MINIMIZING PROFESSIONAL RISK IN THE REPRESENTATION OF ESTATES AND TRUSTS: A PRACTICAL GUIDE FOR IOWA AND NEBRASKA LAWYERS

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I. INTRODUCTION

The practice area with the highest professional liability risk is Wills, Trusts, and Estates.[1] In fact, the claims frequency in this area has nearly doubled between 2007 and 2014.[2] This should be no surprise given the aging of the "baby-boomers." In addition, in Iowa and Nebraska alone, the amount of wealth now being transferred, and to be transferred over the next fifty years via wills, trusts, and estates, is estimated to be over a trillion dollars.[3] A complex tax system and the various tax implications in the transfer of that much wealth also increase the risk of liability. These factors, considered alone, might not explain the growth in liability claims, but when one considers these factors in conjunction with the propensity of family members and other beneficiaries to sue each other and their attorneys, there is reason for concern. Additionally, the risk is not limited to malpractice claims, because the allegation of an ethics violation is equally great.[4]

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1. AMES & GOUGH, LAWYERS' PROFESSIONAL LIABILITY CLAIMS TRENDS 2-3 (2015), http://www.law.uh.edu/faculty/adjunct/dstevenson/007a%20Legal%20Malpractice%20Claims%20Survey%202015%20Final.pdf. *See also* CNA PROF'L COUNSEL, WILLS, TRUSTS, AND ESTATES – PROFESSIONAL LIABILITY FACT SHEET 1 (2016), https://www.cna.com/web/wcm/connect/c602e9ec-0a65-412c-a2cd-c2226d4f76ae/Wills-Trusts-Estates-PL-Fact-Sheet.pdf?MOD=AJPERES.

2. *Id.*

3. In Iowa, the transfer of wealth through 2049 is estimated at nearly $530 billion. CMTY. VITALITY CTR., OUR GOLDEN OPPORTUNITY: TRANSFER OF WEALTH RESEARCH, https://www.givingforum.org/sites/default/files/resources/Iowa%20Transfer%20of%20Wealth%20Study.pdf. Over a fifty-year period in Nebraska, wealth transfer estimations are over $600 billion. THE NEB. CMTY. FOUND., 2011 TRANSFER OF WEALTH STUDY (2011), http://www.nebcommfound.org/media/docs/2011_Transfer_of_Wealth_Report__2012-March.pdf.

4. *See, e.g.*, MODEL RULE OF PROF'L CONDUCT r. 1.7 cmt. 27 (AM. BAR ASS'N 2016) (stating that conflict of interest questions may arise in estate administration, as the

In order to minimize professional risk in this area, perhaps the easiest advice to follow is "don't dabble."[5] However, if one already is or becomes comprehensively involved in this field, the advice becomes more complicated. Part of the difficulty is that there is significant disagreement over the most fundamental question we must ask ourselves—namely, who is the client?

II. WHO IS THE CLIENT: AN ESTATE OR TRUST AS AN ENTITY

A. What's the Big Deal?

Shouldn't any ethics class, article, or presentation start with a simple question: who is the client? Once one understands the answer to this question, the answers to other troublesome issues almost seem to flow naturally. However, in the area of estates and trusts, there are at least four possible answers:

- The estate or trust as an entity;
- The fiduciary of the estate or trust, as a fiduciary;
- The fiduciary in his or her individual capacity; or
- The estate or trust beneficiary or beneficiaries in their individual capacities.

The issue is further complicated by the fact that various jurisdictions follow different rules. For example, this Article will show the rules and the courts in Iowa strongly indicate an estate or trust will be treated *like* an entity. Nebraska law, on the other hand, clearly states an estate or trust is not an entity.

Whether the estate or trust is treated *like* an entity will often dictate an answer to the question, who is the client? There are many guiding principles for the representation of a corporation or other recognized entities. However, deciding whether an estate or trust is one of those entities, or *like* one of those entities, is not easy.

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identity of the client may be unclear); *id.* r. 1.1 (stating a lawyer shall represent a client with competence); *see also* Sabin v. Ackerman, 846 N.W.2d 835, 842 (Iowa 2014) (explaining "a duty for an estate attorney to protect the personal interest of the executor cannot arise from the duty of the attorney to administer the estate"); Comm. on Prof'l Ethics v. Elson, 430 N.W.2d 113, 113-14 (Iowa 1988) (noting lack of cooperation by the fiduciary did not excuse the attorney's failure to take appropriate action to close the estate).

5. CNA Prof'l Counsel, *supra* note 1 (explaining that because the "wills, trusts, estates, probate and planning practice area frequently involves complex issues requiring specialized legal experience and training" lawyers should avoid dabbling in this area of practice). *See also* Thomas E. Spahn, Ethics Issues Facing Trust and Estate Lawyers 476-80 (2017), http://media.mcguirewoods.com/publications/Ethics-Programs/9990705.pdf (identifying the critical importance of identifying the client).

B. The American College of Trust and Estate Counsel

The American College of Trust and Estate Counsel's ("ACTEC") commentaries for the Model Rules of Professional Conduct ("Model Rules") support the theory that a lawyer represents the fiduciary of an estate or trust rather than the estate or trust as an entity. In particular, the commentaries advise "the lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client."[6] Although the ACTEC annotations do not include an annotation for Nebraska under Rule 1.2, the Nebraska Supreme Court has previously held that an attorney for an estate represents the fiduciary, not the estate as an entity.[7] Thus, Nebraska follows the majority rule under the ACTEC commentaries.

