ETHICS AND ADVISING A FIDUCIARY

How to Avoid the Pitfalls that Confront You and Your Client

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Ethical Consideration When Advising a Fiduciary

The Pitfalls:

1. Agreeing to represent a client in a fiduciary capacity before understanding how the client’s personal rights, interests and claims or prior duties or acts in relation to the decedent and interested parties in the estate, may conflict with his or her fiduciary duties and proper course of administration under the Colorado Probate Code.
2. Agreeing to represent a client in a fiduciary capacity before disclosing how you or your firm’s current or former representations may limit the scope of your representation and failing to disclose those limitations to your prospective client.
3. Failing to monitor your client’s acts as a fiduciary and correct or disclose errors or conflicts as they arise or take other appropriate steps under the Colorado Probate Code.
4. Failing to diligently identify and manage conflicts or potential conflicts between you, your client and his or her duties as a fiduciary throughout the course of the administration process.

Colo. RPC 1.4

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Colo. RPC 1.0[21](e)

“’Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

Colo. RPC 1.2(d)

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

Official Comment [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Official Comment [11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Colo. RPC 4.1

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

***Black v. Black*, 422 P.3d 592 (Colo. App. 2018).**

The fiduciary has "an affirmative duty to disclose material information" about a conflicted transaction. Restatement § 78 cmt. c(1).

To recover civil theft damages, a party must prove, by a preponderance of the evidence, that the defendant committed all of the elements of criminal theft… A person commits theft when he "knowingly obtains, retains, or exercises control over anything of value of another without authorization or by threat or deception" with the intent to deprive the other person permanently of the thing of value. § 18-4-401(1), C.R.S. 2017. "[T]heft by deception requires proof that misrepresentations caused the victim to part with something of value and that the victim relied upon the swindler's misrepresentations."

Mr. Black does not dispute that there was sufficient evidence that he obtained control over Joanne's assets with the intent to permanently deprive her of them. He disputes only the probate court's finding of deception.

A finding of deception requires proof that the defendant made misrepresentations to the victim. In this context, a "misrepresentation is a false representation of a past or present fact or a promise to perform a future act made with the present intention not to perform the promise or future act." *People v. Lewis*, 710 P.2d 1110, 1116-17 (Colo. App. 1985). This includes statements that are misleading or "convey a false understanding . . . by concealment of information." *People v. Harte*, 131 P.3d 1180, 1185 (Colo. App. 2005); *see also People v. Campbell*, 58 P.3d 1148, 1161 (Colo. App. 2002) (failure to disclose material information could support element of theft by deception).

Before Agreeing to Represent a Prospective Client in a Fiduciary Capacity

Identify your prospective client's rights, interests and claims as it relates to the Decedent, the Estate and any non-probate assets. Consider, with reference to the Colorado Probate Code, whether your client's individual rights, interests and claims may currently or prospectively constitute a material conflict of interest (C.R.S. § 15-12-703) and disclose to your client how his or her duties as a fiduciary may conflict with his or her own personal interests, objectives or goals. Specifically, consider the following:

a. Does your client have prior knowledge or information that may be relevant to the administration of the estate or related issues that if disclosed would harm his or her personal interest(s)? If your client is a fiduciary, will he be obligated to disclose such information or may you, as his attorney, be obligated to disclose such information?

b. Has your client served in any capacity, or committed any act, that may subject him or her to a claim(s) that may be properly prosecuted by the personal representative of the estate or at estate expenses?

c. Can your client's personal interests, goals or objectives be reconciled with his or her duties as a fiduciary, such as by disclosure, supervised administration, court order or separate legal representation.

Illustrative Case Facts and Sample Analysis

1. **You receive an e-mail from Sam, a prospective client, with the following information and a copy of a handwritten document (included in case file) and video recording.**

Cathy Johnson recently underwent surgery. Although Cathy was expected to fully recovery, she developed a serious infection in the hospital. A week before her death, in the presence of her nephew, Sam, and her niece, Susie, and with their assistance. Susie made a video recording of Cathy giving Sam specific verbal instruction as to the dispositive provisions and Sam writing Cathy's instructions on a piece of paper. Then, the video also shows, Cathy taking the paper from Sam, reading what Sam had wrote, making some notations of her own and signing and dating the document.

The document directs that three real properties be divided three ways with one-third devised to Sam and his wife, Sara, one-third devised to Cathy's brother, Jack, and one-third devised to Cathy's niece, Susie.

The three properties listed in the "will" are Cathy's personal residence in Denver, a farm in Fort Collins that is currently rented to tenants for $3,000 a month and a piece of vacant land in Colorado Springs that Cathy is under contract to purchase for $200,000.

Sam contacts your firm because Cathy has your firm's contact information under "attorney" in her files. Sam wants to know what he needs to do to open probate and become personal

representative of Cathy's estate. He is very anxious to meet with you because he needs to deal with the purchase contract for the Colorado Springs property right away so if you can't help him, please let him know so he can find someone else quickly.

2. **What should you do before you agree to meet with Sam to discuss your potential representation?**

First, you identify whether your firm represented the Decedent, Cathy. You learn that your partner, represented Cathy in her divorce 7 years ago.

Second, you have a conference with your partner to ask about the status of the divorce proceedings and his prior representation of Cathy. Your partner does not remember a lot of details but believes that the terms of the separation may have included maintenance payments to Cathy's ex-husband. You determine, based on this information, that there is nothing in your firm's prior representation of Cathy, that would, at least initially, preclude you from representing Sam, as the personal representative of her Estate, or requires informed consent from a former client, under Colo. R.P.C. 1.9 – *Duties to Former Clients*.

However, you also recognize that under Colo. R.P.C. 1.6 and Colorado Formal Ethics Opinion 132 – *Duties of Confidentiality of Will Drafter Upon Death of Testator*, you cannot disclose confidential information acquired through your firm's prior representation of Cathy, even if it may helpful in advising Sam, to anyone other than the court-appointed personal representative of Cathy's Estate.

Third, you reach out to Sam via e-mail and ask him to provide you with the full names and for both heirs and devisees. But, since Sam won't know how to determine whether someone is an heir, you will have to ask him specific questions to identify interested persons in the Estate to whom you may currently or formerly have represented. Your e-mail to Sam asks for the following:

1. Full names and addresses of the four individuals named in the "will".
2. Names and addresses for the following:
    a. Cathy's husband, if she remarried;
    b. Cathy's children natural or adopted, if she had any;
    c. If Cathy was not married and had no children, the names of Cathy's parents if they are living;
    d. If Cathy's parents are deceased, the names of any of Cathy's siblings;
    e. If any of Cathy's siblings are deceased, the names of any of her deceased siblings children;
    f. The full name of any other individual or entity, that Sam has reason to believe may make a claim or otherwise be interested in the Estate and the reason why Sam thinks they may have such an interest.

