between low-cost, flexible, and private form of surrogate decision-making and the protection of an incapacitated principal from financial abuse.

John Simshauser, JD: is a solo practitioner in Estate Planning, Elder Law, Social Security Disability and Real Estate Law in Brooklyn Park, MN.

Technology: Tools For the Mobile Lawyer

Richard Bunin and Derrick Doerr

One of the benefits of technology has been to free lawyers from their desks and offices. The chains that have bound us to our desktop computers and telephones have been broken by the rapid development of laptop computers and cellular phones. While there are many gadgets that can enhance our entertainment and leisure time, there are others that can be useful tools for the busy lawyer who is on the go, attending meetings or visiting with clients at their homes, nursing homes or hospitals.

Smart Phones

Smart Phones have given us the portable office that we can carry in our pocket, purse or briefcase. A variety of Smart Phones are available with plans offered by all of the major carriers. The iPhone broke new ground and is still very popular, but other options are available. A key difference is the operating system used by each phone. In addition to Apple's iPhone operating system (which is also used on the new iPad), Google offers its Android operating system and Blackberry offers its own operating system. These have truly become mini computers and their functionality is far beyond the cellular phones of just a few years ago that could store music and take photographs. The Smart Phones can do all of that and so much more.

The software that has been developed for these phones are called "Apps". Apps are written for the specific operating system used on each phone. You cannot currently use Apple Apps for Android phones and vice versa. The good news is that many of these

Apps are free or sold at a small cost. Currently Apple offers the largest number of Apps, but those available for other operating systems are growing quickly. The question then is what do these phones offer that would tempt you to trade in your current trusted cell phone for a Smart Phone?

Although many cellular phones today allow you to check your emails, the Smart Phones also give you full internet access. You will see websites the same way that you see them on your computer. Of course, you will need to pay a monthly fee to your carrier for internet access, but the charges are relatively nominal (they do vary from carrier to carrier). With unlimited internet access you can do all the surfing that you wish, and your main limitation is the length of your battery charge. Since you will be using your phone for many things beyond phone calls, you may want to purchase a car charger in addition to the charger that comes with the phone. Another issue that you may want to consider as you evaluate phones is the keyboard. Touch screen phones have virtual keyboards which appear on the face of your phone. A light touch is usually desirable or you may find yourself touching one character multiple times. Other phones have actual keyboards with buttons you can feel and press more vigorously. Some phones have both touch screens with virtual keyboards and actual keyboards. You should try both to see which you feel better suits you.

Perhaps one of the nicest features of most Smart Phones is that they are GPS enabled.

This means that your phone knows where you are. Most have software that allows you to obtain turn by turn voice guided directions to your selected destination. You may not even need a separate GPS device. The other advantage of being GPS enabled is that you can locate the nearest restaurant, hospital, or a specific business or type of business. If you want to locate the nearest Kinkos, you can locate it based upon your current location. You can then call for information or to determine hours of operation and obtain voice guided directions from your current location.

Portable Scanners

Scanners have given us the opportunity to streamline our organization and storage of documents. By converting documents into electronic form, we can easily create our virtual file cabinets and eliminate some of our physical file cabinets. Although the need for some original documents continues, particularly in areas of law such as estate planning and real estate, many documents need only be retained in electronic form. With so much communication by email, we can all appreciate the time and postage saved when we scan documents, convert them to PDF format, and attach them to emails.

There are many scanning options, including smaller, lightweight scanners for the mobile lawyer. Popular brands include Fujitsu, Kodak, Xerox, Pentax, Scanshell, Visioneer, and Plustek. The smaller more compact models are not designed for heavy usage so you should not depend on these if you need to scan a lot of documents. However, for a meeting with a client outside of your office, you can certainly use these for a variety of sized documents, from business cards up to legal size. Most may not be appropriate for fragile documents that you would need to feed through the device.

Look for a USB cord to connect the scanner to your laptop. Ease of use will be a

consideration. Some portable scanners require you to hand feed every page, which may be annoying if you do any volume. Others have document feeders of varying capacities which are more convenient. Usability will also be impacted by the software that comes with the scanner. Look for models which provide clear and simple options to allow you to easily save scanned documents as a familiar Word document, attach to an email as a Word document or PDF, or send directly to a printer.

