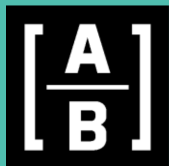

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February 2019

SHIFTING GEARS: PLANNING FOR THE DEATH OF A FOREIGN GRANTOR

Shelly Meerovitch, Director—Wealth Strategies

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Family Story

- Philip, a Hong Kong resident, has one son, Nick, who lives in NYC. Nick, a history professor at NYU, spends far more than he earns
- Since Philip's sister passed away, he raised his niece, Astrid and his nephew, Alexander
- Alexander and Astrid are successful on their own. One lives in the US and the other lives in Hong Kong
- Years ago, Philip established a revocable foreign trust
  - Current Value: $200 million
  - Beneficiaries: Nick, Astrid, and Alexander
  - Upon Philip's death: the trust is to be divided equally into two trusts, one for Nick and one for Astrid and Alexander

Tax Planning Considerations—US Beneficiaries of Foreign Trusts

	During Philip's Life Foreign Grantor Trust	After Philip's Death Foreign Non-Grantor Trust
Distribution of Current Income (DNI)	No US income tax	US income tax; income retains its character
Distribution of Accumulated Income (UNI)	No US income tax	US income tax; throwback tax + interest charge

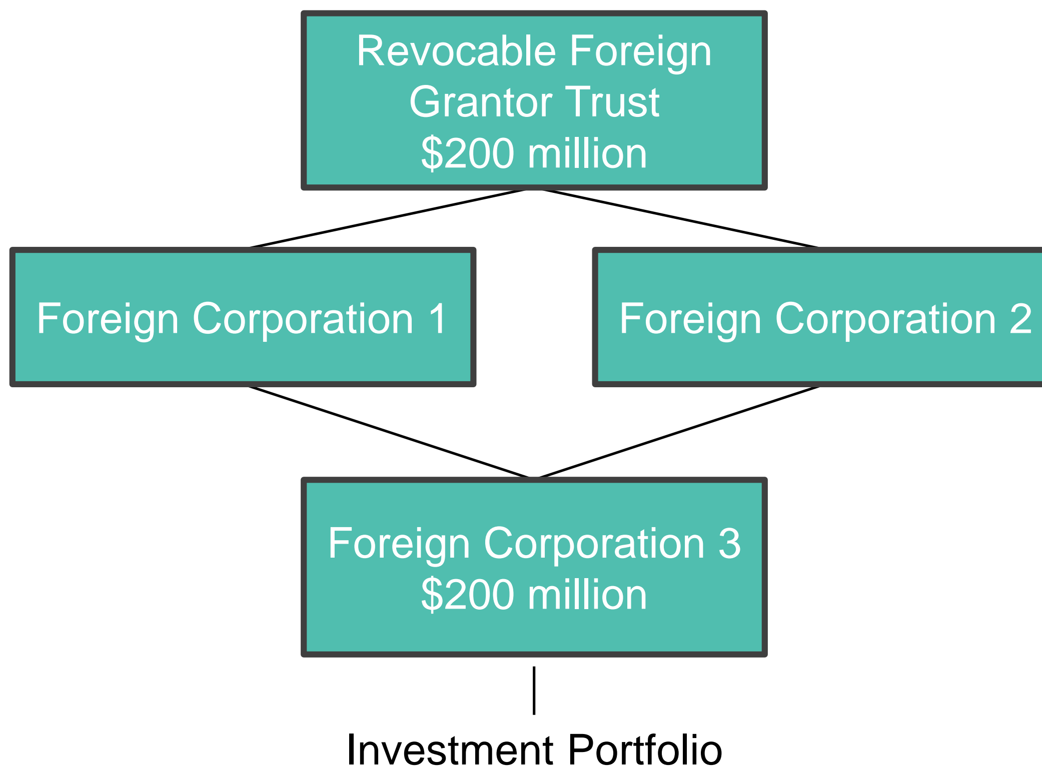
Tax Planning Considerations

- Upon Death: Maximize basis step-up
- Post Death: Flexible trust provisions to allow adjustments to distribution strategies and asset allocation

Maximizing Basis Step-Up

- Check-the-box election “CTB"
- Election to treat the corporate entity as a disregarded entity
- Can take effect up to 75 days prior to election date
- Treated as a taxable liquidation for US income tax purposes

Maximizing Basis Step-Up: Prior to the 2017 Tax Act



- Philip dies on February 18
  - CTB election made on Foreign Corp 3 effective on February 17
  - CTB election made on Foreign Corp 1 and 2 effective on February 19

Tax Treatment Prior to the 2017 Tax Act

- US owners of Controlled Foreign Corporations (“CFCs”) must include in their income the CFC’s Subpart F Income
- **30-Day Grace Period**—If the foreign corporation was controlled by US taxpayers for less than 30 days during the calendar year, no Subpart F income inclusion applies
- Basis Step-Up with CTB elections:
  - CTB election on lower-tier corporation effective the date before death, steps up the basis in the US assets without estate tax exposure, **BUT** gives rise to Subpart F income in the upper-tier corporations
  - CTB election on the upper-tier corporations steps up basis on the upper-tier corporations
  - No Subpart F income inclusion for US beneficiaries because the upper-tier corporations were controlled for less than 30 days during the calendar year

Tax Treatment after the Enactment of the 2017 Tax Law

- **30-Day Grace Period—Eliminated**
- Subpart F income must be included even if the foreign corporation was controlled by US shareholders for one day during the calendar year
- Basis Step-Up with CTB elections:
  - CTB election on lower-tier corporation effective the date before death, steps up the basis in the US assets without estate tax exposure, **BUT** gives rise to Subpart F income for the upper-tier corporations
  - CTB election on the upper-tier corporations steps up basis on the upper-tier corporations, but because made the day after death, the upper-tier corporations are controlled by US shareholders for one day