However, "[w]hile the Commentaries are intended to provide general guidance, ACTEC recognizes and respects the wide variation in the rules, decisions, and ethics opinions adopted by the several jurisdictions with respect to many of these subjects."[8] The ACTEC Commentaries explain:

> If a lawyer is retained to represent a fiduciary generally with respect to an estate, the lawyer's services are in furtherance of the fulfillment of the client's fiduciary responsibilities and not the client's individual goals. The ultimate objective of the engagement is to assist the client in properly administering the fiduciary estate for the benefit of the beneficiaries. Confirmation of the fiduciary capacity in which the client is engaging the lawyer is appropriate because of the priority of the client's duties to the beneficiaries. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate.[9]

Though the Commentaries may be relevant for the majority of jurisdictions, the annotation to the Commentaries for Model Rule 1.2 for Iowa presents evidence that Iowa does not follow the majority with regard to this issue.

Schmitz v. Crotty[10] is the source for the annotation for Iowa's Model Rule 1.2. In this legal malpractice action, the Iowa Supreme Court found that an attorney retained to handle a decedent's estate

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6. The Am. Coll. of Tr. & Estate Counsel Found., Commentaries on the Model Rules of Professional Conduct 37 (5th ed. 2016) [hereinafter "ACTEC"], http://www.actec.org/assets/1/6/ACTEC_Commentaries_5th_rev_06_29.pdf.

7. In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986).

8. ACTEC, *supra* note 6, at i.

9. ACTEC, *supra* note 6, at 39.

10. 528 N.W.2d 112 (Iowa 1995).

had breached the duty of care he owed to the estate's beneficiaries.[11] Crotty was alleged to have negligently prepared the estate's death tax returns and negligently identified and reported certain real estate in the returns. In other words, the Annotation for Model Rule 1.2 suggests Iowa has separated itself from the majority of Model Rule jurisdictions that hold a lawyer represents the fiduciary, not the estate.

C. The Rules Provide Little Guidance

The Model Rules themselves are confusing, even contradictory. Model Rule 1.13 makes clear that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[12] This rule recognizes corporations are "inanimate and can only act through agents."[13] This begs the question, why should an estate or trust be treated differently than "an organization"? The Iowa Probate Code[14] is likewise unclear, even contradictory. For example, section 633.82 of the Iowa Probate Code describes the attorney as "employed by the fiduciary to assist in the administration of the estate."[15] However, section 633.198 of the Iowa Code, pertaining to fees, refers to the attorney as the "personal representative's attorney."[16]

Model Rule 1.7 confirms the confusion in this area and states that "[u]nder one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries."[17]

In order to address the conflicting rules, one must understand how various rules of a particular jurisdiction will be applied. How the rules and courts define the duty of the lawyer will provide guidance. The key duties of the lawyer in the estates and trusts field are discussed below.

III. DUTY OF THE LAWYER

To determine an answer to the fundamental question, "who is the client?" it is helpful to understand how the rules and courts have described the duties of the lawyer. Although the rules and courts of each jurisdiction may not expressly dictate whom the attorney represents

11. Schmitz v. Crotty, 528 N.W.2d 112, 117 (Iowa 1995).
12. *Crotty*, 528 N.W.2d at 117.
13. Kenneth R. Berman, *Litigation Ethics: Representing Corporations and Other Organizational Clients*, ABA Sec. Litig.: ABA Ann. Meeting, Aug. 8-12, 2013, at 1, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/aba-annual-2013/written_materials/5_1_litigation_ethics.authcheckdam.pdf.
14. Iowa Code Ann. § 633 (West 2017).
15. Iowa Code Ann. § 633.82 (West 2017).
16. *Id*. § 633.198.
17. Model Rules of Prof'l Conduct r. 1.7 cmt. 27 (Am. Bar. Ass'n 2013).

in the context of an estate or trust, some at least indicate the answer. There are several factors one can use to help with the analysis.

A. Duty of Allegiance to "Similar Entity"

A lawyer employed by a corporation or similar entity owes allegiance to the entity and not to an officer, representative or other person.[18] In representing the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person in the organization. Therefore, if state law treats estates and trusts *like* an entity, the lawyer has significant ethical risk and/or liability by not following Model Rule 1.13 (duty of allegiance to the entity). In other words, if the rules and courts of a jurisdiction treat estates and trusts *like* entities, the lawyer's duty is owed to the estate or trust, not the fiduciary (as an agent). On the other hand, if a jurisdiction does not treat an estate or trust *like* an entity, it should be easier to conclude that the lawyer represents the fiduciary; the lawyer's duties flow to the fiduciary not the estate or trust (as an entity). The following analysis strongly suggests Iowa treats estates and trusts *like* an entity and that Nebraska treats estates and trusts as a non-entity to which the lawyer owes no duties.