Mobile Printers

Mobile printers can be very useful, but how portable it will be will depend upon your needs. Some, such as the PlanOn Printstik or the Pentax Pocketjet are lightweight and small, but, since they are thermal printers, they use the thin thermal paper which will not be your first choice for printing a will or durable power of attorney. At about triple the weight, but still portable are HP OfficeJet and Cannon Mobile Printers. These will use regular paper and are preferable if you need to provide finished and executable documents on the spot.

You should also consider the device you will be printing from. Will it be from your laptop or do you want the capability of printing from a Smart Phone, a PDF, or a memory card? Do you want the printer to have wireless and/or Bluetooth capabilities? As with any printer, you will want to consider speed, whether it prints in color or just black and white, and sheet feeding capabilities.

Since our technology changes so rapidly, we can expect to constantly find newer and better products that will eventually make us all mobile lawyers. Features vary and it is always best to research your options, read reviews by other users, and, of course, consider your own needs before purchasing any equipment.

Top Five “Take-Aways” From Judge Quam’s Reflections On His First Thirty Day

Crystal Patterson

On February 9, 2010, Judge Jay Quam, the newly-appointed Presiding Judge of the Hennepin County District Court, Probate Division, reflected on his first thirty days in the probate court before a group of approximately fifty attorneys. Judge Quam provided insight into how he plans to manage the division, as well as practice tips for those who will be appearing before him. The top five “take aways” from the discussion include:

1. **He Will Be Active.** Departing from the practice of his recent Presiding Judge predecessors, Judge Quam will have an active presence on the probate bench. He intends to spend approximately fifty percent of his time handling contested and uncontested probate and trust matters. The balance of these cases will continue to be overseen by Referee Kruger and Wolfson, who will be carrying a full and half case-load, respectively.
2. **Don’t Dilute Your Position.** Too often attorneys are tempted to fill their briefs with every possible argument in support of their position. Judge Quam cautions against this practice for at least two reasons. First, judges frequently allocate equal time to each of your arguments. This means your flyer argument will get as much time as your solid argument. The practical effect will be that the judge will spend far less time analyzing your strongest arguments and far more time wondering why you are advocating for

weak arguments. You want the judge to focus on your best, winning arguments. By including the weaker arguments, however, you are taking time and attention away from your strong ones.

Second, by presenting numerous weak arguments, you may be diluting your good arguments. The way judges see it, you would not have to make weak arguments if you have truly strong arguments. The result may be that the judge could question how strong your best arguments really are if you had to include three or four “fall back” positions.

The bottom line: Choose your two or three best arguments and stick with those. If you don’t win on those arguments, you almost certainly are not going to win on the weak arguments, either.

3. **Rise Above the Mudslinging.** Judges recognize and respect aggressive litigation. But aggressive litigation often leads to exchanges that reflect poorly on the attorneys and the clients they represent. To put it simply, unprofessional conduct (even outside the courtroom) can lead to the loss of two very important things: (for you) the loss of your credibility with the court, and (for your client) the loss of his/her case.

While Judge Quam agrees that the contentious, name-calling emails and

letters exchanged by counsel prior to submitting a motion – and then inevitably attached to the motion – sometimes provide entertaining reading for the court, they rarely lay the groundwork for success. This is especially true if the zingers are two-sided. If you have a dispute, succinctly state your position in your communication to opposing counsel and avoid the temptation to call him or her “disingenuous,” “unprofessional,” or something on that order (or worse). If you get a mudslinging letter in return, take comfort in Judge Quam’s suggestion that, as long as the name-calling is one-sided, and as long as you can demonstrate that you have been reasonable along the way, “you’re probably golden.”

4. **Consider Early Dispute Resolution. Or Late Dispute Resolution. Or Resolution Anywhere Else Along the Way.** Judges generally like trials—the opportunity to be involved in trial after trial is one of the reasons that a lot of judges pursued the job in the first place. What is clear to Judge Quam, however, is that judges often like trials a whole lot more than clients do, and that most clients looking back at their case wish they would have found some way to resolve the case without the cost, risk, hassle, and stress of trial.

With this result in mind, Judge Quam encourages counsel to creatively consider all dispute resolution options, and to suggest to him ways that may help move the parties toward settlement. Those ways may be through a typical mediation session or through an early neutral evaluation, similar to that used in family court matters.