You also inform Sam that your law firm represented Cathy in her divorce proceedings. You explain that your firm's prior representation of Cathy does not prevent you from representing Sam with regard to his interests in Cathy's Estate or for purposes of assisting Sam in administering her Estate. However, you cannot share confidential information about that prior

representation with Sam until, or unless, he is appointed as personal representative of Cathy's Estate and you would only share that information to the extent that it became relevant to the administration of the Estate. You ask Sam to confirm that he understands this limitation and is comfortable moving forward with your firm's potential representation of him, now that he understands the scope of your prior representation of Cathy.

3. **Sam replies to your e-mail and sends you the names and addresses you requested along with the following additional information.**

Cathy's parents, Ann and Alan are deceased. Cathy never had any children and she never adopted any children. Cathy and her ex-husband rarely spoke, but he thinks Cathy may have had to pay him money every month after the divorce. Sam does not know whether Cathy was current on her payments to her ex-husband. Sam is fine with the fact that your law firm represented Cathy in the divorce and understands the limits on your ability to share Cathy's confidential information.

Cathy has four siblings but only her two brothers, Jack and Peter, are living. Her sisters, Jane and Jessica are deceased. Jessica has two living children, Susie and Veronica. Susie was adopted by Jessica when Susie was young child. Veronica has been estranged from the family for many years and Sam is not sure where she lives. Jane lived in Brazil when she died and never had any children.

Cathy loaned her brother, Peter, fifty-thousand dollars a few years ago and he didn't pay it back even though he promised he would. That is why Cathy did not leave Peter anything in her "will". Peter is Sam's father. Sam and his father are not on speaking terms.

4. **After receiving the additional information from Sam, you run a complete conflicts-check and determine that your firm does not currently, and has not previously, represented any of the individuals he identified, what do you do next?**

You are still not sure whether you are willing or able to represent Sam as personal representative of the Estate, because you need to determine what hurtles may have to be overcome to have him appointed or whether he has any conflict that may limit his ability to serve as personal representative.

Therefore, you advise Sam that he should schedule an appointment to come into your office for a one-hour consultation so you can determine whether you will be able to assist him and in what capacity you may be able to assist him.

You also advise Sam, that while he has not yet engaged to you to represent him, and you have not yet agreed to represent him in this matter, the information he shares with you as a prospective client is subject the same protection that would apply if he engaged you as his attorney. *See* Colo. RPC 1.18.

5. **During your initial consult with Sam you ask the following additional questions so you can gather enough information to determine whether you will represent Sam and the scope of your representation.**

When a client is asking you to represent him or her as a fiduciary and to assist in having him or her appointed as a fiduciary, ethically it is often necessary to gather more information about the matter than you may otherwise gather if simply agreeing to represent the client with regard to his or her personal rights, interests or claims.

The Rules of Professional Conduct require that your client provide informed consent to the scope of the representation. Colo. RPC 1.0[21](e) defines informed consent as follows:

"'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Additionally, Colo. RPC 1.4 requires that you as an attorney to communicate with your client as follows:

(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

If you as an attorney do not take steps to understand how your client's rights, interests and claims in an estate (or trust) may conflict with his duties as a fiduciary, you cannot explain the material risks associated with (1) his application to serve as a fiduciary or (2) his duties if so appointed. During your initial consultation with Sam as a prospective client, you specifically ask Sam the following questions to help you "issue spot":

(1) What were the facts and circumstances surrounding the preparation and execution of Cathy's handwritten "will"?
(2) What relationship do each of the individuals named in the "will" have to Cathy?
(3) Even though Cathy was not married, did Cathy have a partner and/or was she cohabitating with anybody?
(4) What, if anything, does Sam know about Cathy's personal and financial relationship with her ex-husband after the divorce?
(5) What does Sam know about the real property described in the "will"?

(6) What, if any other assets, debts, expenses, income did Cathy have?
(7) Did anyone serve as Cathy's medical or financial power of attorney prior to her death, and if so, who?
(8) What, if any additional information, does Sam have about the background, relationships, location and status of Cathy's relatives and the individuals named in the "will".
(9) Why does Sam wish to serve as the personal representative of Cathy's estate?

6. In response to your questions, Sam provides you with the following additional information about his aunt, Cathy, and her estate.

Cathy lived in the house in Denver for many years. It is a nice house but it is filled to the brim with all of Cathy's antiques and collectibles. Cathy inherited the Fort Collins farm from her parents and has been renting it to a family for $3,000 a month for last three years. Sam does not know when the family's lease expires. Sam believes there is a small loan secured by the Fort Collins farm in the amount of $20,000.00.

Cathy was really excited about buying the vacant land in Colorado Springs where she planned to build her retirement home. The purchase of the property is scheduled to close in three weeks but the Seller had a lot of interest in the property and has told Sam that they will not agree to extend the closing deadline unless they receive an additional $20,000 in earnest money now and a $10,000 increase in the purchase price. The earnest money for the purchase contract was $5,000.00. Sam knows about the sales contract, because Cathy asked Sam if he would loan her the $5,000.00 for the earnest money deposit, until Cathy completed the paperwork to borrow the money to purchase the Colorado Springs property from her IRA. Sam loaned her the money. Sam does not think that Cathy was able to submit the paperwork to borrow from her IRA due to her unexpected decline in health and her long-term stay in the hospital.

Cathy has a small bank account with $20,000. Before Cathy went into the hospital, she made Sam a joint owner on the account, in case he needed to pay any of her bills or make deposits for her. Cathy's deceased sister, Jane is listed as the POD beneficiary on the account. Sam believes that Jane, is also the named beneficiary of the IRA. Sam doesn't know if there are any contingent beneficiaries, but he doesn't think so. Sam doesn't know exactly when Jane died, he thinks it was three or four years ago.

Sam was Cathy's financial power of attorney and his cousin, Susie, was Cathy's medical power of attorney. When Cathy was in the hospital and did not come home as soon as she planned, she asked Sam to open her mail and to start paying her bills. Before Sam could pay any of the bills, Cathy passed away. Sam is ready to pay Cathy's bills and he is anxious to do so, but he wanted to talk to an attorney before he mailed any checks.

Sam lives in Colorado and is the only one who is in a position to manage Cathy's estate. Sam does not think anybody will object to him being personal representative, but he hasn't spoken to either Peter or Veronica for some time. He wants to know whether his wife, Sara, can be co-personal representative with him, since he sometimes travels for business and it may be easier if she can sign checks and paperwork too.

Sam and his wife, Sara, are great. They have been married for 10 years, have two kids and they both really loved Cathy.