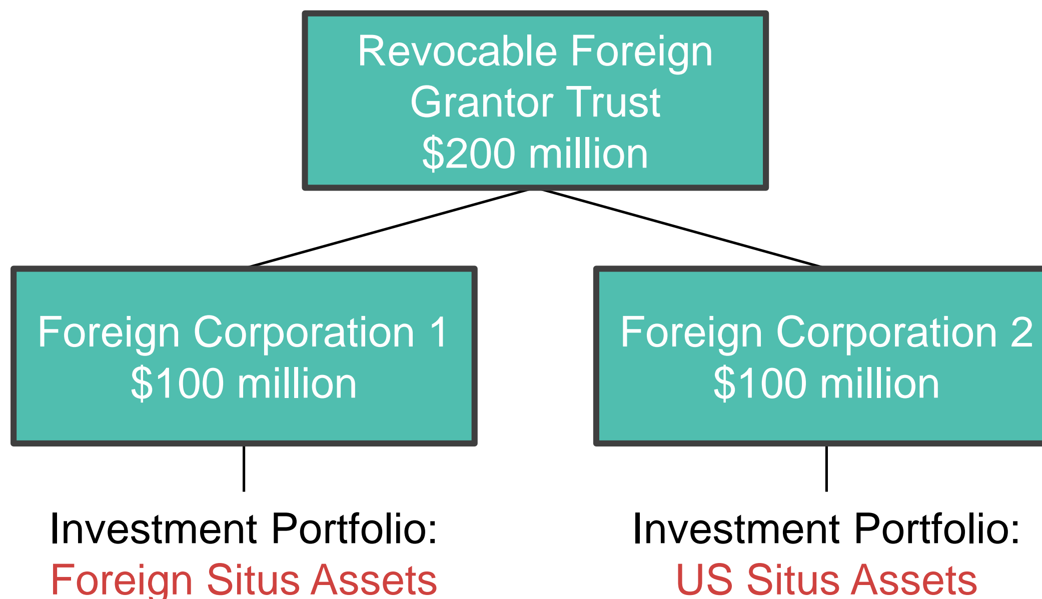
Tax Treatment after the Enactment of the 2017 Tax Law

- Subpart F Inclusion Ratio [Reg. §1.951-1(a)(2), §1.952-1(c)(2)(i)]

$$\frac{\text{\# of days the corporation was a CFC}}{\text{\# of days in existence during the calendar year}}$$

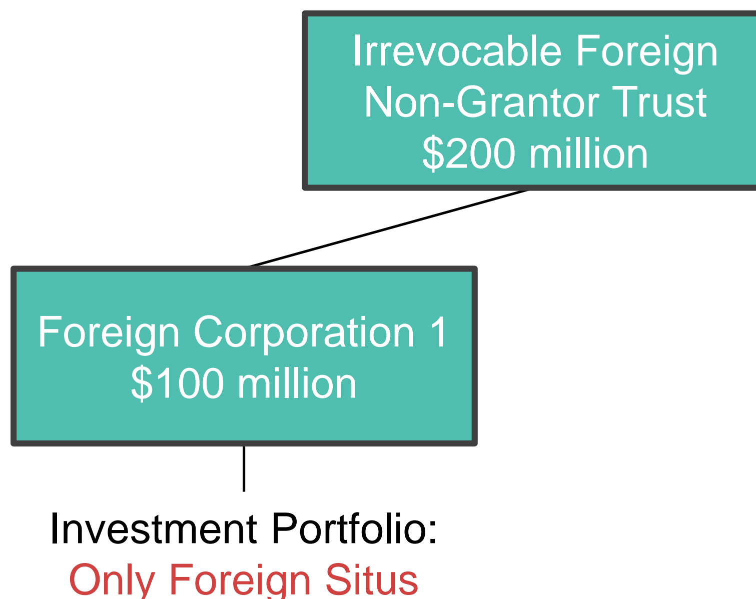
- Result—the later in the year that the grantor dies, the smaller the inclusion ratio of the upper-tier corporations' Subpart F income

Maximizing Basis Step-Up: After the 2017 Tax Act



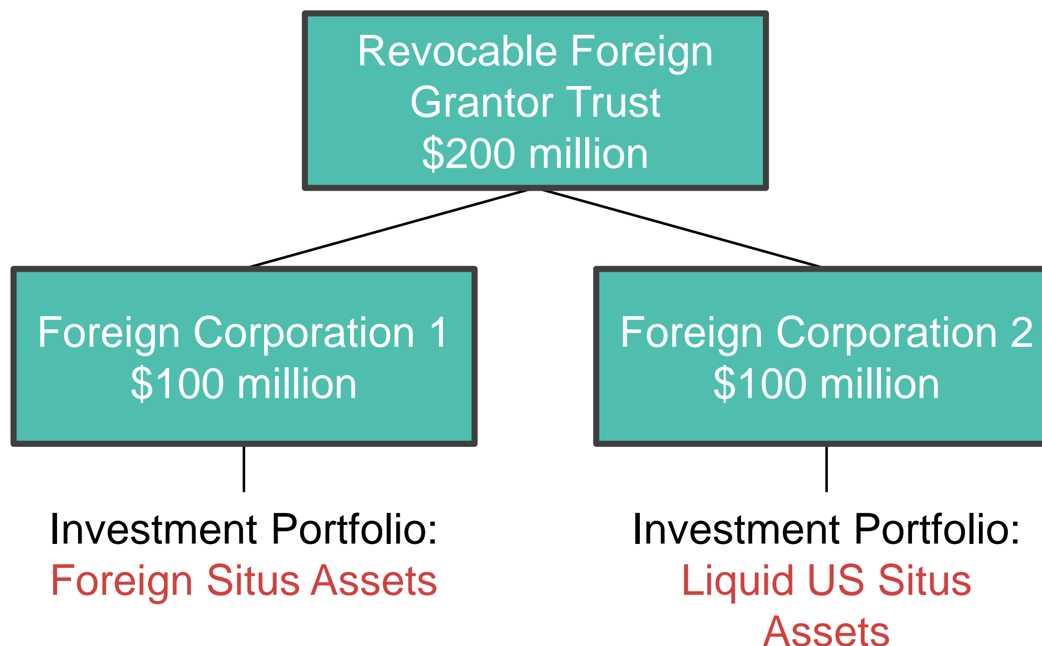
- Step 1: Segregate US Situs assets and Foreign Situs assets

Upon Philip's Death—Foreign Situs Assets



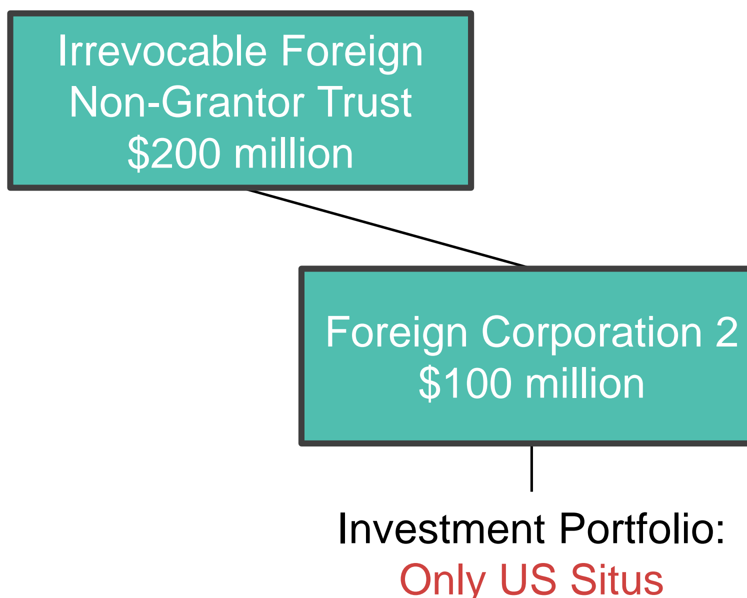
- Philip DOD December 15
- Foreign Situs Assets—Make a CTB election, effective December 14, to step up basis to DOD value