While the probate court currently does not have an early neutral evaluation program, Judge Quam questioned whether practitioners felt such a program would be helpful, particularly for clients who may benefit from receiving a neutral party’s candid evaluation of their position. Because avoiding the cost and relationship damage that can result from protracted probate litigation benefits everyone, most practitioners present agreed that a program facilitating early resolution would be positive. Stay tuned for more developments in this area.

5. **Know Your Stuff.** Judge Quam was not an estate planner when he was in private practice. Consequently, he is learning. You should not assume he knows the intricacies of generation-skipping taxes and you should not assume that he is going to just “take your word for it.” He will read the statutes and cases, and he will verify your cites. And, he will remember if you have not presented a statute or a case accurately. You need to maintain your credibility and reputation with Judge Quam – and the rest of the judges – by ensuring that you know your stuff and you accurately portray it in your representations to the court. If you have earned the trust of your judge, you will have an advantage when you go into court; conversely, you will be at a disadvantage if you have lost that trust.

Tips on Best Practices for Fiduciary Due Diligence

Margaret A. Reisdorf, J.D., LL.M. (Taxation)

At the Estate and Probate Section Meeting in April, attendees benefited from a panelist discussion regarding Minnesota trustee fiduciary due diligence. The meeting emphasized that fiduciary due diligence is dependent upon the following; a fiduciary following the objective standards outlined in the Minnesota Prudent Investor Act, Minn. Stat. § 501B.151, the language of the trust and the circumstances of trust beneficiaries. Also, the fundamental importance of observing procedural prudence in the areas of overall trust management and delegation of duties was highlighted. Finally, the discussion emphasized that compliance with the Act is determined by conduct not outcomes, so that a trustee's decision or action is evaluated on the facts and circumstances that existed at the time of the decision without the use of hindsight. The following is a brief overview of the Minnesota Prudent Investor Act and highlights and tips from the April panel discussion.

Minnesota Prudent Investor Act

In 1996, Minnesota enacted the Prudent Investor Act codified generally at Minn. Stat. §§ 501B.151 (1996). Modeled after the Uniform Prudent Investor Act (1995)(UPIA), The Act provided fundamental changes in the criteria for prudent investing by,

- applying the prudence standard to individual investments as part of the total portfolio rather than on an individual basis,
- identifying risk/return objectives as a fiduciary's central consideration,
- repealing categorical restrictions on types of investments provided they play an

appropriate role in risk/return objectives and meets other requirements of prudent investing,

- investment diversification was integrated into the definition of prudent investing and
- the prohibition on trustee delegation is repealed.

The Minnesota Prudent Investor Act (The Act) requires that any trustee who invests and manages trust assets must comply with its rules. Minn. Stat. § 501B.151 Subd. 1. (a). The Act serves as a default rule, however, that can be expanded, restricted or otherwise altered by the provisions of the trust instrument itself or by the court. Minn. Stat. §§ 501B.151 Subd. 1(b), Subd. 9. Thus, The Act applies to any trustee who manages a trust or invests trust assets to the extent trust provisions or the courts alter its application.

Much of the substantive changes made by the 1996 revisions are codified in the second subdivision of the statute. They provide the requirements for the trustee standard of care, portfolio strategy and risk/return objectives. Minn. Stat. § 501B.151 Subd. 2. Specifically, this subdivision requires that the trustee, "shall invest and manage trust assets as a prudent investor would by considering the purposes, terms, distribution requirements, and other circumstances of the trust ...exerci[zing] reasonable care, skill and caution." Minn. Stat. §501B.151 Subd. 2(a). Next, The Act provides that a trustee's investment and management decisions respecting individual assets must be taken in

the context of a portfolio as a whole and, “as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.” Minn. Stat § 501B.151 Subd. 2(b). Thus, this provision ends the notion that existed under prior law that a prudent investor must evaluate each investment as a discrete endeavor and requires a contextual approach to investment management that better reflects modern market realities.