7. **You advise Sam that all of this information is really helpful, but before you can advise him about next steps or whether you recommend that he seek appointment as personal representative, you need to spend some time reviewing the Colorado Probate Code and then send him an e-mail with some additional information.**

The following is a list of issues and questions that you identified:

1. Can Sam meet the statutory requirements for informal probate and informal appointment of personal representative? If informal probate is an option, do you recommend that Sam proceed informally?
2. Does the "will" qualify as a holographic will?
3. Is there clear and convincing evidence that the "writing is intended as will"?
4. Does Sam have priority to serve as personal representative? If not, who has priority to serve as personal representative?
5. The "will" only disposes of the Decedent's real property, how is the Decedent's non-real property to be divided and distributed?
6. If the Estate has property that passes both by testacy and intestacy, how should the Estate be administered? How should fees, costs, income and expenses be allocated between the testate estate and the intestate estate?
7. The real estate closing for the Colorado Springs property is scheduled to close in three weeks but no one has authority to act on behalf of the Estate or to determine whether the Estate should sign an amend/extend agreeing to the additional earnest money and the increased purchase price. If the amend/extend is not signed, the Estate will forfeit the $5,000 in earnest money if the sales contract falls through. Is Sam at risk if the sales contract falls through and the earnest money is forfeited? How might you protect Sam and/or the Estate from liability if this risk exists?
8. If Sam is appointed to serve as a fiduciary, would signing the amend/extend violate any of his fiduciary duties and would the amend/extend be in the best interests of all of the successors of the Decedent (both testate and intestate)?
9. If the purchase of the Colorado Springs property falls through, what, if anything, are the devisees of the Colorado Springs property entitled to receive?
10. Can, or should, Sam borrow from the intestate assets to administer testate property or to purchase the Colorado Springs property for the benefit of the testate devisees?
11. How does the loan against the Fort Collins farm affect the interests of the testate devisees v. the intestate heirs?
12. Sam is devisee under the "will" but he is not an intestate heir, is this a material conflict of interest?
13. Can, or should, Sam, as a devisee under the "will" seek to have the writing intended as a "will" admitted to probate at the expense of the Estate?
14. Sam loaned the Decedent $5,000.00 prior to her death. Sam is a creditor of the Estate, is this a material conflict of interest?

15. In what capacity should you agree to represent Sam? Should you place any limits on the scope of your representation based on the facts he has shared with you?
16. Sam has the Decedent's check book and he is listed as joint owner on Cathy's checking account. Sam asks whether he can give the Seller of the Colorado Springs property the additional $20,000 earnest money payment from the joint account and agree to amend the purchase contract. Sam thinks that the Decedent was getting a good deal for the Colorado Springs property and that the property is worth more than $210,000. Should you advise Sam to spend the $20,000 and sign the amend/extend for the purchase of the Colorado Springs property?
17. Sam is now the sole owner of the joint checking account, is the money in this account Sam's or is it property of the Estate?
18. The Decedent, sister, Jane, is the named payable on death beneficiary of both the joint checking account and the IRA. If there are no contingent beneficiaries, what happens next?
19. Should you considering having Sam and his wife, Sara, appointed co-personal representatives, since Sam may be unavailable when he is traveling for business?
20. Does the Decedent's ex-husband have a claim against the Estate for current or past maintenance payments? If so, should you provide him with actual notice of the creditor claim's period?

8. **After "issue spotting", you then prioritize your list and focus on what issues may affect your representation of Sam and his expectations as a client.**

To help your work though those questions, you create a simple flowchart to map out how the individuals, assets and liabilities of the relate to each other (included in case file). You also create a chart to identify the individuals who receive a share of any intestate property in the Estate (included in case file).

You decide that you want to disclose the following potential risks and issues to Sam before agreeing to represent him for purposes of securing his appointment as a fiduciary for the Decedent's Estate:

1. You advise Sam that you will be agreeing to represent him in a fiduciary capacity. Therefore, to the extent that his individual rights, interests and claims in the Estate conflict with his duties as a fiduciary, he may need to engage separate legal counsel to prosecute or defend his individual rights, interests or claims. However, based on the information you have learned to date, and subject to Sam's understanding of the following issues you are about to disclose, you are comfortable advising Sam that he can seek appointment of as a fiduciary.
2. Sam's ownership of the multi-party account. Sam admitted that to you that he was a joint owner of the Decedent's checking account for fiduciary purposes therefore the Estate has a claim for ownership of the account. *See Sandstead-Corona v. Sandstead*, 415 P.3d 310, 320-21 (Colo. 2018); C.R.S. § 15-12-202. The POD beneficiary on the checking account, is the Decedent's deceased sister, Jane. Therefore, pursuant to C.R.S. § 15-12-

212(2)(b)(III) there is an argument that the sums on deposit belong to the Estate. You explain that as a fiduciary, Sam will at a minimum need to disclose material information about this account, however, you recommend that based on the information he has shared with you, that the sums on deposit in this account be treated as an Estate asset.

3. Sam disclosed that he loaned the Decedent $5,000 prior to her death. You explain to Sam that while he is entitled to file a creditor's claim against the Estate, his priority for payment of his claim is governed by C.R.S. § 15-12-801 *et. seq.* When, and if, Sam's claim may be satisfied by the Estate will be determined in the due course of administration and he must follow the same procedures as all creditors in asserting his claims.
4. You explain to Sam, that since he served as the Decedent's agent under financial power of attorney, he has a fiduciary duty to account for his acts as agent to the Estate, if any.
5. You explain to Sam, that the Decedent's "will" only disposes of a portion of her probate assets, and that if appointed to serve as a fiduciary, Sam has a duty of loyalty to both the testate devisees and intestate heirs and must make all decisions impartially for the benefit of all successors of the Estate, including for the benefit of his father, Peter. As a fiduciary, Sam will need analyze, with your assistance, how amending the contract for the purchase of the Colorado Springs property affects both the testate devisees and intestate heirs and whether amending the contract is consistent with his duty of loyalty.
6. You also explain to Sam that as fiduciary he has a duty to disclose all material information about any conflicted transaction. Since Sam is a devisee under the "will" but not an intestate heir, all decisions he makes allocating assets, expenses and income between the testate devisees and intestate heirs are "conflicted transactions". To protect Sam as a fiduciary, you will recommend that he proceed formally with administering the Estate including providing a formal accounting detailing all financial transactions on behalf of the Estate and expressly disclosing all allocations between the "testate estate" and "intestate estate". You further explain to Sam that in cases where a fiduciary has failed disclose such material information about a conflicted transaction, Colorado has found this failure to disclose as tantamount to misrepresentation opening the door a claim for civil theft and treble damages. *Black v. Black*, 422 P.3d 592, 604 (Colo. App. 2018); C.R.S. § 15-12-713.
7. You explain to Sam that he does not have priority to serve as a personal representative until, or unless, the "will" is admitted to probate. However, the best interests of all potential successors of the Estate, require that someone have authority to act immediately on behalf of the Estate with regard to the Colorado Springs purchase contract. You recommend disclosing all relevant facts to the probate court and interested parties in a petition for appointment of special administration. If Sam is appointed as special administrator, he can preserve and protect the Estate and gather additional information that may be relevant before deciding whether Sam may, in good-faith, and at Estate expense, seek the admission of the "will" to formal probate and defend it as the Decedent's intent. C.R.S. § 15-12-703(6).
8. Finally, you explain to Sam that pursuant to C.R.S. § 15-12-717, co-personal representatives must act unanimously. You advise Sam of all of the ethical considerations

addressed in Colorado Formal Ethics Opinion 135 – *Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding*.