Maximizing Basis Step-Up



- Step 1: Segregate US Situs assets and Foreign Situs assets
- Step 2: If US Situs assets are liquid, actively churn the account and realize gain at the end of every calendar year, to fully step up basis on December 31

Upon Philip's Death—Liquid US Assets

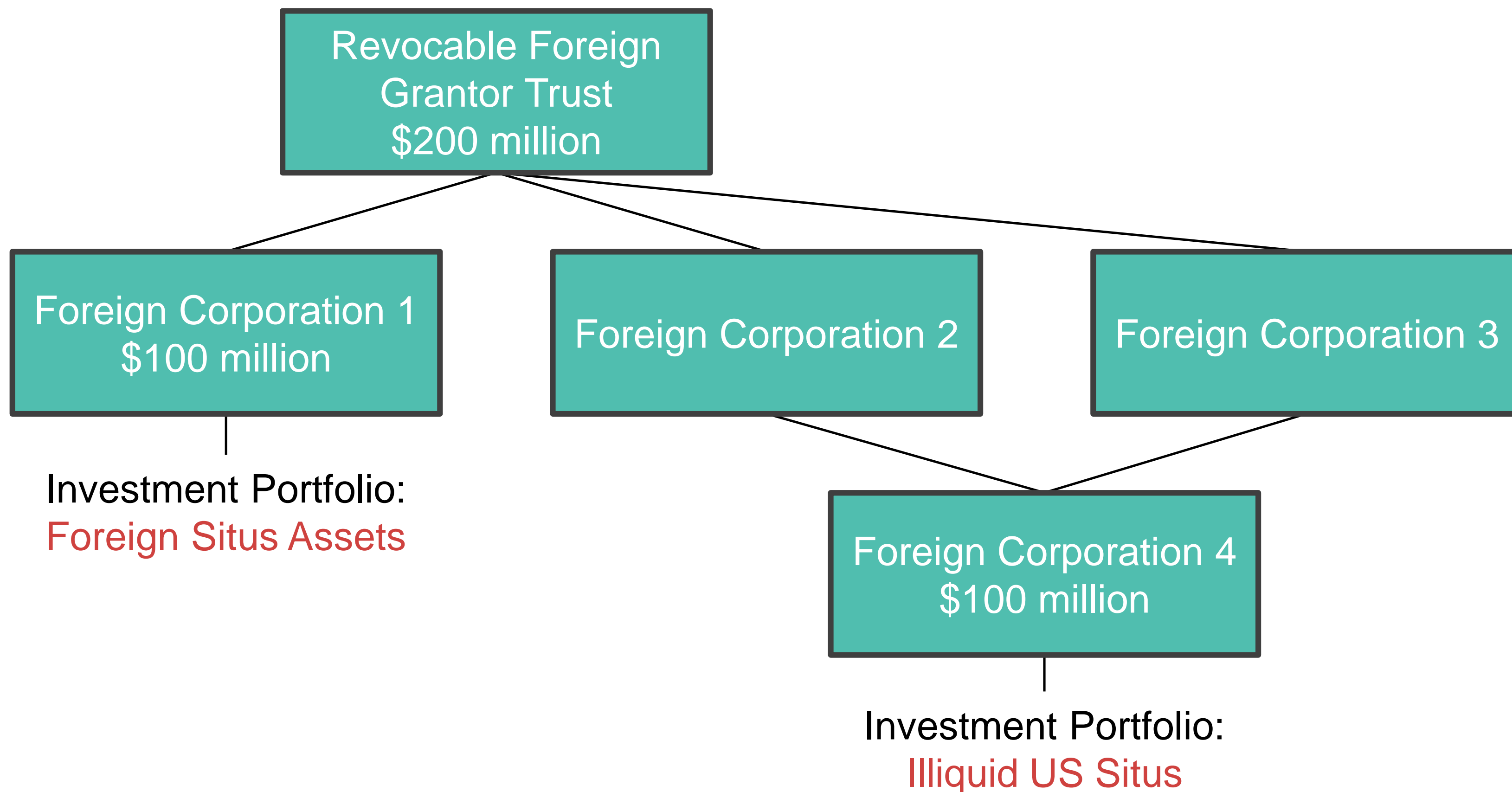


- Philip DOD December 15
- US Situs Assets—Make a CTB election, effective December 16
- Consequences—Income tax exposure for US beneficiaries (Nick and Alexander)

Upon Philip's Death—US Income Tax Exposure on Liquid US Assets

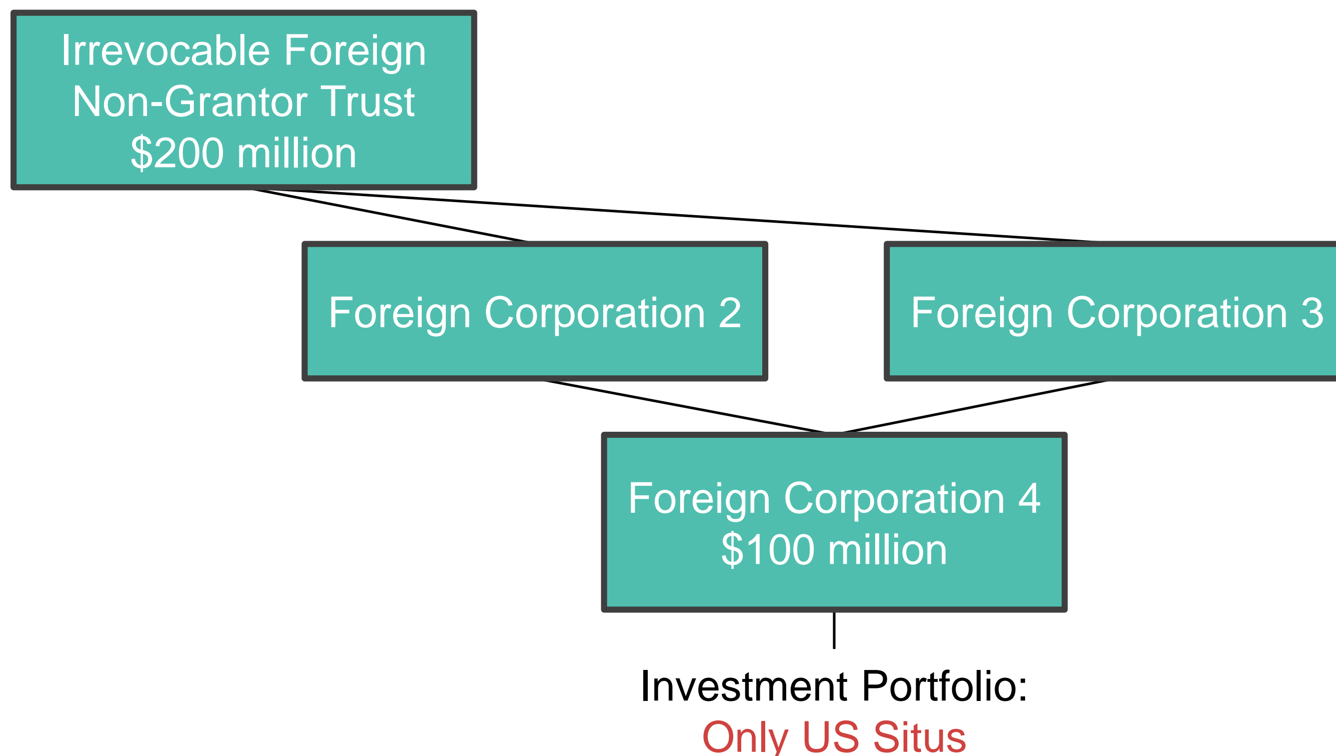
- Basis is value on December 31 of the prior year
- If the account appreciated by 10% since the beginning of the calendar year, there would be a $10 million unrealized short-term gain in the portfolio
- Two of the three discretionary beneficiaries are US taxpayers, but for simplicity, we will ignore Astrid and assume that Nick and Alexander are the sole beneficiaries and that they are taxed at the highest tax bracket of 50%
- The US income tax liability would be $5 million, ($10 million x 50%), or only 5% of the account and only 2.5% of the trust's total value of $200 million
- This tax exposure can be even further reduced by churning the assets at a gain more frequently than once a year