Further, The Act enumerates circumstances that a trustee may consider when making management decisions, such as general economic conditions, inflation, tax consequences, expected return of capital, beneficiary resources, liquidity needs, and unique asset considerations. Minn. Stat. § 501B.151 Subd. 2(c). While instructive this list is not intended to be all-inclusive. Also, Subdivisions 2(d) and 2(e) provide that a trustee may invest in any type of property or investment as long as they are managed consistently with the provisions of the statute and that a trustee will be held to a standard of care consistent with any special skills or expertise possessed or professed by the trustee. Here, the use of the term management in Subdivisions (a) through (e) invokes the ongoing duty of the trustee to monitor the suitability of the investments already made as well as new investments. UPIA § 2 Comment.

In addition, The Act states, “[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.” Minn. Stat. § 501B.151 Subd. 3. While there is no definition provided indicating how much diversification is enough, the rationale is based on the fact that “Diversification reduces risk ...[because] stock price movements are not uniform. This

means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another.” UPIA § 3 Comment. Further, for small trusts where the transaction costs of creating a diversified portfolio out of individual investments would be prohibitive, the use of pooled investments are recognized as an appropriate mechanism for diversification. Id.

Finally, The Act also permits a trustee to delegate any trust function, “that a prudent person of comparable skills could properly delegate under the circumstances.” Minn. Stat. §501B.152. The issue of delegation has evolved over time from a strict policy of non-delegation, to this section permitting delegation under The Act. The provisions under this section seek to strike the appropriate balance between the, “intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration ... and protecting trust beneficiaries from the misuse of such powers on the other.” UPIA § 9 Comment. The Act permits delegation provided that the trustee establish the scope and terms of the delegation, performs ongoing review of the agent’s actions to ensure compliance and provides that the agent has an independent duty to comply with the terms of the delegation. Minn. Stat. § § 501B.152 (b), (c). If the trustee complies with the provisions they are not liable to beneficiaries or the trust for the decisions or actions of the agent to whom the function was delegated. Id.

Best Practices in Summary

The objective standards put forth in the Act provide that a trustee will meet their goal of due diligence if they focus on conduct rather than investment outcomes. Panelists emphasized that this focus on conduct begins with a clear understating of beneficiaries situation and a careful reading of the trust instrument. A thorough reading of the trust must take place

at the inception of the engagement and continue periodically throughout the trust administration. It was advised that conscientious trustees should resist the urge to work from memory or rely exclusively on a colleagues notes or memoranda regarding a trust's operative provisions. Indeed, law changes and other external factors will also require thoughtful periodic re-reading of the trust instrument as well.

Similarly, panelists emphasized that it was critical for a trustee to have a written procedural plan in place for trust investments. Specifically, the plan should address in detail the asset allocations for the trust including all relevant sub-categories of investment types. Also, strategies to achieve diversification must be documented with detail. The details must explain any obstacles to diversification or other trust goal, and a schedule of exactly how/when such obstacles are being addressed and eliminated. Where deemed appropriate, panelists recommended seeking court approval of an investment plan.

The discussion emphasized that despite our recent economic downturn, no investment is per se imprudent. As long as investments made pursuant to a given trust investment plan; comport with the overall goals of the trust, The Act (to the extent it applies), the needs of the beneficiaries and proper oversight occurs, no investment is per se improper. Again it is the procedural prudence not investment outcomes that count.

In addition, for the professional trustee, any trust investment plan should be written in a manner consistent with internal manuals and marketing materials. If the terms or circumstances are found to be different, the trustee should be sure to explain and document the reasons for the deviations and get written approval for these changes.

Further, meeting fiduciary due diligence requires on-going review and monitoring of trust investments. A trustee should review all account statements on a monthly basis. On a quarterly basis a trustee should be evaluating trust performance and whether the plan continues to meet plan objectives. On the issue of rebalancing asset allocations, the panelists suggested either a periodic or percentage approach. As a general rule periodic rebalancing should occur every six to twelve months. If a percentage approach is followed, rebalancing should occur when asset classes increase or decrease more than the specified percentage. Regardless of any routine method employed, however, if changing circumstances dictate rebalancing the prudent trustee should respond to the change and rebalance accordingly.

Also, the panelists urged that quality communication is of course central to meeting a trustee's fiduciary duty. Keeping a written record of communications was also advised. For institutional trustees, devising a documented communication structure that provides a clear delineation of duties amongst the different service roles was also recommended. Clear internal review processes with managers reviewing the day-to-day trust officers communications as well as a periodic review of the trust by management officers was also advised.