9. **After discussing all of these potential conflicts and issues with Sam, he is able to weigh both the risks and benefits of serving as a fiduciary for the Estate and he may provide informed consent to your representation of him as a fiduciary.**

Fiduciary Duties of Estate and Trust Administration

Because "estate" administration may be controlled by the terms of a will or the terms of a trust, the following materials set forth provisions of the Colorado Probate Code ("CPC") as well as the newly adopted Colorado Uniform Trust Code ("CUTC"), effective as of January 1, 2019. While the Probate Code sets forth specific duties applicable in estate administration pursuant to the terms of a will, it also incorporates by reference, all of the fiduciary duties set forth in the Trust Code. Although there are many types of fiduciary duties that are similar, their application may differ slightly depending on whether administration is conducted pursuant to a decedent's will or pursuant to the terms of a revocable trust, now made irrevocable as the result of the testator's death.

General Duty to Administer the Estate

Section 15-12-703(1) of the probate code states that a personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by §15-5-801 through 818, C.R.S. "A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code, and as expeditiously and efficiently as is consistent with the best interests of the estate. A personal representative shall use the authority conferred upon him or her by this code, the terms of the will, if any, and any order in proceedings to which he or she is a party for the best interests of successors to the estate". §15-12-703(1), C.R.S.

Personal representatives are vested with broad powers in order comply with their statutory duties. See Fry & Co. v. District Court, 653 P.2d 1135 (Colo. 1982).

General Duty to Administer Trust

Likewise, "upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with article 5". §15-5-801, C.R.S.

Duty of Prudent Administration

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. §15-5-804, C.R.S.

A trustee who has special skill or expertise, or is named trustee in reliance upon the trustee's representations that the trustee has special skills or expertise, has a duty to use those special skills or expertise. §15-5-806, C.R.S.

PRACTICE TIP: Consider using a corporate or professional fiduciary if the estate or trust is large, has numerous tax reporting requirements, has unusual or complicated assets, or if it would benefit familial relationships. While corporate or professional fiduciaries can bring more expense to the administration process, their expertise can avoid many pitfalls for nonprofessional fiduciaries.

Duty to Inform – Personal Representative

Upon appointment as personal representative of an estate or acceptance of a trusteeship, these fiduciaries have duties to inform heirs, devisees and beneficiaries of their positions and most aspects of the ongoing administration.

Personal representatives have thirty (30) days from appointment to inform heirs and devisees of their appointment. The Information can be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative.

The information shall include:

1) the name, address, and date of appointment of the personal representative;
2) the date of death of the decedent;
3) whether the decedent died intestate or testate and, if the decedent died testate, the dates of the will and any codicils thereto, the date of admission to probate, and whether the probate was formal or informal;
4) that it is being sent to persons who have or may have some interest in the estate being administered;
5) whether bond has been filed;
6) whether administration is supervised and, if administration is unsupervised, that the court will consider ordering supervised administration if requested by an interested person;
7) that papers relating to the estate, including an inventory of estate assets, as described in section 15-12-706, are either on file with the court or available to be obtained by interested persons from the personal representative;
8) that interested persons are entitled to receive an accounting;
9) that the surviving spouse, minor children, and dependent children may be entitled to exempt property and a family allowance if a request for payment is made in the manner and within the time limits prescribed by statutes;
10) that the surviving spouse may have a right of election to take a portion of the augmented estate if a petition is filed within the time limits prescribed by statute;
11) that, because a court will not routinely review or adjudicate matters unless it is specifically requested to do so by a beneficiary, creditor, or other interested person, all interested persons, including beneficiaries and creditors, have the responsibility to protect their own rights and interests in the estate in the manner provided by the provisions of this code by filing an appropriate pleading with the court by which the estate is being administered and serving it on all interested persons pursuant to section 15-10-401;

12) that all interested parties have the right to obtain information about the estate by filing a demand for notice pursuant to section 15-12-204;
13) that any individual who has knowledge that there is or may be an intention to use an individual's genetic material to create a child and that the birth of the child could affect the distribution of the decedent's estate should give written notice of such knowledge to the personal representative of the decedent's estate; and
14) that any individual who has knowledge that there is a valid, unrevoked designated beneficiary agreement in which the decedent granted the right of intestate succession should give written notice of such knowledge to the personal representative of the decedent's estate. §15-12-705(1), C.R.S.

A personal representative's failure to give the information required by this section is a breach of his or her duty to the persons concerned but does not affect the validity of the personal representative's appointment, powers, or other duties. A personal representative may inform other persons of his or her appointment by delivery or ordinary first-class mail. §15-12-705(2), C.R.S.

The personal representative shall file with the court a copy of the information provided and a statement of when, to whom, and at which address or addresses it was provided. §15-12-705(3), C.R.S.

PRACTICE TIPS:

1) The requirements of section 15-12-705 can be met by submission of Judicial Department Form (hereafter referred to as "JDF") 940 Information of Appointment.
2) When communicating with any heir or devisee, it is wise to include all heirs and devisees in your communication, unless a matter of confidentiality would prevent you from doing so. Providing all heirs and devisees with the same information at the same time is both efficient and avoids potential misinformation and conflicts.

Duty to Inform and Report - Trustee

A trustee also has a duty to keep **qualified** trust beneficiaries reasonably informed about the administration of the trust and the material facts necessary for them to protect their interests. A trustee must promptly respond to a beneficiary's request for information related to the administration of the trust.

Section 15-5-813(2) of the CUTC, requires that a trustee provide the following:

1) a copy of the portions of the trust instrument that describe or affect the beneficiary's interest;
2) within sixty days of acceptance, the trustee's name, address, and telephone number;
3) within sixty days of knowledge of the creation of an irrevocable trust, or that a revocable trust has become irrevocable, the trustee must notify the beneficiaries of the trust's existence, the identity of the settlor(s), the right to request portions of the trust instrument that describe or affect the beneficiary's interest, and of the right to a trustee's annual report;as provided in subsection (3) of this section; and

4) notice of any change (in advance) in the trustee's compensation.