Maximizing Basis Step-Up—Illiquid US Situs Assets



- If US Situs assets are not liquid, like real estate, and thus cannot be churned, consider a two-tiered corporate structure

Upon Philip's Death—US Income Tax Exposure on Illiquid US Assets



- Best Case Scenario:
  - Philip dies January 1
  - CTB election made on Foreign Corp 4 effective on December 31 of the prior calendar year
  - CTB election made on Foreign Corp 2 and 3 effective on January 2, of the current calendar year
  - Subpart F inclusion ratio—include only the minimal appreciation that occurred on January 1

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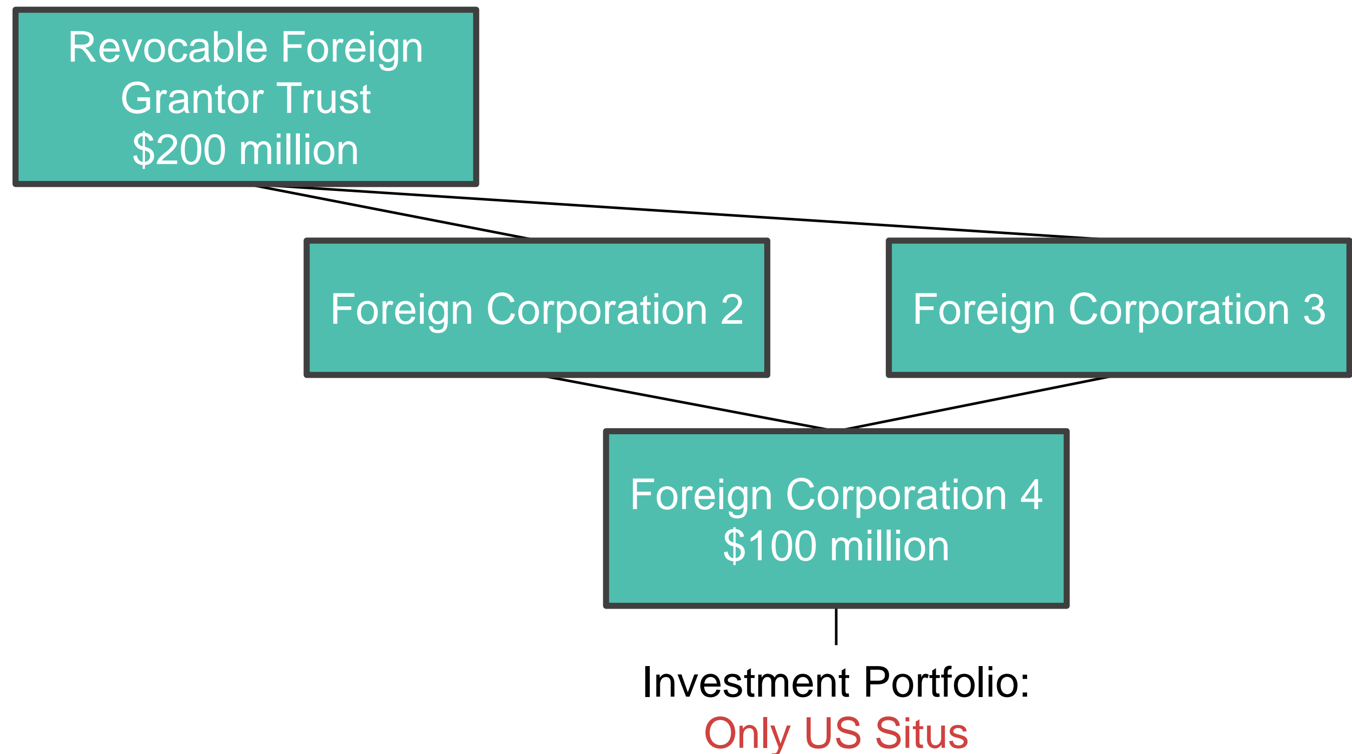
Upon Philip's Death—US Income Tax Exposure on Illiquid US Assets



- Worst Case Scenario:
  - Philip dies February 18
  - CTB election made on Foreign Corp 4 effective on February 17, giving rise to Subpart F income for Foreign Corp 2 and 3
  - CTB election made on Foreign Corp 2 and 3 effective on February 19
  - What is the tax consequence?

Worst Case Scenario: Not That Bad

- Assuming a zero basis and a tax rate of 50%
- The Subpart F Inclusion Ratio—2% (one day over 50, the number of days the corporation was in existence during the calendar year)
- Calculation: **(1/50) x $100 million x 50% tax = $1 million**
- Tax is only 1% of the US account and only 0.5% of the entire trust value of $200 million
- If Philip dies later in the year, the inclusion ratio would be even lower and thus the tax would be lower
  - Example: Philip dies on July 20, 200 days into the year
  - Calculation: **(1/200) x $100 million x 50% tax = $250,000**

Maximizing Basis Step-Up: Recap

- New Challenge: Subpart F income inclusion
- Minimize Exposure by:
  - Separating US and Foreign Situs Assets
  - Churning Liquid US Assets
  - Two-Tier Corporate Structure—still effective with income tax cost of ~1% or lower
- Don't lose sight of the fact that estate taxes are still the most expensive

Post-Death Distribution Strategy—US Beneficiary

Upon Philip's passing, the FGT split into two FNGTs.

Nick, a 55-year-old US citizen and New York City tax resident, became the sole beneficiary of one of the FNGTs, with assets worth $100 million.