Finally, in the area of delegation, the panelists recognized that the complexity of families and planning techniques can reasonably require a delegation of trustee duties. The key to prudent delegation requires that the trustee provide the same standards of conduct as required for themselves. This begins with a detailed written instruction describing the delegation and ends with the careful monitoring and review of the delegation.

The Fiduciary Exception: When the Attorney-Client Privilege Is Not Yours

W.T. Roberts III (Trey) and David A. Snieg

If you think all attorney-client communications are privileged, think again. The “fiduciary exception” to the attorney-client privilege could defeat a fiduciary’s privilege claim.

The attorney-client privilege is far narrower in scope and application than many think. What does it cover? In short, it protects from disclosure confidential communications made by or to a client for the purpose of facilitating the rendition of legal advice to the client. The privilege is premised on the policy rationale that assumes that open consultation between client and counsel ensures that counsel is reasonably informed and able to provide better legal advice. However, because it is based on policy, the attorney-client privilege can be trumped by any other policy or interest that the court deems more compelling – for example, by open meeting laws (in some jurisdictions), by the policy against perpetuation of a crime or fraud, and by fiduciary duties.

The Fiduciary Exception. Imagine a trustee in his or her office, the phone rings, and it’s the beneficiary of a trust. Without any of the usual pleasantries, the beneficiary snaps, “Send me over all the emails between you and the attorney about this issue of the trust’s concentration of ACME stock.” The trustee, being conflict averse, begins to sweat, but then responds, “Those are privileged communications with my attorney.” The beneficiary is not satisfied, and responds

“Well, it is your job to manage my trust for my benefit, so if this attorney is advising you on my trust, isn’t he my attorney?” After a few choppy parting phrases, the call ends. The trustee immediately calls the attorney to figure out if the beneficiary gets the emails. During that call, the trustee frantically reviews the emails to see how bad it is going to be if the attorney says, “Yes, send the beneficiary the emails.”

The fiduciary exception to the attorney-client privilege is the basis some courts utilize to require fiduciaries to turn over the emails to the beneficiary. There is no national ‘fiduciary exception.’ Courts across the country are split on what to do, and even when they agree on what to do, they are split on why. As a result, there is no single broadly accepted and applied test, and no common nationally applied framework or rationale. Thus, the question may be answered differently depending on where it is asked. Of course, it is not always clear when the beneficiary asks for the emails which court’s law will govern, and it may have been even more unclear months prior when the fiduciary and counsel were actually typing the emails.

Courts that apply the fiduciary exception – that is, courts that require the fiduciary to give the beneficiary the emails, tend to rely on one of the following rationales:

1. The beneficiary is the client because the

-
- attorney's services for the trust or estate are for the benefit of the beneficiary;
 2. It is the fiduciary's duty to manage and administer the trust or estate solely for the beneficiary's benefit;
 3. The fiduciary has a duty to inform the beneficiary relating to trust or estate administration, and that duty trumps any privilege claim;
 4. Disclosure of the communication to the beneficiary is determined on a case-by-case basis in light of the purpose and potential benefit of the communication in relation to what litigation is pending or threatened (that is, was the communication administrative or defensive?); or
 5. If the trust or estate paid the attorney, the beneficiary is entitled to the communications.

Of course, courts that deny the fiduciary exception – that is, courts that allow the fiduciary to withhold the emails from the beneficiary – view these rationales differently. First, some courts punt (usually in states where the attorney-client privilege is codified), saying that if the legislature wants an exception it can write one. Other courts view the rationales with an eye towards the fiduciary's perspective, concluding that the fiduciary is the client because it selects and hires counsel, or that the fiduciary can inform the beneficiary without the necessity of disclosing privileged communications. Still other courts weigh the policy behind the attorney-client privilege more heavily. These courts reason that without the attorney-client privilege, the fiduciary may fail to seek legal advice, thus potentially harming the beneficiary in a manner that could have been avoided if legal advice had been obtained.

Understanding the broad framework of possible rationales on both sides of the fiduciary exception will aid the analysis of

how a particular court may address the question. For example, Minnesota courts have not clearly articulated whether and to what extent they recognize the fiduciary exception. While the precise issue remains undecided, rulings in legal malpractice cases suggest that it is unlikely Minnesota would adopt the exception based on the premise that the beneficiary is the 'real client.' That, however, still leaves other rationales, such as those based on the priority of the fiduciary duties and, most likely, the administrative-defensive test.