(Note that requirements 2) and 3) cited above do not apply to a trustee who accepts a trusteeship before January 1, 2019, to an irrevocable trust created before January 1, 2019, or to a revocable trust that becomes irrevocable before January 1, 2019.)

Further, trustees must provide to distributees of trust income and principal, at least annually and at the termination of the trust, the following:

1) A report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation; and
2) A listing of the trust assets and, if feasible, their respective market values.

A "qualified" beneficiary is a beneficiary who (on the date the beneficiary's qualification is determined):

1) is a distributee or permissible distributee of trust income or principal;
2) would be a distributee or permissible distributee or trust income or principal if the interests of the former distributes terminated on that date without causing the trust to terminate; or
3) would be a distributee or permissible distributee if the trust terminated on that date. C.R.S. § 15-5-104(16).

PRACTICE TIP:

1) Note that there is no equivalent "trustee' JDF to JDF 940 for personal representatives.
2) However, JDF 732 Trust Registration Statement, does provide basic information of the identity of the trustee, the principal place of administration, and the type of trust, whether intervivos or testamentary, and that upon reasonable request, beneficiaries are entitled to additional information.
3) Although the CUTC only requires annual reports to distributees, it is strongly recommended that reports be provided at least quarterly, if not monthly. Qualified beneficiaries can be given online "view access" only or paper statements of accounts.

Trust Registration provisions

Section 15-5-205 of the Trust Code provides that a trustee of a trust having its principal place of administration in Colorado **may** register a trust in the court where the principal place of administration is located. You cannot register a fully and concurrently revocable intervivios trust until the settlor's power to revoke has terminated.

PRACTICE TIPS:

1) Please note that prior to the enactment of the CUTC, registration of irrevocable trusts was mandatory. Under CUTC, it is optional. However, it is often advisable to register irrevocable trusts in order to establish jurisdiction and venue in the event you anticipate a demand by a beneficiary or litigation. The current cost to register a trust is $168.
2) Generally, it is not necessary to register irrevocable life insurance trusts prior to their funding.

The principal place of administration is generally determined as the trustee's principal place of business or residence or where all or part of the administration occurs. In the case of cotrustees, the principal place of administration is the usual place of business of the corporate cotrustee, or the usual place of business or residence of the individual trust who is a professional fiduciary, and otherwise the usual place of business or residence of any of the cotrustees as they agree. 15-5-108(1) and (2), C.R.S.

A trustee has a duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries. 15-5-108(3), C.R.S.

Use of JDF 732 Trust Registration Statement, will satisfy the majority of the requirements set forth is section 15-5-206, including;

1) the name of the testator and date and place of domiciliary probate of a testamentary trust;
2) the name of the settlor(s), the original trustee and date of the trust instrument of a written intervivos trust; and
3) a statement informing all interested persons that they have the responsibility to protect their own rights and interests as the court will not routinely review or adjudicate trust matters unless requested to do so.

Within sixty days of filing the trust registration statement, a trustee shall notify in writing all co-trustees, qualified beneficiaries and other fiduciaries and persons having authority to act under the terms of the trust. For purposes of privacy, names of qualified beneficiaries may be redacted from the statement filed with the court or provided to other beneficiaries. 15-5-206 (3), C.R.S.

Failure to register

A trustee who does not register a trust in the proper place, for purposes of any proceedings initiated by a beneficiary prior to registration, is subject to the personal jurisdiction of any court in which the trust could have been registered. Also, any trustee who, within thirty days after receipt of a written demand by a settlor or qualified beneficiary, fails to register the trust, may be subject to removal or to surcharge as the court may direct. §15-5-207, C.R.S.

Duty to Inventory Assets – Personal Representative

Within three months of appointment, a personal representative must prepare an inventory of the decedent's property subject to disposition by will or intestate succession at the time of his death. The inventory must include reasonable detail and the fair market value of each item as of the date of death along with any encumbrance. The inventory must include the the personal representative's oath or affirmation that the inventory is complete and accurate so far as he is informed. §15-12-706(1), C.R.S.

The personal representative must send a copy of the inventory to interested persons who request it, or may file the original inventory with the court. §15-12-706 (2), C.R.S.

The personal representative must file a supplemental inventory if additional property is discovered or if values listed in the original inventory are erroneous or misleading. The supplemental inventory should be filed with the court where the original inventory was filed of provided to interested persons who request the inventory. §15-12-708, C.R.S.

Power to Employ Appraisers

The personal representative may employ qualified and disinterested appraisers to ascertain the date of death fair market value of any asset, the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different types of assets. Names and addresses of appraisers must be included on the inventory with the items appraised. §15-12-707, C.R.S.

PRACTICE TIPS:

1) Use of JDF 941 Decedent's Estate Inventory and JDF 942 Interim/Final Accounting is recommended.
2) Depending on the size of the estate, the value of real estate, the particular family circumstances and tax considerations, employment of appraisers is recommended for the valuation of real property, especially if it is going to be sold. Reliance on assessor's values or websites such as Zillow, Redfin, Redefy or Open Door are not recommended.
3) If the cost of an appraisal is not warranted, full disclosure of all material information surrounding the sale of real property, and consent from interested persons is recommended.
4) Appraisers for valuable tangible personal property are recommended for jewelry, art work and collectibles.

Duty to Take Possession

A personal representative has a right to, and shall take possession or control of, the decedent's property; except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it, unless, in the judgment of the personal representative, possession of the property by the personal representative is necessary.

If a personal representative requests delivery of any property possessed by an heir or devisee, there is a presumption that such possession is necessary for the purposes of administration.

The personal representative must pay taxes on and take all steps reasonably necessary for the management, protection, and preservation of the estate in their possession. §15-12-709, C.R.S.

This section expressly confers the power upon an administrator and makes it his duty to sue for, recover, and preserve the estate, both real and personal.
Grover v. Clover, 69 Colo. 72, 169 P. 578 (1917); De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 P. 1049 (1924); Swartz v. Rosenkrans, 78 Colo. 167, 240 P. 333 (1925); Norris v. Bradshaw, 92 Colo. 34, 18 P.2d 467 (1932); Weaver v. Weaver, 99 Colo. 74, 60 P.2d 227 (1936); Gushurst v. Benham, 151 Colo. 159, 376 P.2d 687 (1962).

The duty to protect and preserve the estate assets implies the further duty to employ counsel. See People ex rel. Eaton v. El Paso County Court, 74 Colo.123, 219 P. 215 (1923).

