

THIRD-PARTY AND SELF-CREATED TRUSTS

A Modern Look

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CHAPTER 2

Ethical Issues and Fiduciary Representation¹

I. Introduction

There are at least five typical scenarios to consider in drafting special needs trusts (SNTs) as part of planning for the clients who are elders or who have a disability. Is the attorney:

1. Only the drafter of the documents?
2. Representing the trustee or other fiduciary?
3. Hired by, and representing, the beneficiary?
4. Expected to draft the documents and represent one of the parties?
5. Drafting the documents and serving as a fiduciary once the drafting is finalized?

Whichever scenario applies, there will typically be ethical issues that an attorney may face in these discrete roles. Sometimes those issues will result from multiple roles—or at least multiple expectations—affecting the representation.

II. Who Is the Client?

The first step in any representation is to always, always determine who the attorney represents and make it clear to all concerned. In the creation of an SNT, the answer to the question may not be quite clear initially.

For example, with a first-party SNT, when only hired to draft the documents, the attorney may be hired by the personal injury attorney,

1. This chapter assumes the reader has a working knowledge of the applicable state Rules of Professional Conduct, and of the attorney's ethical duties.

court-appointed guardian ad litem, or another to draft the SNT. In such instances, does the drafting attorney have any duty to the SNT beneficiary or another, such as the parents when the beneficiary is a minor? Is the SNT court-created and the drafting attorney's fees will be approved by the court? Who is signing the drafting attorney's engagement agreement?² In other cases, the client might be the beneficiary whose money will be used to establish the trust. In other instances, the client may be the parents, guardian, or grandparents³ who act for the beneficiary. Although a court can "establish" the first-party SNT,⁴ the attorney will not represent the court. Instead, the attorney may represent those who petitioned the court for approval of the SNT, who hired the attorney for the creation of the SNT, or who was appointed by the court to create the SNT. Keep in mind that with the first-party SNT, the settlor may not be the client, but instead the individual who has provided the money to fund the SNT.⁵ Even if everyone understands that the client is the person who will sign the trust, or the person or entity that will fund it, the attorney's obligation to the beneficiary will often be both clearer and more complicated.⁶ Although the attorney's duty to the nonclient beneficiary is going to be state specific, guidance may be taken from the Life Passages PSNT Best Practices Guidelines⁷ for pooled trust administrators regarding when and how to best communicate with beneficiaries.⁸

When the attorney is hired to draft a third-party trust, it may be easier to identify the client. There is no scenario as in the first-party SNT where the beneficiary's money is used to fund the trust. The beneficiary is not the client.

The creation of the client-attorney relationship is critical for the imposition of duties on the attorney. The Restatement (Third) of the Law Governing

2. Who signs the engagement agreement is one factor to be considered when identifying who is the client. See generally MODEL RULES OF PRO. CONDUCT scope [17] (AM. BAR ASS'N 1983).

3. 42 U.S.C. § 1396p(d)(4)(a).

4. *Id.*

5. *In re Hertsberg Inter Vivos Tr.*, 578 N.W.2d 289, 291–92, 292 (Mich. 1998) (mother created trust and funded trust pursuant to court order for benefit of daughter; court held the money was that of the daughter) ("settlor is the one who provides consideration for a trust").

6. See, for example, Model Rules of Professional Conduct Rule 1.14 comment 2, which states: "The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." See also comment 4, which states:

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.

7. STETSON L., LIFE PASSAGES PSNT BEST PRACTICES GUIDELINES (2020), https://www.stetson.edu/law/academics/elder/home/media/Best_Practices_Guidelines_Final_42022.pdf.

8. *Id.* at 13.

Also available as part of the eCourse

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