

Conflicts of Interest

What You Don't Know Can Hurt You!

ACUÑA ❖ REGLI

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About the Presenters

Frank R. Acuña is a founding partner of ACUÑA ❖ REGLI. He is a California State Bar certified estate planning, trust, and probate law specialist. His practice includes estate planning; inheritance litigation; business succession planning; special needs trusts; and farm, ranch, and vineyard succession planning. Mr. Acuña has taught tax seminars for the National Tax Practice Institute, the California Society of Enrolled Agents, the California Society of Tax Professionals, the National Association of Enrolled Agents, and the American Institute of Certified Public Accountants. Mr. Acuña also is a featured speaker for the Professional Fiduciary Association of California, the National Guardianship Association, and the California Public Administrators, Public Conservators, and Public Guardians. He advises tax, fiduciary, and investment professionals throughout the State of California.

About the Presenters

Tracy S. Regli is a founding partner of ACUÑA ❖ REGLI. Tracy focuses her practice on probate and trust administration, fiduciary representation, conservatorship and special needs planning. She has assisted many banks, fiduciaries, and family members with administering large and small estates throughout California. Prior to starting the firm, Tracy worked for a national real estate investment trust, negotiating and drafting commercial real estate transactions. Her extensive business experience makes her a more effective lawyer when administering estates and negotiating disputes for her clients.

Tracy is an active member of the Alameda and Contra Costa Bar associations, the Professional Fiduciary Association of California (PFAC), and the Southern Alameda Estate Planning Council. She is a sought-after speaker and has spoken at PFAC and Estate Planning Council meetings and conventions. Her pro bono activities include participating in the Lawyers in the Library program and assisting low income seniors through workshops sponsored by the Contra Costa County Bar Association.

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The Duty of Loyalty

All fiduciaries owe their clients a “Duty of Loyalty”

- ❖ NGA Rule 2.2: The guardian shall scrupulously avoid conflict of interest and self-dealing in relationships
 - ❖ Breaching the Duty of Loyalty will subject a fiduciary to personal liability and damages
 - ❖ A thorough document review and conflict check are the first things a fiduciary should review **before taking the case!**

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Three Types of Conflict of Interest

- ❖ Personal: The fiduciary has interests which are adverse to the client or proposed client
- ❖ Direct: The fiduciary has served, or is serving, a client whose interests are adverse to the client or proposed client
- ❖ Indirect: A professional chosen by the fiduciary has interests, or has served clients who have interests, which are adverse to the client or proposed client

Personal Conflicts of Interest

- ❖ Typically, investments in bank accounts or publicly traded securities do not create conflicts of interest
- ❖ A fiduciary should keep a list of personal, non-publicly traded investments they have to evaluate whether there may be a personal conflict of interest
 - ❖ Real property owned
 - ❖ Watch out for HOAs!
 - ❖ Partnerships
 - ❖ Other limited investments
- ❖ If a conflict exists, decline representation in writing

Personal Conflicts of Interest

Case Study (two slides):

- ❖ Joe Guardian is an investor in a real estate limited partnership. Over the years, he has become acquainted with the Smith family, a couple who has one child who lives in a distant state. As the couple aged and the first slid into dementia, Joe was asked by the caregiver spouse to serve as guardian of the person and estate. Documents were signed and the caregiver spouse died.

Personal Conflicts of Interest

Case Study (two slides):

- ❖ After accepting the appointment, the general partner received an offer to purchase the limited partnership asset; a rural mobile home park that cash flowed well (12% return on cash), but that has not achieved any equity appreciation because of its location. Joe Guardian would like to hold on to the asset, but knows that his client received a step-up in basis on the death of the caregiver, would not pay capital gains tax on sale, and really should diversify their investments with the real estate sales proceeds.

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Direct Conflicts of Interest

- ❖ This should be the easiest type of conflict of interest to avoid
- ❖ **All** fiduciaries should maintain a client database
 - ❖ Identify all clients and spouses
 - ❖ Identify all beneficiaries named by the clients under their estate planning documents
 - ❖ Fiduciary duties and malpractice liability extends to “third party intended beneficiaries” of the client
 - ❖ Lucas v. Hamm, 56 Cal.2d 583 (1961) (attorney liability)

Direct Conflicts of Interest

- ❖ With every case, ask your attorney to review the estate planning documents or court orders to determine
 - ❖ Who is the client?
 - ❖ Is there a spouse?
 - ❖ Who are the client’s beneficiaries or heirs at law?
- ❖ (Note: Many attorneys offer this as a free service and include an analysis of fee provisions and extent of authority)

