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Representing Fiduciaries: Guidance From NAELA's Aspirational Standards

By Renée C. Lovelace, CELA

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I. Introduction to the Stage: Fiduciary Representation

In most attorney-client representation matters, the party who signs the engagement agreement and pays the attorney's fees will be the client. It may appear — at first glance — that there is little difference between this type of representation and an attorney's representation of fiduciaries.

With nary a moment of comfort, however, the plot thickens, as the saying goes. In the theater version of "The Fiduciary Representation Story," a complex and duty-laden character referred to as a fiduciary enters the stage playing multiple roles while changing hats frequently. Spoken in ominous tones, the lines "breach of fiduciary duty" and "abuse of discretion" whispered or shouted by other characters put audience members on the edge of their seats.

As the story unfolds, the audience realizes it is a mystery. One person is charged with the goal of protecting the property or well-being of another, under circumstances that may be as vast as the population itself. It appears that the goal is ambitious, but one has a foreboding that it is just the proverbial tip of the iceberg. The mystery continues; the audience is puzzled by scenes in which a fiduciary appears to meet all legal duties yet faces accusations of impropriety, which could be costly. As this story continues, an increasing number of scenes cast the fiduciary as a villain.

At some point in the play, several fiduciary litigation attorneys enter the stage and speak their lines: "If you are asked to serve as a fiduciary, decline." "If you are serving as a fiduciary, resign." "Never let anyone you care about serve as a fiduciary." Part of the mystery becomes clear: Fiduciaries are held to high — sometimes unattainable or uneconomical — standards when managing property for the

benefit of others. We see that fiduciary duties can create time-consuming work and liability risks and that costs increase as work and risks increase.¹ Suspense builds as a person with property needs more assistance and others try to assist, balancing costs and benefits, sometimes resulting in fiery disagreements.

As in the field of elder and special needs law, we see that fiduciaries are not just *important* — they are *essential*. If fiduciaries leave the stage, the story ends; if there are no fiduciaries, there can be no implementation of plans. If a plan cannot be implemented, it is not a realistic plan; it is merely a one-person play in which the script consists of a property owner saying, "My property shall be used to do as I say," along with a list of instructions no one must follow.

This article discusses the importance of fiduciary representation — even when protecting fiduciaries is not the primary goal of the field of elder and special needs law. The primary goal is to create, provide, administer, and protect long-term care plans for individuals who are (or may become) vulnerable, using the property available to implement such plans.

¹ "The law tends to impose fiduciary obligation in circumstances that present what economists call a *principal-agent* or *agency problem*. An agency problem arises whenever one person, the *principal*, engages another person, the *agent*, to undertake imperfectly observable discretionary actions that affect the welfare of the principal. ... Agency problems are pervasive because no one has the skills necessary to do everything for himself and because every undertaking has an opportunity cost." Robert H. Sitkoff, *An Economic Theory of Fiduciary Law* ch. 9, 198, in *Philosophical Foundations of Fiduciary Law* (Andrew Gold & Paul Miller eds., Oxford U. Press 2014), ssrn.com/abstract=2367006 (accessed Sept. 14, 2018) (emphasis in original).

To meet this goal, effective fiduciaries are necessary. To have effective fiduciaries, prudent and qualified individuals must be willing to serve in fiduciary roles despite the risks. The NAELA Aspirational Standards provide guidance to attorneys who represent fiduciaries.²

If an article on fiduciary representation were a play, the audience would leave unsatisfied; critics would be merciless. At the end, the mystery would not have been solved because there was no Agatha Christie or Perry Mason moment of clarity. When there are problems, the final act may close with the fiduciary — or the fiduciary's attorney — as the prime suspect. It appears that the only way to fully protect a proposed fiduciary is to advise the individual to decline to serve — to stay off the stage no matter how much the fiduciary cares about the original property owner's objectives. If an attorney advises a fiduciary to decline to serve, will the attorney be liable to the intended beneficiaries for the lack of the fiduciary's service?

We leave this introduction with the understanding that the basic principle of administering estates for the benefit of intended beneficiaries is unchanged, ex-

cept that representation of fiduciaries has tipped from the need to advise fiduciary clients on meeting fiduciary duties to the need to advise them on meeting fiduciary duties in a defensive manner and on recognizing the possibility that in some cases or states, an attorney may be treated as having fiduciary duties to parties the attorney has never met.

II. Background: Fiduciary Duties, Liability Risks, and Chaos

In cases handled by elder and special needs law attorneys, fiduciary representation is not a play, it is not fiction, and it does not exist for the entertainment of others. Although cases replete with family dynamics, property, accusations of greed and misdeeds, unmet health and safety needs, and harm to vulnerable individuals make for dramatic reading,³ such cases may represent staggering legal fees, overall failures in planning, and lost opportunities for the health and well-being of those who may suffer greatly from such losses.

An objective of this article is to consider how the NAELA Aspirational Standards apply to duties, risks, and uncertainties associated with planning for one party to be responsible for the property of another. Representation of fiduciaries from the planning stages forward may encourage more prudent individuals to serve in fiduciary roles.

When deciding whether to represent a fiduciary or a proposed fiduciary, the attorney will consider what fiduciary duties apply, who owes the duties, to whom the duties are owed, the costs of meeting the duties, whether costs will be covered, whether documents may be changed or

2 See NAELA Aspirational Stand. Preamble (2d. ed., NAELA 2017), which states: "Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, 'Who is the client?' present issues not regularly faced by attorneys in other fields." In this article, there is more emphasis on the problems faced by family, friend, and other individual fiduciaries than on the problems faced by other types of fiduciaries.

3 For examples of such cases, search the internet for "fiduciary" along with the names Brooke Astor, Mollie Orshansky, or Michael Jackson.

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