PRACTICE TIPS:

1) The one item most frequently not completed by clients in the estate planning process is a list of tangible personal property. Ask your estate planning clients to inform you of items of value. Photograph and inventory them, if possible, prior to your clients' death. Photographs and descriptions of valuable personal property can be used for insurance purposes in the event of theft or loss. Valuable personal property such as jewelry and art work and other collectibles need to be placed in secure locations such as fireproof safety deposit boxes where possible. This also applies to firearms. There can be significant value in tangible personal property and the division of tangible personal property is one of the most highly litigated areas in estate administration.
2) Generally, nominated personal representatives have no powers and cannot undertake the duties or begin administration of an estate prior to being appointed by the court and the issuance of letters from the court (§15-12-103, C.R.S.). However, under certain circumstances, nominated personal representatives or persons with priority for nomination, if acting in good faith, may have limited authority and rights. See § 15-19-106, C.R.S. (right to dispose of remains); § 15-12-1201, C.R.S. (collection of personal property by affidavit) and §15-12-703 (6) and (7), C.R.S. (standing to defend testator's estate planning intent and to offer a will for probate).
3) Attempts to secure property of the estate should be considered in situations that demand it. Persons nominated as personal representative in wills should be notified as soon as possible of the death of a decedent so actions can be taken in a timely manner.
4) The personal representative should file a forwarding address notice with the Post Office so that all decedent's mail is delivered to the personal representative. Additional assets can be discovered in this manner.
5) If you find cash in a decedent's home, deposit it into an account titled in the name of the estate as soon as possible. You will need to have an estate EIN issued by the IRS, a copy of the death certificate as well as Letters from the court in order to open an estate bank or investment account. Cash should not be deposited into a decedent's checking account as it may have POD designations that are contrary to the terms of the will or may be titled with joint ownership.
6) Cash found in decedents' homes should not be used to pay bills or expenses. Assets and liabilities should be accounted for separately. This will be helpful when an interim or final accounting is filed with the court. (See JDF Interim/Final Accounting). Persons who pay funeral expenses or bills that cannot be delayed until a personal representative is appointed can be reimbursed by the estate or can file a creditor claim against the estate in order to be reimbursed.
7) Attorneys should review the establishment of bank and investment accounts established in the name of the estate and request access to them. The account should be titled in the name of the personal representative(s) only and have no POD designation. Access can be by statement or online via "view only" capabilities, if the financial institution offers these capabilities. Statements and activity should be reviewed monthly.

Control and Protection of Trust Property

Trustees have the same duties as personal representatives with respect to the control and protection of trust property.

"A trustee shall take reasonable steps to take control of and protect the trust property. §15-5-809, C.R.S.

"A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee". §15-5-812, C.R.S.

Record Keeping and Identification of Trust Property

"A trustee shall keep adequate records of the administration of the trust." §15-5-810(1).
"A trustee shall keep trust property separate from the trustee's own property.' §15-5-810(2), C.R.S.

PRACTICE TIPS:

1) As with estate administration, a bank or investment account in the name of the trust will provide the majority of required records of assets and transactions. Statements should be provided to beneficiaries and other interested persons on a regular basis. Remember that a statement that discloses an error or potential breach of fiduciary duty may start the statute of limitations running or at least give rise to an argument for the doctrine of laches.
2) Never allow your client to commingle funds or to place funds in accounts with joint ownership or POD designations. Always review trustee records.

Breach of Fiduciary Duty – Personal Representatives and Trustees

The improper exercise of a personal representative's powers subjects the personal representative to the provisions of section 15-10-504 and liability for damages or loss resulting from the breach of fiduciary duty to the same extent as the trustee of an express trust. §15-12-712, C.R.S.

Section 15-10-504 provides that if a court determines that a breach of fiduciary duty has occurred or that the exercise of a fiduciary power has been improper, the court may surcharge the fiduciary for any damage or loss to the estate, beneficiaries or interested persons. These damages may include compensatory damages, interest and attorneys' fees and costs.

Co-Personal Representatives and Trustees

If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. §15-12-717, C.R.S.

Likewise, co-trustees who are unable to reach a unanimous decision may act by a majority decision. §15-5-703(1), C.R.S.

An exception to the requirements of concurrence by joint fiduciaries may occur if it is necessary to take emergency action to preserve the estate or to avoid injury to trust assets. §§15-12-717 and 15-5-704(3), C.R.S.

Co-trustees have a duty to take reasonable care to prevent another trustee from committing a breach of fiduciary duty and may have a further duty to pursue a remedy for a co-trustee's serious breach.

PRACTICE TIPS:

1) Please note this requirement with respect to bank and investment accounts. Dual signatures may or may not be required depending on the financial institution.
2) If you represent a co-fiduciary who objects to or dissents from the actions taken by other fiduciaries, or who does not join in the action of another fiduciary, they may be protected from liability for that action, unless the co-trustee action represents a serious breach. Dissensions and objections should be documented and sent to all co-fiduciaries.

Duty to Creditors – Personal Representatives

Unless one year or more has elapsed since the death of the decedent, a personal representative shall cause a notice to creditors to be published in some daily or weekly newspaper published in the county in which the estate is being administered, or if there is no such newspaper, then in some newspaper of general circulation in an adjoining county. Such notice shall be published not less than three times, at least once during each of three successive calendar weeks. § 15-12-801, C.R.S.

Statutory format:

NOTICE TO CREDITORS
Estate of _________________(Deceased)
No. _____________________

All persons having claims against the above named estate are required to present them to the undersigned or to the District Court of ____________ County, Colorado (or Probate Court of the City and County of Denver, Colorado), on or before (a date not earlier than four months from the date of first publication or the date one year from the date of death, whichever occurs first), _____________ 20___, or said claims may be forever barred.

PRACTICE TIPS:

1) It is typically recommended to publish a notice to creditors as this shortens the time frame to four months for unknown creditors to submit claims. This can also decrease the time needed to fully administer and close a simple estate in less than a year. Otherwise, the estate must remain open for at least one year.

2) Actual notice should be given to known creditors if you want them to file a claim. This may arise in situations where family members may want to submit caretaker costs or other unreimbursed expenses.
3) Use of JDF 943 Notice to Creditors by Publication Pursuant to §15-12-614, C.R.S. and JDF 944 Notice to Creditors by Mail or Delivery Pursuant to §15-12-801, C.R.S., is recommended.
4) For ease of administration in addressing creditor claims, JDF 945 Notice of Disallowance of Claims Pursuant to §15-12-806. C.R.S. and JDF 946 Petition for Allowance of Claim(s) Pursuant to §15-12-806, C.R.S. can be used.

Duty to Creditors – Trustees

There are no similar statutory requirements of notice to potential creditors of irrevocable trusts. However, trustees do have a duty to "take reasonable steps to enforce claims of the trust and to defend claims against the trust of which the trustee has knowledge". §15-5-811, C.R.S.

Additional Fiduciary Duties

The following fiduciary duties are set forth in the CUTC, but apply equally to personal representatives and trustees.