Direct Conflicts of Interest

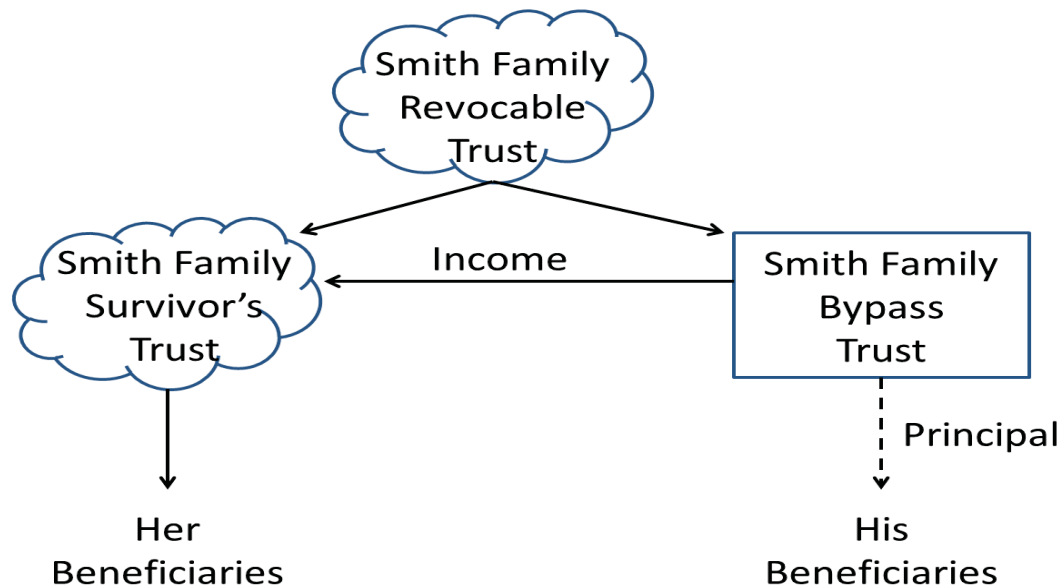
- ❖ When review is received, input all persons identified together with the matter name (name of the prospective client), and the date of the consult
- ❖ Search your database for the prospective client, their spouse, and their third party intended beneficiaries
- ❖ If conflict is found, ask attorney to review and advise as to whether you should take the case
- ❖ If a conflict exists, decline representation in writing
- ❖ If no conflict, update database to reflect "client", "client's spouse" or "third party beneficiary"

Direct Conflicts of Interest

Examples:

- ❖ Where a beneficiary in this probate is the fiduciary's client or third party intended beneficiary in another matter
- ❖ Where the fiduciary has created the impression that the beneficiary is a client
- ❖ Where the fiduciary has created the impression that the beneficiaries' wishes will be controlling
- ❖ Where the fiduciary has communicated with some, but not all beneficiaries
- ❖ Where the fiduciary represents competing estates and trusts (think mom and dad in a second marriage)

Direct Conflicts of Interest



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Indirect Conflicts of Interest

- ❖ This may be the most difficult type of conflict of interest to identify or to address
- ❖ Definition: A professional chosen by the fiduciary has interests, or has served clients who have interests, which are adverse to the client or proposed client
- ❖ ***The problem is often that the referring attorney wants to be retained as your attorney in the referred matter***

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Indirect Conflicts of Interest

- ❖ A note on attorney conflicts of interest:
 - ❖ Attorneys are permitted to stay in a case, even with the conflict of interest, if all affected persons receive written disclosure and waive the conflict of interest
- ❖ As a result:
 - ❖ Many attorneys are sloppy with their definition of “conflict of interest”
 - ❖ Many attorneys think that every other profession enjoys the same shield
 - ❖ Many attorneys have not thought about a client having a conflict of interest

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Indirect Conflicts of Interest

How to Handle:

- ❖ When the attorney review and list of affected persons is received (or as part of asking the attorney to review), ask the question:
 - ❖ Have you or has your firm represented any of these persons?
 - ❖ Have you or has your firm represented any businesses owned by these persons?
- ❖ If the answer is yes, it is time for a “heart to heart” talk
- ❖ If the attorney insists on representing you in a conflict situation, decline the representation in writing

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Indirect Conflicts of Interest

Case Study:

- ❖ John Smith represented Mr. and Mrs. Jones for years. During that time, he created the living trusts of two of their three children, but the Joneses were “old school” and never completed an estate plan. He also represented their small, closely-held corporation. When Mr. and Mrs. Jones were ill, he assisted one of the children who assumed the duties of the president. During their illness, he created quick wills dividing the estate equally and naming you as executor. Now, he would like to file the Petition for Probate and to represent you as executor.

Indirect Conflicts of Interest

Case Study:

- ❖ The child who acted as president and one other child will present creditor claims for wages not paid and monies advanced to the corporation.

The Bottom Line: Best Practices

- ❖ Before taking any case, obtain an attorney review of the operative documents
 - ❖ Court order (or proposed court order)
 - ❖ Estate planning documents
- ❖ Maintain your own conflict checking system
 - ❖ List of closely held business and investment interests
 - ❖ Client and beneficiary database

The Bottom Line: Best Practices

- ❖ Update your database religiously
 - ❖ Why not? It is a great start for a marketing database!
- ❖ If a conflict of interest is identified, decline the representation in writing
- ❖ Learn to have the “heart to heart” talk with your attorney
 - ❖ Honor your heart to heart talk by referring the next case to them!

Questions?

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