Nick's spending needs are satisfied by one-half of the income generated by the FNGT.

He would like to invest the remaining half of the income for growth to ultimately benefit his children, but would like to maintain access to it in case of emergencies.

Key Question—What is the best distribution strategy?

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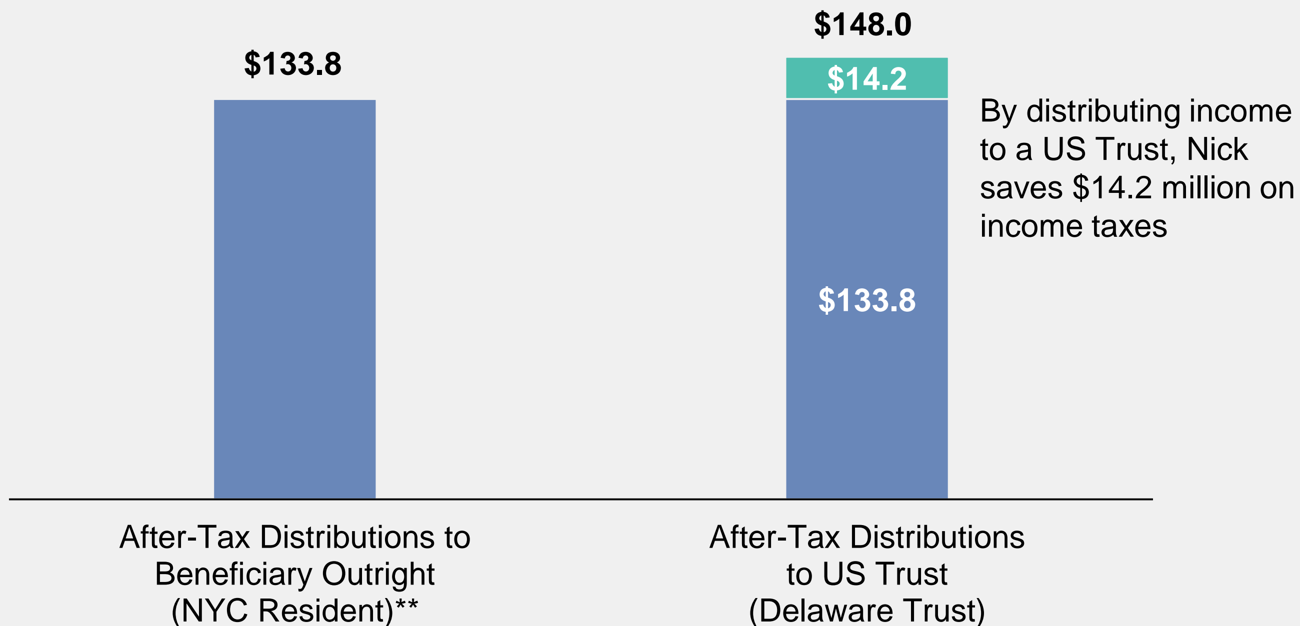
Distributing Income to a US Trust Saves on NYC Income Taxes…

$Millions, Nominal



*Assumes FNGT that is making the distributions is allocated 80% globally diversified equities and 20% intermediate-term municipal bonds.
Based on Bernstein's estimates of the range of returns for the applicable capital markets over the periods analyzed. Data do not represent past performance and are not a promise of actual or range of future results. Reflects the cumulative amount received (after taxes) and does not include the potential growth of assets received over the period. See Assumptions and Notes on the Wealth Forecasting System in the Appendix for further details.
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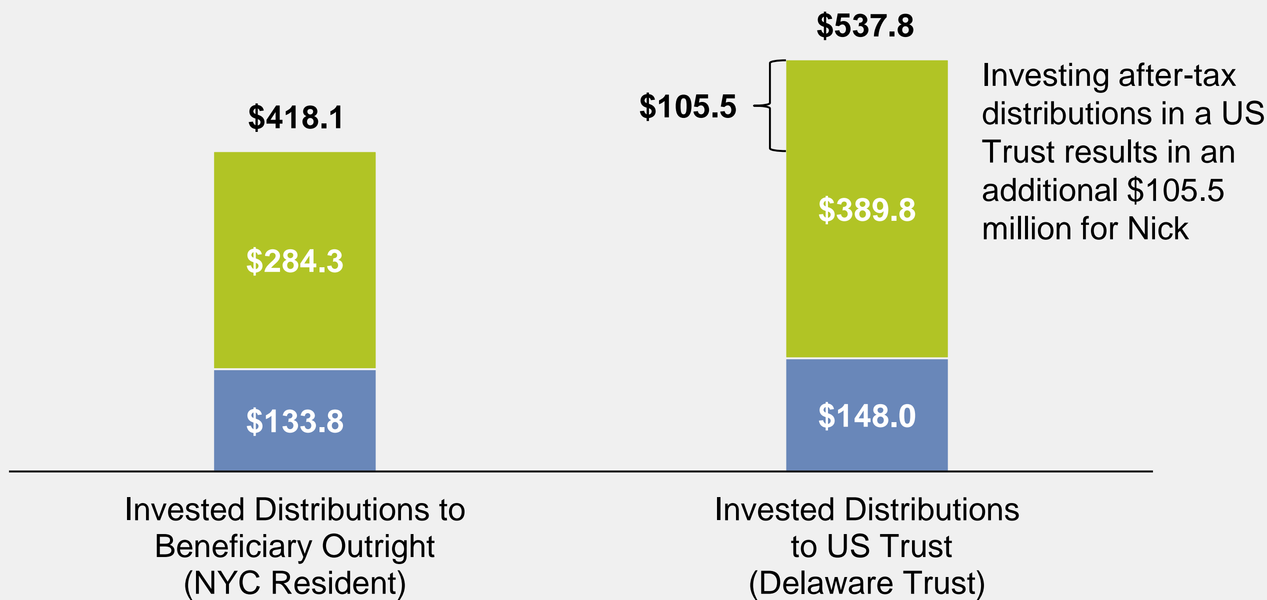
…Which Is Compounded When Distributions Are Invested…

$Millions, Nominal



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**80% globally diversified equities and 20% intermediate-term municipal bonds.