The Iowa Supreme Court explained in *Ruden v. Jenk*[19] that "although the estate attorney is hired by an executor or administrator, his obligations, like those of the fiduciary, extend to the estate and all other distributees."[20] In this malpractice case, the court found the attorney, Jenk, was hired to act as attorney for the estate and had a duty to advise the administrators relative to that estate. Although Jenk was ultimately found not liable, the court stated the rule that "[a]n attorney designated for an estate is charged with the duty of . . .

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18. Iowa Code of Prof'l Resp., EC 5:13. Although the Iowa Code of Professional Responsibility was replaced by the Iowa Rules of Professional Conduct in 2005, the author believes EC 5:13 effectively states the current law. See Iowa Rules of Prof'l Conduct 32:1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents . . . (b) If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action . . . likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization . . ." and comments to 32:1.7 [1] "loyalty and independent judgment are essential elements in the lawyer's relationship to a client"). *See also* ACTEC, The Comprehensive Annotations to ACTEC Commentaries 52 (2016), http://www.actec.org/assets/1/6/2016_July_Comprehensive_Annotations_ACTEC_Commentaries_5th.pdf. EC 5:13 and Rule 1.13 both impose similar duties and restrictions upon a lawyer who represents an entity or organization, and the author will use the "allegiance to the entity" phrase of EC 5:13 throughout this article synonymously with the "represents the organization" phrase of 32:1.13.

19. 543 N.W.2d 605 (Iowa 1996).

20. Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996).

overseeing administration of the estate."[21] This language indicates the duty is upon the lawyer to oversee the estate itself, and not to merely advise the fiduciary.

The Nebraska Supreme Court, on the other hand, has held that "[a]ttorneys represent people. There is no such position known as 'attorney of an estate.' When an attorney is employed to render services in securing the probate of a will or settling an estate, he acts as attorney for the personal representative and not for the estate."[22] However, various states continually treat estates as entities for tax purposes.[23] And the Nebraska court's pronouncement could be construed in conflict with other provisions of Nebraska law.[24] Jeffrey Pennell further notes that estates are treated as entities for awards of litigation costs, wrongful death recoveries on behalf of the decedent, and tort or contract actions.[25]

Some would argue that an estate or trust is merely a res, a thing. Consider other legal examples of a res: real estate, a bank account, a herd of cows. None of these have representatives; rather, they have owners. Nor do any of these examples have their own federal tax number and duty to file tax returns. Likewise, none of these things have fiduciary duties. Estates and trusts, on the other hand, are different and more similar to a corporation:

- They have a representative;
- They have a federal tax number and a duty to file tax returns; and
- Their representatives have fiduciary duties.

Although opinions throughout the country may differ, an estate should be treated *like* an "organization" as described in Model Rule 1.13, and the lawyer should keep the interests of the estate or trust,

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21. *Ruden*, 543 N.W.2d at 610.

22. In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986).

23. *See* Jeffery N. Pennell, *Proceeding of the Conference of Ethical Issue in Representing Older clients: Representing Involving Fiduciaries Entitles: Who is the Client?*, 62 FORDHAM L. REV. 1319, 1334 (recognizing that estates are treated as entities for tax purposes). In fact, an entity may be a fiduciary. *See, e.g.*, IOWA CODE ANN. 633.63(2) (explaining an entity may be a fiduciary). *But see* NEB. REV. STAT. § 30-2403 (1974) (illustrating that a personal representative must be a *person*); Cont'l Tr. Co. v. Peterson, 110 N.W. 316, 317 (Neb. 1906) (dictating that "under the laws of this state a corporation cannot be appointed administrator of the estate of a deceased person"). Although section 30-2209 of Nebraska Revised Statutes states generally that "person" includes corporations and other legal entities, *Continental* is cited with approval in the Notes of Decisions under section 30-2444 of Nebraska Revised Statutes (qualification of personal representative).

24. *See* Perez v. Stern, 777 N.W.2d 545, 550 (Neb. 2010); *infra* notes 80-93 and accompanying text.

25. Pennell, *supra* note 23, at 1334 n.36.

not the individual fiduciary, paramount.[26] The Nebraska Supreme Court's holding in *In re Wagner* [27] is flawed, as a general rule, because lawyers represent entities in a myriad of situations, and it is common for an entity to serve as an executor of an estate.[28] In any event, instead of focusing on the largely academic argument of whether an estate or trust is an entity, we should be focused on treating estates and trusts *like* an entity.

B. Duty to "Assist in the Administration" or "Oversee Administration"

A second factor in determining whether the attorney for an estate represents the estate or the fiduciary is the attorney's duty to assist in the administration or oversee administration of the estate. The Iowa Supreme Court has held that "[a]n attorney designated for an estate is charged with . . . overseeing administration of the estate."[29] The Iowa Supreme Court went on to state that "[a]lthough the estate attorney is hired by an executor or administrator, his obligations, like those of the fiduciary, extend to the estate and all other distributees."[30] Furthermore, Iowa Probate Code section 633.82 expressly provides that "[t]he designation of the attorney employed by the fiduciary to assist in the administration of the estate shall be filed in the estate proceedings."[31] Model Rule 1.13 makes clear that "[a] lawyer employed or retained by an organization represents the organization acting through its duly

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26. *Compare id.* at 1334 n.35 (arguing attorneys represent entities such as corporations and partnerships and not individual people frequently and that "just as a corporation or a partnership designates an individual to deal with the world on its behalf, a fiduciary entity exists vis-a-vis the world through the fiduciary, making the analogy appropriate for these purposes."), *with Ruden* 543 N.W.2d at 610 (explaining that although an estate attorney is hired by an executor or administrator, his or her obligations, like those of the fiduciary, extend to the estate and all other distributees), Prof'l Fiduciary, Inc. v. Silverman, 713 N.W.2d 67, 73-74 (Minn. Ct. App. 2006) (noting an estate is a separate entity), *and* ACTEC, *supra* note 6, at 39 (illustrating that a lawyer's services for an estate are in furtherance of the administration of the estate and not the individual beneficiaries).