In courts where the beneficiary is deemed the 'real client' or where a broad, overriding duty to inform trumps the attorney-client privilege, the fiduciary exception is likely to require the fiduciary to turn over many communications to the beneficiaries that the fiduciary thought would have been privileged. By contrast, courts that rely on the administrative-defensive test give the fiduciary a fighting chance to avoid disclosure of some communications. Fiduciaries and their counsel do not always know when the email is sent whether it is subject to disclosure under the laws of a court where they might later end up. That makes it important for fiduciaries and their counsel to take reasonable steps to prevent disclosure where they can. As a practical matter, because the exception – at least in some variation – is fairly widespread, the conservative assumption is that some form of the fiduciary exception will apply. After making that assumption, fiduciaries and their counsel should take practical day-to-day precautions to prevent the disclosure of privileged communications under the rationale that allows some control – the administrative-defensive test.

The Administrative-Defensive Test. It is easy to say that, under this test, administrative attorney-client communications are disclosed

to the beneficiary, while defensive attorney-client communications are not disclosed. But it is more difficult to apply the test to a given set of communications in a particular context. The end points are clear. Routine trust or estate matters, such as making investment decisions, distributions and tax payments are clearly administrative matters subject to the fiduciary exception. Conversely, after a fiduciary has been sued by the beneficiary, communications with counsel regarding that litigation are obvious ‘defensive’ communications that normally fall outside of the fiduciary exception. In the middle, of course, there are varying shades of gray that require application of amorphous standards such as ‘purpose and potential benefit’ or ‘content and context.’ Such standards are fertile ground for argument and unpredictability.

Take, for instance, the five-year accounting review petition. In Minnesota, trustees of court supervised trusts are required to petition the court for review of their accounts every five years. Because it is statutorily-required and routine, there is certainly a component of the petition that is administrative. The petition is also intended to inform the beneficiaries, so that too weighs in favor of a finding that communications between the trustee and counsel regarding the petition are all administrative under the test. However, there is also a clear benefit for the trustee in these petitions. The trustee is obtaining liability protection by notifying the beneficiaries of the issues in the accounts and having the court review and approve the accounts. Moreover, during the drafting of the petition, it is possible that mistakes will be discovered and the trustee will have to determine how to handle those mistakes – certainly by making the right decision as a fiduciary for the benefit of the beneficiaries, but also for itself to address and potentially minimize the liability exposure it faces for

the mistake. Thus, communications with counsel may often include defensive components.

If the trustee treats all communications regarding the petition the same, the trustee risks a court applying the administrative-defensive test and requiring wholesale disclosure of all communications. By contrast, if the trustee makes an effort – perhaps including some of the tips discussed below – to differentiate between the administrative and the defensive components of the petition, then the trustee increases its chances of a court protecting some of the communications from disclosure to the beneficiary.

Practical Tips: What you can control. While the existence of the fiduciary exception or the rationale adopted by a particular court may be out of your control, there are some things you can control in ensuring that sensitive communications are not disclosed later on.

Setting up the engagement. The engagement letter for counsel’s representation of a fiduciary should consider and clearly set out precisely who the client is. In most cases, the engagement letter probably will say that the client is the trustee or personal representative as fiduciary, and not the estate, trust, beneficiaries, surviving spouse or any other interested parties. Each time an issue arises that leads a fiduciary to contact counsel for legal advice regarding a trust, the fiduciary and counsel should be asking, “Is there a legitimate institutional or personal interest for the fiduciary in the legal advice sought?” If the answer is “yes,” consider setting up the engagement between the attorney and the fiduciary as an institution or individual, as opposed to between the attorney and the trustee or personal representative as fiduciary. If the engagement is set up at the

outset as non-administrative or in a capacity other than as a fiduciary, this will bolster the argument for protection of the communications generated during the engagement.

Subsequent communications. Having a clear engagement letter will be near worthless if the fiduciary or its counsel ignore what the engagement letter says and blur the representation issues in communications with the beneficiaries. Thus, when counsel is writing to the beneficiaries and the beneficiaries are not “the client,” counsel should make that clear to the beneficiaries. Where appropriate, consider suggesting that the beneficiaries retain independent counsel for their own interests.