Duty of Loyalty

A trustee shall administer the trust solely in the interests of the beneficiaries. §15-5-802(1), C.R.S.

The duty of loyalty is a prohibition against self dealing. Transactions involving trust property entered into by the trustee for the trustee's own account or benefit are voidable. There are exceptions to this general rule:

1) Transactions authorized by the trust;
2) Transactions approved by the court;
3) The statute of limitations has expired. The statute of limitations for breach of trust is one year after the date that the beneficiary was sent a report that adequately disclosed the existence of a potential claim. §15-5-1005, C.R.S.;
4) The beneficiary consented to the conduct, ratified the transaction or released the trustee; (See §15-5-1009, C.R.S., for additional requirements);
5) The transaction involves a contract or claim acquired by the trustee prior to contemplating or becoming trustee. §15-5-802(2), C.R.S.

There is a presumption of a conflict if a transaction is entered into between the trustee and the trustee's spouse; the trustee's descendants, siblings, parents, or their spouses; an agent or attorney of the trustee; or a corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgement. §15-5-802(3), C.R.S.

In In re Estate of Foiles a corporate trustee ratified a prohibited transaction conducted by the individual trustee who was also a beneficiary and who benefited from the transaction. The court held "given the absence here of a trust provision that would allow ratification by a co-trustee of otherwise invalid actions of a trustee, only the consent of all the beneficiaries, with full capacity to give such consent and full knowledge of the relevant facts, could ratify an action of a trustee that was in violation of the terms of the . . . Trust". Foiles v. Foiles (In re Estate of Foiles), 338 P.3d 1098, (Colo. App., 2014).

The holding in the Foiles case was cited in Black v. Black, 422 P.3d 592 (Colo. App 2018), a case involving breach of the fiduciary duty of loyalty by a conservator. In the Black case, the conservator despite having given proper notice and obtaining a court order authorizing his actions, was later found to have breached his fiduciary duty because he failed to fully and adequately disclose all the relevant information involved in the proposed transaction. The court stated that "at a minimum, then, the fiduciary must disclose the conflict. A fiduciary may not seek safe harbor under a provision that allows him to engage in a conflicted transaction upon the approval of the court if he does not disclose to the court that he is engaging in a conflicted transaction". Black at 422 P.3d 602.

Duty of Impartiality

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, taking into account any differing interests of the beneficiaries. §15-5-803, C.R.S.

PRACTICE TIPS: The duty of impartiality comes into play in numerous aspects of trust and estate administration.

1) Investments: A trustee must invest assets to benefit both current income and principal beneficiaries as well as remainder beneficiaries. For example, in a split interest trust, a current beneficiary who needs income cannot demand that all assets be invested in fixed income securities. Some assets must be invested in equities to provide long term growth for remainder beneficiaries and as a hedge against inflation. A good rule of thumb is that at least 25-30% of a trust's assets be invested in growth investments. Likewise, it is not prudent to invest the assets of a marital trust in all equities as the surviving spouse has a reasonable expectation of a stream of income.
2) Distributions: If partial distributions are made from an estate before administration is complete, generally, all heirs and devisees should be given an equal distribution. When exercising discretionary distribution powers in a trust, a trustee must take into account many factors and should not show partiality to any one beneficiary.
3) The impact of transfer and income taxes as well as administrative expenses on different classes of beneficiaries. See rules of construction at §15-11-601 et. seq, C.R.S. and §15-11-701 et seq, C.R.S.

Duty to Exercise Discretionary Powers in Good Faith

The CUTC specifically addresses the duty to exercise good faith when making discretionary income and principal distributions.

"Notwithstanding the breadth of discretion granted to a trustee in the terms of a trust, including such terms as "absolute", "sole", or uncontrolled", the trustee shall exercise a discretionary power in good faith. The parameters for that exercise are established by the terms and purposes of the trust, the interests of the beneficiaries, and relevant fiduciary duties. A trustee does not abuse its discretion if the trustees, following the terms and purposes of the trust and considering the interests of it beneficiaries, exercises its judgement honestly and with a proper motive". § 15-5-814(1)(a), C.R.S.

"Where a trust gives a trustee unlimited discretion, including the use of such terms as "absolute". "sole", or "uncontrolled, a court may not determine that trustee abused its discretion merely because the court would have exercised the discretion in a different manner or would have not exercised the discretion. § 15-5-814(1)(b), C.R.S.

Clients acting as trustees should understand the difference between "absolute", 'sole", or "uncontrolled" discretion in comparison to language that may include "happiness", "comfort", "welfare", or "best interests" and the ascertainable" discretionary standards set forth at IRC §2041(b)(1)(A). Ascertainable standards include distributions for health, education, maintenance and support ("HEMS") and provide guidelines for making distributions that are appropriate for a particular beneficiary. The standard of "health" generally includes emergency medical treatment; psychiatric and psychological treatments; routine health care and preventative procedures; dental and vision care as well as health, dental and vision insurance; and home health care. "Education" typically includes grammar, secondary and high school and college tuition; technical and career training;, support of the student while in school; study abroad programs; and related expenses. It may or may not include graduate or post graduate studies. "Support" and "maintenance" are somewhat synonymous and can include mortgage or rent payments, property and income taxes; health, life or property insurance; accustomed patterns of lifestyle and vacation; and family and charitable gifting. An ascertainable standard as defined by the IRS does not typically include funds for a wedding, the purchase of a home or the establishment of a business.

PRACTICE TIPS:

1) Read the provisions of the trust agreement carefully. They are the best insight into the intent of the settlor and control the appropriateness of discretionary distributions. Terms such as "happiness", "welfare", and "comfort" indicate an intent to be liberal in making distributions. An ascertainable standard requires a more thorough examination of the request for a distribution.
2) A request that a beneficiary submit a budget and an income and expense statement is not unreasonable.
3) Take into account the size and liquidity of the trust assets, the length of its term, any required distributions at specific ages, the number of beneficiaries, their ages and individual needs, the frequency of requests and lifestyles.
4) Discretionary payments to beneficiaries with known or suspected substance abuse issues should be made directly to institutions or creditors.
5) Document, document, document.

Costs of Administration

In administering a trust, the trustee may incur only costs that are appropriate and reasonable in relation to the trust property, the purposes of the trust and the skill of the trustee. §15-5-805, C.R.S.

A fiduciary and his or her attorney are entitled to reasonable compensation for services rendered. §15-10-602(1), C.R.S. Material changes to the basis for charging fees requires supplemental disclosure. §15-10-602(9), C.R.S.

In determining the reasonableness of compensation and costs, there is no presumption that any method of charging a fee is per se unreasonable. §15-10-603, C.R.S.