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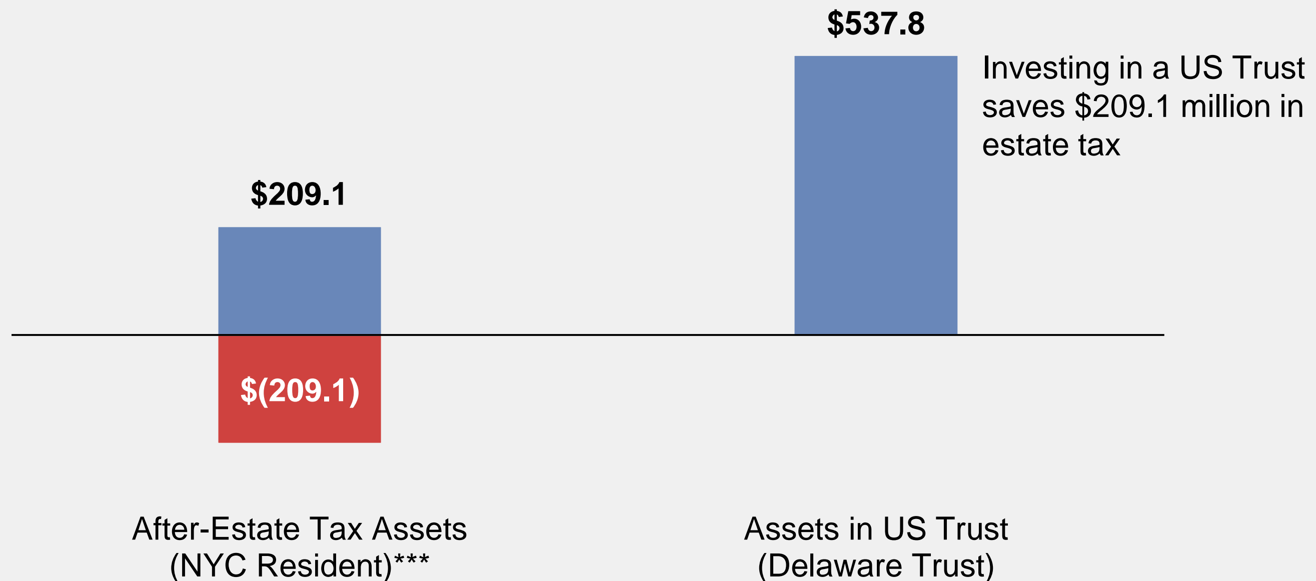
…and Then Assets Are Sheltered from Estate Tax at the Time of Nick's Death

$Millions, Nominal

Portfolio Values in 40 Years*
80% Stocks and 20% Bonds**
Median Outcome



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**80% globally diversified equities and 20% intermediate-term municipal bonds.
**Assumes a 50% blended state and federal estate tax rate for incremental wealth in the US beneficiary's estate. Assumes US beneficiary's other US-based assets will be sufficient to fully utilize the federal and state exclusion amount(s).
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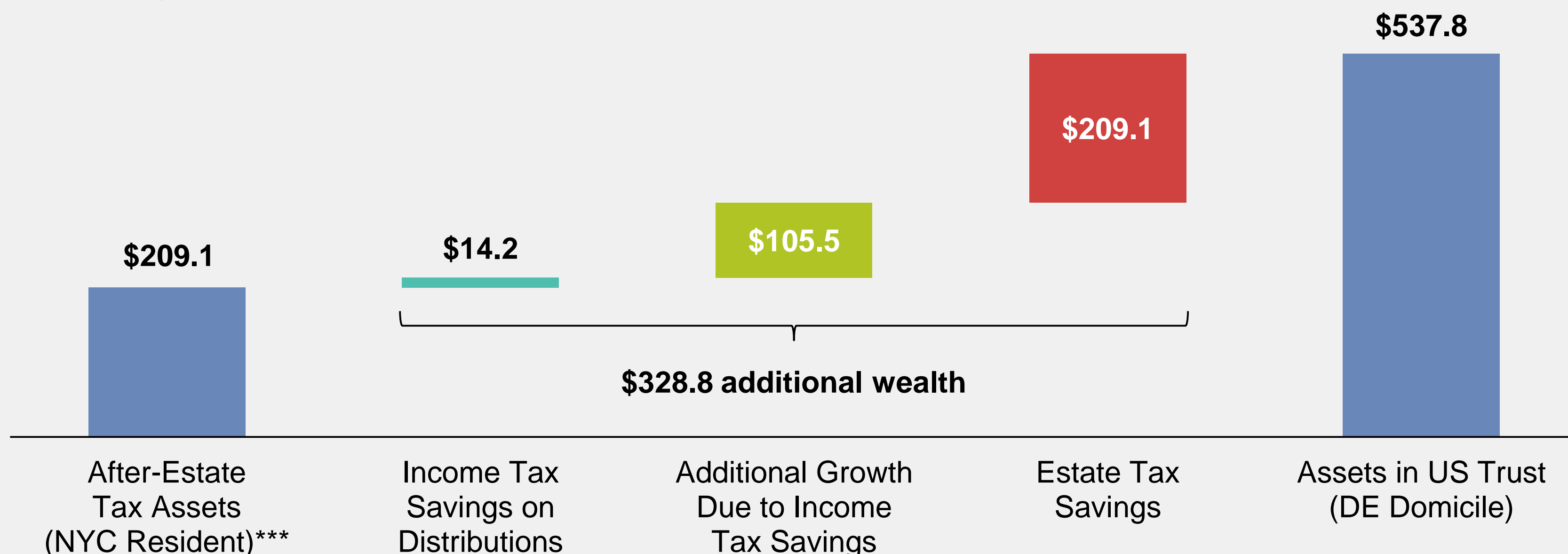
In Total, by Distributing Income to a US Trust, Nick Saves $328.8 Million

$Millions, Nominal



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Post-Death Distribution Strategy—US and Non-US Beneficiaries

Upon Philip's passing, Astrid and Alexander became beneficiaries of the second $100 million FNGT.

They are successful and frugal and do not need to receive any income from this trust for the time being.

Astrid lives in Hong Kong, Alexander is a US citizen.

Key Question—How can wealth be maximized for both beneficiaries?