Labeling your communications. Misuse or abuse of labels, such as “privileged and confidential,” may dilute the protection those labels are intended to garner. Set up a procedure for determining which communications should be labeled “privileged and confidential” and which ones should not. Then, follow that procedure. When there is an institutional or personal, non-fiduciary interest in the legal advice sought, consider adding to the label some indication to that effect, such as “privileged and confidential – communication in a non-fiduciary capacity.” It is easier to argue that a communication was defensive, rather than administrative, where it was labeled as defensive by someone that can reasonably testify that they have a procedure for labeling communications that they routinely follow (at least more often than not).

Segregating your communications. When the non-fiduciary label is in use for a particular trust or estate, create a separate correspondence file for the defensive communications (and make sure it is actually used!). This separate file should only contain

the defensive communications. Continue to file the routine, administrative correspondence in the regular correspondence file.

Be reasonable, but alert. It is not necessary in every case to take every precaution. There is an efficiency cost for the fiduciary and counsel with each added step taken to protect communications from disclosure. Thus, for routine trusts with no troublesome beneficiaries, no investment concentrations, and no other glaring issues, most trustees and their counsel should generally consider these practical tips, be prudent in drafting communications, have a process in place for considering the nature of each communication, and then label and file the communications in accordance with their established policy. However, when a particular beneficiary objection, investment issue, or other circumstance arises, be alert and consider additional protective measures so that later on, there will be stronger arguments to prevent the disclosure of sensitive, defensive attorney-client communications to the beneficiary.

Head for the mattresses. The belt-and-suspenders approach to creating attorney-client communications that are more likely to be protected from disclosure to the beneficiaries comes down to one word – separation. It starts with the separate engagement, separate labels and separate correspondence files discussed above. As trouble in a particular matter increases, more separation may be appropriate. This may include a separate lawyer for the defensive aspects. For institutional fiduciaries, it may include a separate employee. Beyond that, perhaps a separate law firm. Each layer of separation further separates the administrative communications from the defensive communications, thus increasing the likelihood that the defensive communications may be withheld from the

beneficiaries on attorney-client privilege grounds. Thus, for the most sensitive of communications in the most contentious of environments, head for the mattresses by having the administrative and defensive aspects handled by two different officers, each maintaining their own separate file, and each retaining their own law firm. Even that is no guarantee in every court, but it certainly strengthens the argument.

Trey Roberts is a partner and David Snieg is an associate at Faegre & Benson LLP. They are both litigators with an emphasis in trusts and estates litigation.

Deciding who pays. Payment is another factor that is controllable. In most courts, payment is not determinative, but in some it is, and in others it is a factor. It is still okay for fiduciaries to seek reimbursement for attorneys' fees from the trust, and that is the norm in most cases. However, in sensitive or contentious environments, a conservative approach may be to delay the decision to seek reimbursement from the trust or estate. When potential defensive situations arise, the fiduciary and counsel should consider separate billing until the situation is clarified.

Watch what you say. In closing, it is worth repeating that the conservative assumption is that some form of the fiduciary exception will apply and all communications will be turned over to the beneficiaries. That means that the fiduciary and counsel should assume that the beneficiaries will read everything in every written communication. If every communication were written with that assumption in mind, then most litigation would be bland. By avoiding the tendency to be careless or to include unnecessary characterizations in writing, the fiduciary and counsel minimize the damage caused if a court ultimately requires them to disclose the communication to the beneficiaries. If you want to say something colorful, pick up the phone.

2009-2010 Probate & Trust Section Council Members

Chair: Robert A. McLeod
Lindquist & Vennum
Phone: (612) 371-3272
Email: rmcleod@lindquist.com

Vice-Chair: Susan J. Link
Maslon Edelman Borman & Brand
Phone: (612) 672-8349
Email: susan.link@maslon.com

Treasurer: Thomas J. Woessner
Lindquist & Vennum, PLLP
Phone: (612) 371-3517
Email: twoessner@lindquist.com

Secretary: Thomas H. Rauenhorst
United States Trust Company, N.A.
Phone: (612) 336-1376
Email: thomas_h_rauenhorst@ustrust.com

Past Chair: Dale J. Schoonover
Fredrikson & Byron
Phone: (612) 492-7189
Email: dschoonover@fredlaw.com