See In Re Estate of Painter, 39 Colo. App. 506, 567 P.2d 820 (1977) which held that an award of fees to an administrator of an estate and his counsel was improper because the trial court used the percentage method for determining fees, which had been rejected in favor of a standard of reasonableness.

The court will consider the following factors in determining reasonableness of compensation and costs:

1) The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the service properly;
2) The likelihood that acceptance of the fiduciary position will preclude other employment;
3) The compensation customarily charged in the community for similar services;
4) The nature and size of the estate, the liquidity or illiquidity of the estate, and the results and benefits obtained during administration;
5) Litigation;
6) Life expectancy and needs of the beneficiaries;
7) Time limitations imposed on the beneficiary;
8) The adequacy of detailed billing statements;
9) Whether the fiduciary has charged variable rates;
10) The expertise, special skills, reputation and ability of the fiduciary and level of experience;
11) The terms of the governing instrument;
12) Whether courses of action taken were reasonable given various courses; and
13) The cost effectiveness of actions taken.

PRACTICE TIPS:

1) Many family members will act as personal representative or trustee at no fee or ask only to be reimbursed for expenses. If family members wish to be compensated, they are entitled to reasonable compensation. It is a good idea to keep detailed records of work performed, amount of time expended and all associated costs. The more detail provided, the less likely that a beneficiary will be able to challenge charges for compensation.
2) Corporate and professional fiduciary fees are presumed to be reasonable if they are in accordance with a published fee schedule. Corporate and professional fiduciaries are typically compensated as a percentage of the assets under management with extraordinary fees set by published schedule as well. Such extraordinary fees may be

charged for the sale of real estate or management of oil and gas interests. Fees taken by a fiduciary should be reviewed on a monthly basis.

Delegation by Fiduciary

Under common law there existed a general prohibition against the delegation of a fiduciary's duties. The former nondelegation rule survived in the Restatement of Trusts 2d (1959), which provided that "the trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform".

Today it is well recognized that "a trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee must exercise reasonable care, skill and caution in selecting an agent; establishing the scope and terms of the delegation, consistent with the terms of the trust; and periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation. § 15-5-807(1), C.R.S.

A trustee who complies with these requirements is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated. §15-5-807(3), C.R.S.

The Colorado Fiduicary Power's Act similarly provides that a fiduciary has the power to "employ attorneys or other advisors to advise or assist the fiduciary in the performance of his or her duties or, instead of acting personally, to employ one or more agents to do any ministerial act required to be done by the fiduciary in the performance of his or her duties". §15-1-804(2)(x)(I), C.R.S. It further specifically incorporates by reference to the Colorado Uniform Prudent Investor Act, the power to delegate investment and management functions. §15-1-804(2)(x)(II), C.R.S.

PRACTICE TIPS:

1) A power to delegate may become a duty to delegate if the proper administration of the trust or estate requires skills that the trustee does not have;
2) The sale of real estate; management of complex business interests; oil and gas or other mineral interests; or even a fairly large portfolio of marketable securities may call for hiring professional agents.

Standards for Investments – The Evolution of the Prudent Man Rule

The common law reasonable prudence standard for investments holds that a trusted owes a duty to his beneficiaries to exercise such skill as a man of ordinary prudence would exercise in safeguarding and preserving his own property. Rippey v. Denver United States National Bank, 273 F. Supp 718 (D.Colo. 1967)

The common law rule was codified in Colorado and can be found at §15-1-304, however, it changed the standard of reasonable prudence to that which a prudent man would exercise in the management of the property of another. The statute provides:

"In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit of others, fiduciaries shall be required to have in mind the responsibilities which are attached to such offices and the size, nature and needs of the estates entrusted to their care and shall exercise the judgement and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of the property of another, not in regard to speculation, but in regard to the permanent disposition of funds, considering the probable income as well as the probable safety of capital".

Effective July 1, 1995, Colorado enacted the Colorado Uniform Prudent Investors Act ("CUPIA") §§15-1.1-101 through 115, C.R.S. Under the act, fiduciaries are governed by the standards set forth therein. §15-1-304.1, C.R.S.

The Act is based on the revised standards for prudent trust investment set forth in the Restatement of Trusts, 3d. (1992). It incorporates modern portfolio theory as applied to capital markets. There are five fundamental changes in the former criteria for prudent investing:

1) The standard of prudence is no longer applied to each individual security, but rather as part of the total portfolio;
2) The tradeoff between risk and return is the fiduciary's most important consideration;
3) There are no longer any categorical restrictions on types of investments as long as the particular investment plays an appropriate role in achieving the risk/return objectives of the trust;
4) The definition of prudent investing incorporates the concept of diversification; and
5) As mentioned earlier, delegation of investment management duties is no longer forbidden.

For an excellent overview and discussion of the history of the Uniform Prudent Investor Ac, see *The Green Book,* 2018 Ed. (David K. Johns, ed., CLE in Colo. Inc.) at 1A-89 through 97.

The CUPIA, a default rule, provides that a 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. In satisfying this standard, the trustee must exercise reasonable care, skill and caution. §15-1.1-102(a), C.R.S.

Circumstances that a trustee shall consider in investing and managing trust assets include:
1) General economic conditions;
2) Possible effect of inflation or deflation;
3) Expected tax consequences;
4) The role that each investment or course of action taken plays within the overall portfolio;
5) Expected total return from income and appreciation of capital;
6) Other resources of the beneficiaries;
7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
8) An asset's special relationship or special value, if any, to the purposes of the trust or to a beneficiary. §15-1.1-102(c), C.R.S.

The CUPIA mandates a duty to diversify assets (§15-1.1-103) and reiterates the duties of loyalty (§15-1.1-105) and impartiality (§15-1.1-106). It also sets forth the requirements for delegating investment duties and the ongoing oversight of such delegation (§15-1.1-109) and the duty to incur only costs that are appropriate and reasonable (§15-1.1-107).

PRACTICE TIPS:

1) Small trusts and estates can satisfy prudent investor standards by documenting the overall investment objective and asset allocation in writing. Investment objectives can range from generation of income and preservation of assets to growth of capital with corresponding asset allocations ranging from 100% fixed income assets to 100% equities and any combination of allocations in between.
2) Diversification can be achieved by the use of indexed mutual funds for all classes of equities (domestic, international, emerging markets, small and mid cap stocks) as well as fixed income securities. Many indexed mutual funds provide the added benefit of low costs.
3) Understand the tax consequences of buying and selling assets, especially mutual funds near year end.
4) Do not hesitate to hire professional investment firms if you do not possess these skills or if the estate or trust assets are complicated or large enough to justify professional management. It is not advisable to hire family members.
5) Review statements monthly.

And last but not least, always remember and remind your clients that when serving as a fiduciary, “no good deed goes unpunished.”