27. 386 N.W. 2d 998 (Neb. 1986)

28. *Compare Wagner*, 386 N.W.2d at 450 (holding "[a]ttorneys represent people"), *and* In re Cromwell's Estate, 522 S.W.2d 36, 41 (Mo. Ct. App. 1975) (citing Eisiminger v. Stanton, 107 S.W. 460, 462 (Mo. Ct. App. 1907)) (explaining "[t]he personal estate of a decedent is not a legal entity. It cannot sue or be sued as such, and it cannot appeal as such."), *with* Pennell, *supra* note 23, at 1334 (arguing attorneys represent entities such as corporations and partnerships and not individual people frequently and that "just as a corporation or a partnership designates an individual to deal with the world on its behalf, a fiduciary entity exists vis-a-vis the world through the fiduciary, making the analogy appropriate for these purposes.").

29. Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996) (citing Comm. on Prof'l Ethics & Conduct v. Elson, 430 N.W.2d 113, 114 (Iowa 1988)).

30. *Ruden*, 543 N.W.2d at 610.

31. Iowa Code Ann. § 633.82.

authorized constituents."[32] Iowa's express duty to "oversee administration" and "assist in the administration" language strongly implies its courts will treat the estate or trust *like* an entity.[33]

Nebraska, on the other hand, takes a completely opposite approach. Nebraska Revised Statute section 30-2476(21) empowers the personal representative to employ an attorney to assist in the performance of the administrative duties of the representative.[34] The Nebraska Supreme Court goes even further and expressly notes "the well-established principle that when an attorney is employed to render services for an estate, he or she acts as attorney for the personal representative."[35] These strong pronouncements in Nebraska make it less likely its courts will treat the estate or trust *like* an entity.

C. "Privity" and "Third-Party Beneficiaries"

Although privity and third-party beneficiary issues are generally associated with the liability of a drafting lawyer, the manner the courts and rules treat this issue will help us predict whether any given jurisdiction will treat an estate or trust *like* an entity. Generally, absent special circumstances, an attorney may only be sued for malpractice by a client with whom the lawyer has privity.[36] This privity requirement flows from the United States Supreme Court and is premised upon two basic concerns: first, absent a requirement of privity, parties to a contract for legal services could easily lose control over their agreement; and second, imposing a duty to the general public upon lawyers would expose lawyers to a virtually unlimited potential for liability.[37]

Comment two to Model Rule 1.13 explains that, although an attorney for a corporation must discuss legal matters with constituents of the organization, "[t]his does not mean . . . that constituents of an organizational client are the clients of the lawyer."[38] However, both

32. Model Rules of Prof'l Conduct r. 1.13 (Am. Bar Ass's 2016)

33. *Compare* Iowa Code Ann. § 633.82 (stating an attorney employed by a fiduciary of an estate has a duty to assist in the administration of the estate), *and Ruden*, 543 N.W.2d at 610 (emphasizing an attorney designated for an estate is charged with a duty to oversee the administration of the estate, even though the attorney is hired by the fiduciary), *with* Model Rules of Prof'l Conduct r. 1.13 (stating a lawyer for an organization represents the organization, through its agents).

34. Neb. Rev. Stat. § 30-2476(21) (2010).

35. *Perez*, 777 N.W.2d at 550 (citing In re Estate of Wagner, 386 N.W.2d 448 (Neb. 1986)).

36. Schreiner v. Scoville, 410 N.W.2d 679, 681 (Iowa 1987) (citing Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978)).

37. *Schreiner*, 410 N.W.2d at 681 (citing Nat'l Sav. Bank of D.C. v. Ward, 100 U.S. 195, 199 (1880)).

38. Model Rules of Prof'l Conduct r. 1.13 cmt. 2 (Am. Bar Ass'n 2016)

Nebraska and Iowa have similarly excepted this general rule and have held that a third party constituent for a corporation may bring suit against the corporation's attorney in special circumstances.[39]

The Supreme Court of Iowa excepts the general privity requirement and allows a third-party to sue someone who is not his or her lawyer if the third-party can prove he or she was an intended beneficiary of the transaction.[40] In other words, a lawyer may be liable to a third-party "when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."[41] The Iowa Supreme Court has extended this rule to the attorney for an estate.[42]