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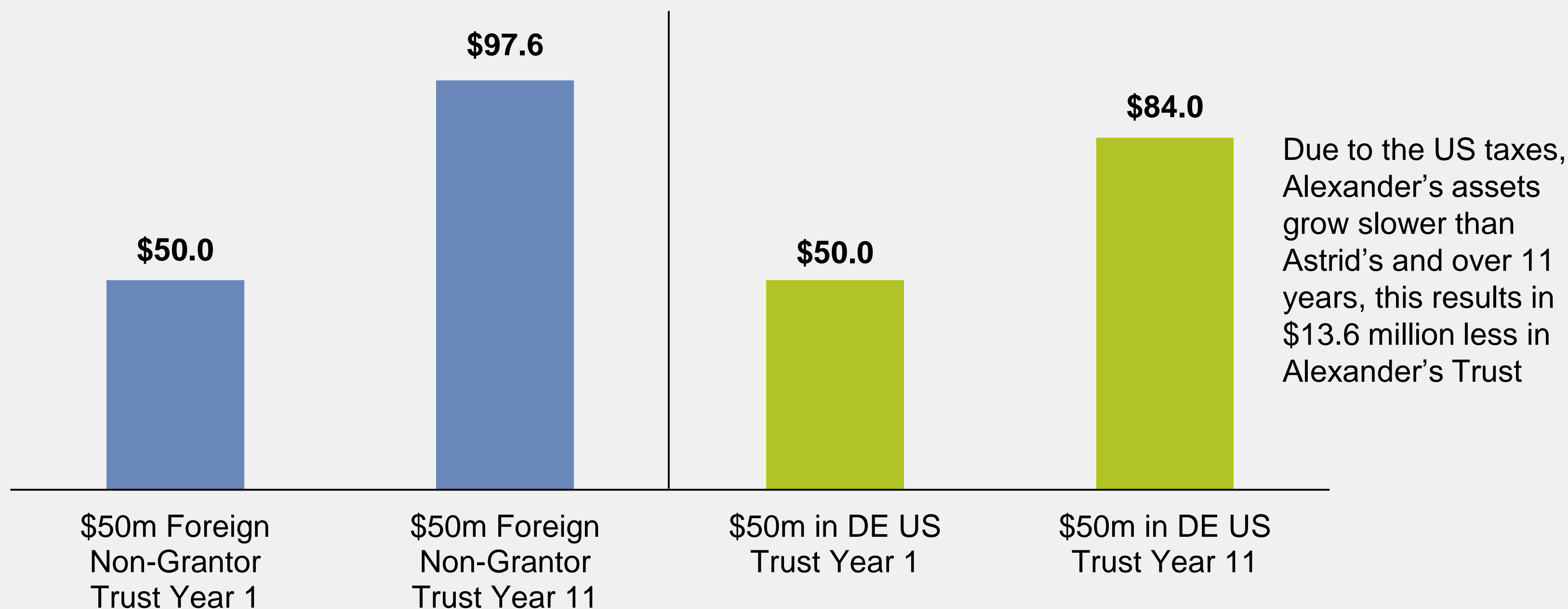
Option 1: Split Up Assets Now into a US Trust and a Foreign Non-Grantor Trust



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**Foreign Non-Grantor Trust is 80% globally diversified equities and 20% intermediate-term taxable bonds. Delaware US Trust is 80% globally diversified equities and 20% intermediate-term municipal bonds.

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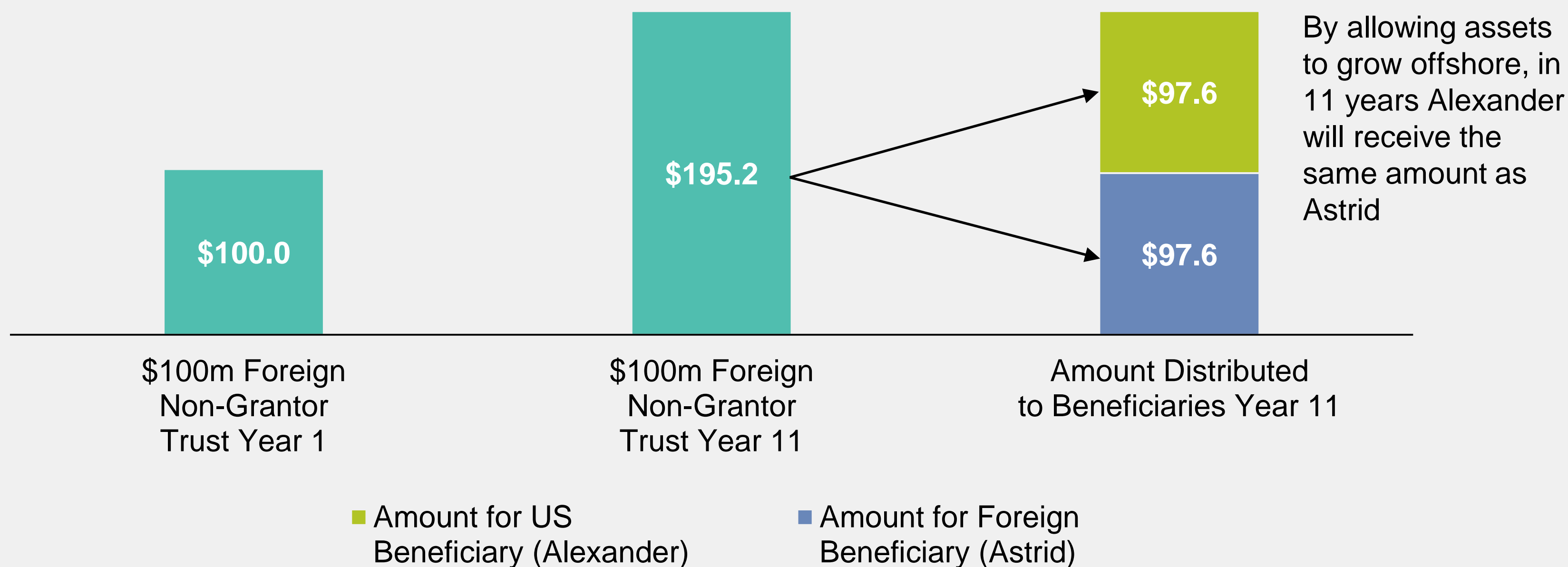
Option 2: Keep All Assets in Foreign Non-Grantor Trust Until It Doubles, Then Distribute Assets



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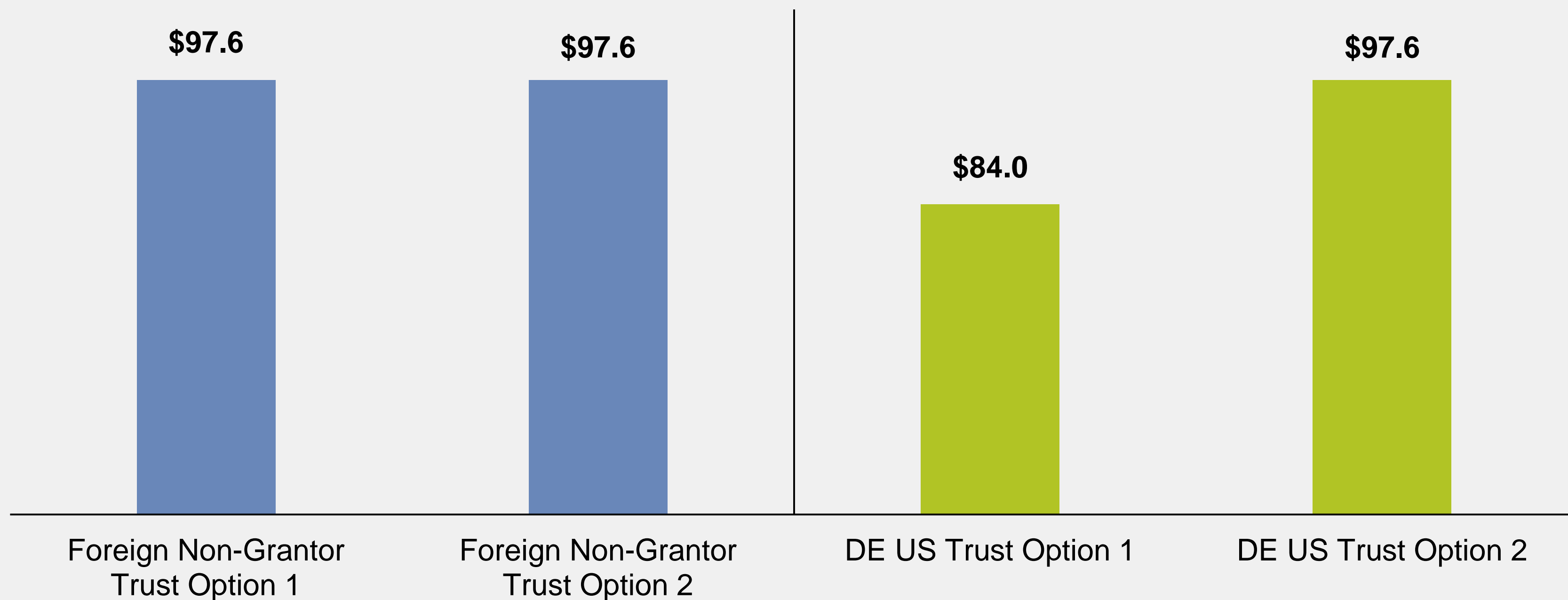
Keeping the Trust Offshore Until It Doubles Increases US Beneficiary's Wealth by $13.6 Million