Andrew M. Baese
Briggs & Morgan, P.A.
Phone: (651) 223-6600
Email: abaese@briggs.com

Andrea Breckner
Olson & Breckner, P.A.
Phone: (612) 455-1002
Email: abreckner@olsonbreckner.com

Michael Cowles
Fryberger, Buchanan, Smith & Frederick, P.A.
Phone: (218) 722-0861
Email: mcowles@fryberger.com

Jolene M. Cutshall
Faegre & Benson LLP
Phone: (612) 766-7000
Email: jcutshall@faegre.com

JoEllen P. Doebbert
JoEllen Doebbert Attorney at Law
Phone: (320) 763-7838
Email: joellen@doebbertlaw.com

Peter S. Hatinen
Fredrikson & Byron, P.A.
Phone: (612) 492-7319
Email: phatinen@fredlaw.com

Jane E. Kiker
Faegre & Benson LLP
Phone: (612) 766-7803
Email: jkiker@faegre.com

Sonny F. Miller
Dorsey & Whitney LLP
Phone (612) 340-2600
Email: miller.sonny@dorsey.com

Scott M. Nelson
Lommen Abdo Cole King & Stageberg, P.A.
Phone: (612) 336-9320
Email: scott@lommen.com

Joseph K. Thiels
University of Minnesota Law School
Phone: (612) 626-5363
Email: thiels@umn.edu

Education Committee Chair

Thomas J. Woessner
Lindquist & Vennum, PLLP
Phone: (612) 371-3517
Email: twoessner@lindquist.com

Legislation Committee Co-Chairs

Scott Nelson
Lommen Abdo Cole King & Stageberg, P.A.
Phone: (612) 336-9320
Email: scott@lommen.com

Peter Hatinen
Fredrikson & Byron, P.A.
Phone: (612) 492-7319
Email: phatinen@fredlaw.com

Litigation Committee Co-Chairs

Alan I. Silver
Bassford Remele
Phone: (612) 376-1634
Email: alans@bassford.com

Bridget Logstrom Koci
Dorsey & Whitney LLP
Phone: (612) 340-2600
Email: logstrom.koci.bridget@dorsey.com

Federal Taxation Committee Chair

Richard Hawk
Phone: (651) 482-9933
Email: rdhawke@ties2.net

Consumer Protection/Publications Chair

Jane Kiker
Faegre & Benson LLP
Phone: (612) 766-7803
Email: jkiker@faegre.com

Greater Minnesota Involvement Committee Chair

JoEllen P. Doebbert
JoEllen Doebbert Attorney at Law
Phone: (320) 763-7838
Email: joellen@doebbertlaw.com

Technology Committee Co-Chairs

Richard D. Bunin
Phone: (952) 544-2345
rbunin@buninlaw.com

Derrick J. Doerr
Swenson Anderson Financial Group
Phone: (612) 347-7833
ddoerr@swensonanderson.com

Gene Daly Award Chair

Andrea Breckner
Olson & Breckner, P.A.
Phone: (612) 455-1002
abreckner@olsonbreckner.com

**Ethics and Professional Responsibility
Committee Chair**

Jane Kiker
Faegre & Benson LLP
Phone: (612) 766-7803
jkiker@faegre.com

Wills for Heroes Committee Chair

Susan J. Link
Maslon Edelman Borman & Brand
Phone: (612) 672-8349
Email: susan.link@maslon.com

Newsletter Committee Co-Chairs

Chad Bigalke
Securian Financial Services, Inc.
Phone: (651) 665-4332
Email: chad.bigalke@securian.com

Catherine S. Clifford
University of St. Thomas
Email: clif3256@stthomas.edu

Probate & Trust Voting Representative

Mary E. Shearen
Best & Flanagan, LLP
Phone: (612) 341-9716
Email: mshearen@bestlaw.com

New Lawyers Section Liaison

Mia E Thibodeau
Fryberger Buchanan Smith & Frederick PA
Phone: (218) 722-0861
Email: mthibodeau@fryberger.com

Law Student Liaison

Catherine S. Clifford
University of St. Thomas
Email: clif3256@stthomas.edu

MSBA Section Services Liaison

Ashley Hacker
Minnesota State Bar Association
Phone: (612) 278-6305
Email: ahacker@mnbar.org