The Nebraska Supreme Court has also excepted the general privity requirement when it comes to third-party claims, but in a more limited context. In *Perez v. Stern*,[43] the Nebraska Supreme Court allowed third-party beneficiaries to sue the estate's attorney for mishandling a wrongful death claim despite the lack of privity.[44] The court noted several factors in determining whether an attorney for an estate may owe a duty to third-party beneficiaries, including "the extent to which the transaction was intended to affect the third party . . . ."[45] Similar to The Iowa Supreme Court, the Nebraska Supreme Court emphasized the importance of determining whether the third party was a "direct and intended beneficiary of the attorney's services."[46]

Perez is more than a little inconsistent with Nebraska's strong pronouncement in *In re Estate of Wagner*,[47] that a lawyer only acts as an attorney for the personal representative. In *Perez*, the court analyzed the risk of conflicts of interests between beneficiaries of an estate, but concluded conflicts did not exist under the facts of that

39. *See* Freedom Fin. Grp., Inc. v. Woolley, 792 N.W.2d 134, 142 (Neb. 2010) (recognizing that in special circumstances, a third party may have standing to sue an attorney for a corporation, but ultimately rejecting the argument that the related entities to an attorney's corporate client were direct intended beneficiaries and disallowing such related entities to bring suit against the attorney); Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978) (explaining it is clear that in order for a third party to successfully sue an attorney, the third party must be a direct and intended beneficiary of the attorney's services).

40. *Schreiner*, 410 N.W.2d at 682. "Because no privity exists, courts extending lawyer liability to nonclient-third parties generally have limited a lawyer's liability to the direct, intended, and specifically identifiable beneficiaries of the testator's testamentary disposition." *Id.*

41. *Id.* at 683.

42. Schmitz v. Crotty, 528 N.W.2d 112, 116 (Iowa 1995).

43. 777 N.W.2d 545 (Neb. 2010).

44. Perez v. Stern, 777 N.W.2d 545, 550-51 (Neb. 2010).

45. *Perez,* 777 N.W.2d at 550.

46. *Id.* at 551.

47. 386 N.W.2d 448 (Neb. 1986).

particular case.[48] Conflicts between beneficiaries, and/or between the fiduciary and other beneficiaries do, however, often exist. The court also distinguished several cases and circumstances: an attorney who prepared a decedent's will was not liable to a beneficiary of the will;[49] and an attorney for a joint venture owed no duty to three individual partners.[50] Although the court initially adopted the "direct and intended beneficiary" standard, it then added a requirement by stating that, in the other cited examples, it was not alleged the "end and aim" of the representation was to benefit the third party.[51] Apparently, in Nebraska, a third party plaintiff must prove both, that they were "direct and intended beneficiaries" and that the "end and aim" of the representation was for their benefit. However, the court never explained the distinction between these two requirements. This case places form over substance, because the beneficiaries of a decedent's estate are always "direct and intended beneficiar[ies] of the attorney's services" when the attorney is retained to oversee an estate.[52]

Jurisdictions that have eroded the general requirement of privity and/or which allow third party claims, especially in the estate and trust context, should be more likely to treat the estate or trust *like* an entity, and hold the attorney to the standards of a lawyer for an entity.[53] And although Nebraska seems to add an "end and aim" component to the "direct and intended beneficiary" requirement, it has muddled the issue of to whom the lawyer owes his or her duties.

D. Duty to "Prevent Breach of Fiduciary Duty" or "Discipline for Uncooperative Fiduciary"

The finding of a duty to "assist in the administration"[54] of an estate or trust strongly implies the courts will treat the estate or trust

48. *Perez*, 777 N.W.2d at 551, 553.
49. *Id.* at 553.
50. *Id.* at 555 n.38.
51. *See generally* Bauermeister v. McReynolds, 571 N.W.2d 79 (Neb. 1997), *opinion modified on denial of reh'g*, 575 N.W.2d 354 (Neb. 1998).
52. *Perez*, 777 N.W.2d at 551.
53. *Compare Schreiner*, 410 N.W.2d at 682 (allowing a third-party beneficiary to sue an estate's attorney because the third-party was a direct, intended, and specifically identifiable beneficiary to the matter), *and Perez*, 777 N.W.2d at 550-51 (emphasizing the importance of determining whether a third-party beneficiary was a direct and intended beneficiary in allowing a third-party to sue an estate's attorney), *with Brody*, 267 N.W.2d at 906-07 (recognizing a third party's ability to sue an attorney if he or she can prove he or she was a direct and intended beneficiary of the attorney's services, but ultimately disallowing such claim), *and Woolley*, 792 N.W.2d at 142 (recognizing that, in special circumstances, a related entity may have standing to sue the parent corporation's attorney).
54. *See, e.g.*, Iowa Code Ann. § 633.82; Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996) (citing Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Elson, 430 N.W.2d 113, 114 (Iowa 1988)).

like an entity. And where a lawyer has a duty to prevent a breach of fiduciary duty or can be disciplined for failing to manage an uncooperative fiduciary, the existence of a duty flowing to the estate or trust is implicit.

In *The Committee on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Elson*,[55] a lawyer was reprimanded for mishandling several different estates.[56] In his defense, the lawyer suggested the fiduciary in one estate failed to cooperate with him, thus causing the delay in closing the estate.[57] The court determined the lack of cooperation by the fiduciary did not excuse the attorney's failure to take appropriate action to close the estate.[58] If the fiduciary's breach of duty can result in an ethics sanction against the lawyer, it follows that the lawyer has a duty to prevent the breach. If a lawyer has a duty to prevent a breach of fiduciary duty, or can be disciplined even when the fiduciary is uncooperative, it is more likely that the court is treating the estate or trust *like* an entity; therefore, the lawyer's duty of loyalty and allegiance is owed to the estate or trust, not the fiduciary.

E. "Duty of Confidentiality"

How a state treats a lawyer's duty of confidentiality indicates whether that state does or should treat an estate or trust *like* an entity. Once the client, whether it be the individual fiduciary or the estate, is properly identified, the general rules pertaining to privilege apply. However, under the Restatement (Third) of the Law Governing Lawyers ("Restatement"), a communication otherwise protected is not privileged if it is relevant to a claimed breach of fiduciary duty—even if the lawyer was hired by the fiduciary—if the lawyer was retained to advise the fiduciary concerning administration of the estate.[59] If the attorney–client privilege is lost due to an alleged breach of duty by the fiduciary, it should follow that the fiduciary is not the client; rather the estate or trust is the client. This analysis closely follows Model Rule 1.13 (duty of allegiance to the entity). If we treat the estate or trust *like* an entity, our allegiance is owed to the estate or trust, not the fiduciary.

This may be especially important in the representation of a fiduciary who is later sued or called to account. Unless it is clearly stated otherwise, an attorney being paid by the estate and called upon to assist the fiduciary, in the fiduciary's capacity, will generally be con-

55. 430 N.W.2d 113 (Iowa 1988).
56. *Elson*, 430 N.W.2d at 114-15.
57. *Id*. at 114.
58. *Id.* at 114-15.
59. Restatement (Third) of the Law Governing Lawyers §§ 84, 85 (Am. Law Ins. 2000).

strued to be the attorney for such estate or trust, and conversations with the fiduciary may not be privileged.[60]

F. Executor or Beneficiary as Client

Some fear has been expressed that, especially in the third-party beneficiary context, an executor, trustee, or beneficiary could sue an estate or trust attorney for failing to protect their personal interests. Iowa has sufficiently settled this issue.[61] Although Iowa recognizes the exception to the third party beneficiary rule (stating a lawyer can be liable to the direct and intended beneficiaries of the lawyer's services), it stops short of making a lawyer responsible for the personal interests of the fiduciary.[62] It would follow that this limitation will apply to a beneficiary of the estate or trust, giving more weight to the conclusion that the lawyer represents the estate or trust, *like* an entity, and no-one else, whether in a representative capacity or otherwise. In other words, if the lawyer has properly represented the estate, there is no liability for any individual interest not flowing directly to the intended beneficiary of said estate or trust.

The ABA Commission on Ethics and Professional Responsibility supports this conclusion. "[T]here is no indirect fiduciary relationship to the legatees which would disqualify the attorney from representing the executors in [a] claim for extra compensation . . . . Even though the lawyer representing the executor may have a duty to see that the assets are preserved and not wasted and has an obligation to the legatees in that respect . . . he is not thereby disqualified to represent the executors in their claim for compensation."[63] The Nebraska Supreme Court similarly recognized this issue in *Perez v. Stern*[64]:

> [C]oncerns weighing against a finding of duty are not present in this case. Stern's [the lawyer's] potential duty to the children would not go beyond the duty owed to and specified by Guido [the personal representative]. Nor is there any evidence that a legal duty to the children would have interfered

60. *Id.* (noting that a communication otherwise protected is not privileged if it is relevant to a claimed breach of fiduciary duty—even if the lawyer was hired by the fiduciary—if the lawyer was retained to advise the fiduciary concerning administration of the estate). *See also* New Hope Methodist Church v. Lawler & Swanson, P.L.C., No. 10-0211, 2010 WL 4484355, at *7 (Iowa Ct. App. Nov. 10, 2010) (unpublished opinion) (quoting Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996) with approval)).

61. *See, e.g.*, Sabin v. Ackerman, 846 N.W.2d 835, 842 (Iowa 2014) (explaining "a duty for an estate attorney to protect the personal interest of the executor cannot arise from the duty of the attorney to administer the estate").

62. *Sabin*, 846 N.W.2d at 842.

63. ABA Comm. on Ethics & Prof'l Resp., Informal Op. 1017 (1967) (attorney for executor may represent executor in petition for extraordinary fees, the question being conflicts of interest with respect to beneficiaries).

64. 777 N.W.2d 545, 554 (Neb. 2010).

> with Stern's duty to Guido, because there is nothing in the record in this case to suggest that the interests of Guido and the children were not aligned. At no time has Stern reported or alleged a conflict of interest. Finally, policy considerations favor a finding of tort duty. Stern was not helping her client, Guido, when she failed to perfect service. An ultimate finding of liability would not discourage vigorous representation; in fact, potential liability under circumstances such as these would encourage zealous advocacy of wrongful death claims.[65]

G. Attorney's Liability to Others

Although the Model Rules and Restatement imply that an attorney may limit responsibility through careful identification of the client, case law suggests otherwise. A lawyer may be disciplined even if the fiduciary fails to cooperate with the lawyer or fails to complain about delay.[66] An attorney designated for an estate is charged with the duty of overseeing administration thereof.[67] "Although the estate attorney is hired by an executor or administrator, his obligations, like those of the fiduciary, extend to the estate and all other distributees."[68] If the estate or trust is treated *like* an entity, the lawyer's allegiance is owed to the estate or trust, and not to an agent (fiduciary) or third party.[69] Once we know where the lawyer's allegiance lies, it defines who the client is, and answers many of our ethical dilemmas. Rule 1.13 not only requires the lawyer's allegiance to the entity, it thereby protects him or her from third parties.[70]

With regard to the estate or trust as an entity, and with regard to third-party liability, Nebraska seems to follow the Model Rules and Restatement more closely, and those rules provide some protection from third-party claims.[71] However, this article has pointed out various inconsistencies in Nebraska's treatment of this issue. The erosion of the privity rule (*Perez v. Stern*[72]) could weaken the logic of standing behind the Model Rules and Restatement. If that happens, Nebraska may have to pivot and fall behind its statutes already in conflict[73]

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65. Perez v. Stern, 777 N.W.2d 545 (Neb. 2010).
66. Comm. on Prof'l Ethics v. Elson, 430 N.W.2d 113, 115 (Iowa 1988).
67. Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996).
68. *Ruden*, 543 N.W.2d at 610.
69. Model Rules of Prof'l Conduct r. 1.13 (Am. Bar Ass'n 1983).
70. *See* Sabin v. Ackerman, 846 N.W.2d 835 (Iowa 2014); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); In re Estate of Wagner, 386 N.W.2d 448 (Neb. 1986).
71. *See Wagner*, 386 N.W.2d 448.
72. 777 N.W.2d 545 (Neb. 2010).
73. *See infra* notes 90-93 and accompanying text.

with the Model Rules, Restatement, and *In re Estate of Wagner*,[74] and begin treating estates and trusts *like* entities.

In any event, if one is handling a Nebraska estate or trust, one should notify the beneficiaries of the lawyer's limited role in representing their interest, and informing them of the lawyer's duty to the fiduciary.[75] However, if one is handling an Iowa estate or trust, one would be prudent to notify the fiduciary of the lawyer's duty to the estate or trust and its "direct and intended beneficiaries."[76] In other words, the complexities of representing an estate or trust warrant the lawyer's warning to the person(s) whose interests are not being protected by the lawyer.

IV. REPRESENTING ESTATES AND TRUSTS

A. Establishing the Relationship

The Restatement emphasizes that the scope of representation is one which must be identified by the lawyer at the start of the representation.[77] However, in light of Iowa's ethics and professional liability cases, an attempt to limit one's liability may be ineffective if that limitation leaves the estate or trust without representation. If and when attempting to limit one's liability under the Restatement, an Iowa lawyer should ask himself or herself what disclosures and warnings will effectively reverse his or her duties under Rule 1.13. The disclosure is particularly tricky when the lawyer tries to explain that, notwithstanding the disclaimers and warnings, the estate will be paying the lawyer's fees.

In light of Nebraska's current posture, limiting the lawyer's duty to the estate and its beneficiaries, a Nebraska lawyer's task is easier in this regard. Under *Perez v. Stern*[78] and the examples cited therein, the engagement could be limited to advising the personal representative by giving a disclaimer to the beneficiaries that the "end and aim" of the representation is only to advise the fiduciary. However, *Perez* and the statutes cited in Section C below suggest the door may remain open to liability due to the vague distinction of the "end and aim" limitation.

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74. 386 N.W.2d 448 (Neb. 1986).

75. *See* ACTEC, *supra* note 6, at 36.

76. *See Ruden*, 543 N.W.2d at 610; *Elson*, 430 N.W.2d at 114.

77. *See* Restatement (Third) of the Law Governing Lawyers § 16. *See also* Sabin v. Ackerman, 846 N.W.2d 835, 842 (Iowa 2014) (noting a duty for an estate attorney to protect the personal interest of the executor cannot arise from the duty of the attorney to administer the estate).

78. 777 N.W.2d 545 (Neb. 2010).

B. Removal

If a fiduciary is not cooperating, the attorney may have a duty to file a petition for rule to show cause under section 633.65.[79] Though some argue the lawyer owes a duty to the executor and, thus, cannot file such a petition against the client, the foregoing analysis suggests a lawyer could be liable and/or disciplined for failing to do so.[80] If a Nebraska lawyer is hired with the "end and aim" of benefitting the beneficiaries of an estate or trust, the duty to take action against the fiduciary could likewise be imposed.[81]

C. Other Remedial Statutes

Iowa Code section 633.70 requires the fiduciary, upon removal, to deliver the property in the fiduciary's hands to the person who may be entitled to it.[82] If there are two or more fiduciaries to an estate, section 633.76 allows, in the event that the two fiduciaries cannot concur, either one of them to apply to the court for directions, and the court "shall make such orders as it may deem to be to the best interests of the estate."[83]

Iowa Code section 633.63(1)(b) disqualifies any "person whom the court determines to be unsuitable."[84] A fiduciary's lack of communication, history of mistrust, and/or hostility with the beneficiaries are all grounds for disqualification and removal of the fiduciary.[85] And remember that *The Committee on Professional Ethics v. Elson*[86] may require corrective action by the lawyer for the estate or trust. Iowa Code section 633.11 also states:

> During the administration of an estate, the district court sitting in probate shall have full, legal and equitable powers to make declaratory judgments in all matters involved in the administration of the estate, including those pertaining to the title of real estate, the determination of heirship, and the distribution of the estate.[87]

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79. *See* Iowa Code Ann. § 633.65. *See also* § 633A.4107 (explaining the removal process for a trustee); Comm. on Prof'l Ethics v. Elson, 430 N.W.2d 113, 114 (Iowa 1988).

80. *See Elson*, 430 N.W.2d at 115, *and* Ruden v. Jenk, 543 N.W.2d 605, 610 (Iowa 1996).

81. *See* Perez v. Stern, 777 N.W 2d 545 (Neb. 2010); *infra* notes 90-93 and accompanying text.

82. Iowa Code Ann. § 633.70.

83. *Id*. at § 633.76. *See also* § 633A.4107(c) (providing grounds for removal "[i]f hostility or lack of cooperation among cotrustees impairs the administration of the trust.").

84. *Id*. § 633.63.

85. In re Estate of Houser, No. 15-1993, 2017 WL 363238, at *1 (Iowa Ct. App. Jan. 25, 2017) (citing Estate of Randeris v. Randeris, 523 NW2d 600 (Iowa Ct. App. 1994)).

86. 430 N.W.2d 113 (Iowa 1988).

87. Iowa Code Ann. § 633.11.

The Iowa Trust Code[88] has similar provisions.[89] These Iowa statutory provisions give lawyers powerful tools to accomplish what is fair, just, and in the best interest of the estate or trust. When the parties are warring, the lawyer is in a good position to recommend a certain resolution and then to submit the matter to the court for a ruling. Iowa gives the lawyer a clearer path, because Iowa courts have indicated they will treat an estate or trust *like* an entity. By undertaking representation of the estate or trust, and treating it *like* an entity, the estate and trust lawyer has a unique role in avoiding, ending, or otherwise effecting a resolution to the destructive tendencies of parties to litigate to the detriment of the estate or trust and themselves.

In Nebraska, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of his office, or make any other order to secure proper performance of his duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person.[90]

Moreover, "a person interested in the estate may file a petition for removal of a personal representative for cause at any time."[91] Notably, among others, "[c]ause for removal exists when removal would be in the best interests of the estate."[92] Notice that, in Nebraska, the personal representative has power over property of the estate "for the benefit of the creditors and others interested in the estate."[93]

Nebraska's statutes give some support to an argument that an estate or trust should be treated *like* an entity. However, the Nebraska court's interpretations indicate the lawyer's duty flows to the fiduciary, not the estate (even though the fiduciary's duty apparently flows to the estate or trust), but perhaps the benefits of treating estates and trusts *like* an entity are working their way into Nebraska's legal fabric.

Other possible solutions to difficult situations arising in estate and trust representation include: asking for appointment of a co-fidu-

88. IOWA CODE ANN. § 633A (West 2017).

89. *See id.* §§ 633A.4103 (impasse between co-trustees); 633A.4107 (removal of trustee); 633A.4201 (duty of loyalty, impartiality, confidentiality); 633A.4605 (action by the trustee for the benefit of the trust); 633A.6101 et seq. (jurisdiction, judicial intervention, petitions for remedies).

90. NEB. REV. STAT. ANN. § 30-2450 (West 2017).

91. *Id*. § 30-2454.

92. *Id.* Ironically, this statute strongly implies Nebraska should or does treat estates *like* an entity.

93. *Id*. § 30-2472.

ciary;[94] asking that all funds of the estate or trust be deposited in the lawyer's client trust account (but beware of the additional risk and responsibility of the lawyer in this circumstance); asking for court approval of any compromise of claims in the estate or trust administration;[95] obtaining beneficiary prior consent to any disputable action by the fiduciary; and finally, withdrawing from representation.

V. CONCLUSION

One should always be aware of conflicts of interest, which can sneak up on the lawyer in the estate and trust context. Based upon the foregoing analysis, in Iowa, for example, the lawyer represents the estate or trust *like* an entity. Therefore, a lawyer for an estate or trust may have a duty to report a fiduciary's breach of duty, placing the lawyer in a classic conflict of interest with the person who hired him or her. If a situation like this arises, a second lawyer will be required to represent the interests of the fiduciary. If the fiduciary is also a beneficiary of the estate or trust, it is possible that a third lawyer will be required to maintain the independence necessary to resolve classic disputes in the administration of the estate or trust. Imagine how quickly this spins out of control when, for example, the testator or trustor names multiple or co-fiduciaries, especially when they are also beneficiaries.

The estate or trust *like* an entity concept may place the lawyer in a unique position to referee, mediate, and resolve disputes between the fiduciary or co-fiduciaries and beneficiaries. Regardless of the position of any one party, the attorney for the estate or trust should carefully consider the best interest of his or her client and make recommendations accordingly. This requires that the lawyer have extensive knowledge in the subject matter of the estate or trust and that he or she be creative and careful.

94. IOWA CODE ANN. § 633.76; NEB. REV. STAT. § 30-2478.
95. IOWA CODE ANN. § 633.114.