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Post-Death Asset Allocation—US Beneficiary

Nick is meeting with the trustees to discuss asset allocation for the FNGT.

He would like to maximize the after-tax income he receives from the Trust. Specifically, he would like to address the taxation of bond interest.

Key Question—What is the most tax-efficient fixed-income allocation for the Trust?

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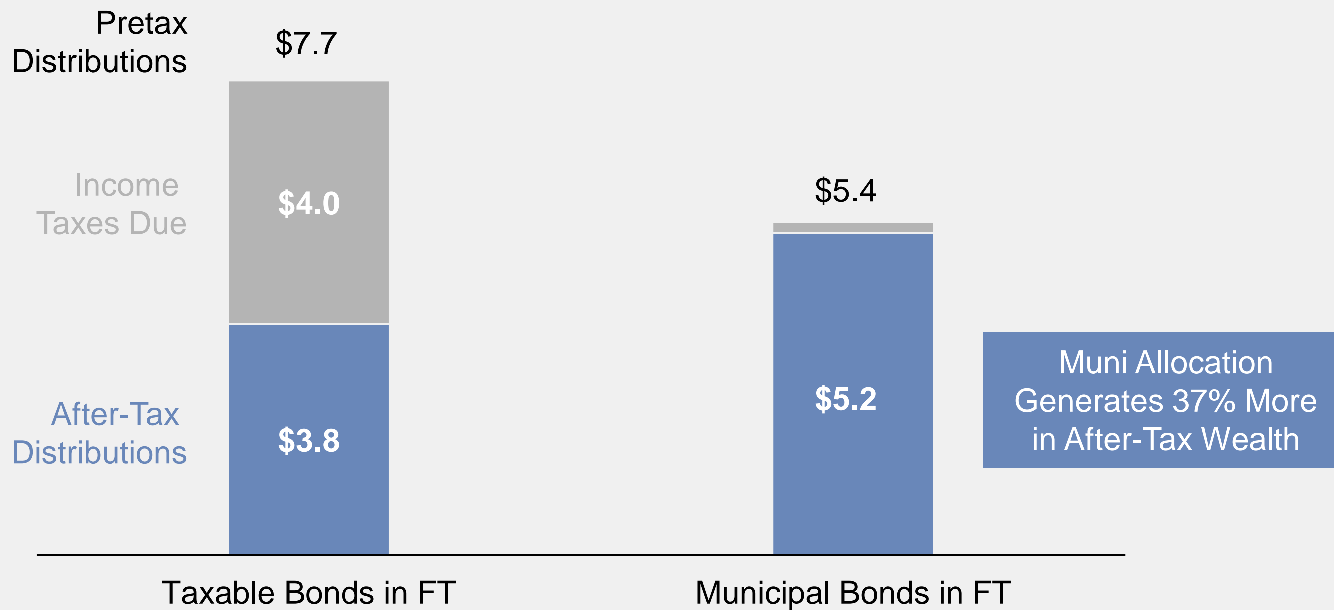
Municipal Bonds Are Preferable for Foreign Trusts with US Beneficiaries

$Millions



*Assumes beneficiary subject to top marginal federal and NY state/city income tax rates.
Based on Bernstein's estimates of the range of returns for the applicable capital markets over the periods analyzed. Data do not represent past performance and are not a promise of actual future results or a range of future results.

Takeaway

Bad News: A one-size-fits-all solution no longer exists

Good News: Proactive planning and thoughtful execution can still have a meaningful impact

Each scenario should be evaluated independently based on the size and type of assets and the beneficiaries' tax profile and spending needs

Consideration should be given to:

- Corporate structures
- Flexible trust provisions
- Tax Trading
- Distribution strategies
- Asset allocation

Capital Markets Projections

	Median 40-Year Growth Rate	Mean Annual Return	Mean Annual Income	One-Year Volatility	40-Year Annual Equivalent Volatility
Municipal Cash	2.8%	3.0%	3.0%	0.3%	9.6%
Int.-Term In-State Munis	3.8%	4.1%	4.0%	4.1%	10.3%
Int.-Term Diversified Municipals	3.9%	4.2%	4.0%	4.1%	10.3%
Int.-Term Taxables	5.1%	5.6%	6.7%	5.2%	11.7%
US Diversified	7.6%	9.5%	3.2%	16.4%	24.1%
US Value	7.9%	9.7%	3.8%	16.0%	23.6%
US Growth	7.4%	9.5%	2.6%	18.2%	25.6%
US Small/Mid-Cap	7.8%	10.0%	2.9%	18.7%	26.1%
US Low-Volatility	7.6%	8.9%	4.5%	14.2%	19.8%
Developed International	8.4%	10.7%	3.6%	18.2%	24.9%
Emerging Markets	6.7%	10.8%	4.5%	26.1%	31.5%
High-Risk Int’l	8.4%	11.7%	2.4%	22.1%	28.4%
Inflation	3.4%	3.8%	—	1.2%	13.9%

Based on 10,000 simulated trials each consisting of 40-year periods. Reflects AllianceBernstein’s estimates and the capital-market conditions as of December 31, 2017.
Data do not represent past performance and are not a promise of actual future results or a range of future results.
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Notes on Wealth Forecasting System

1. Purpose and Description of Wealth Forecasting System

AB's Wealth Forecasting Analysis is designed to assist investors in making their long-term investment decisions as to their allocation of investments among categories of financial assets. Our planning tool consists of a four-step process: (1) Client-Profile Input: the client's asset allocation, income, expenses, cash withdrawals, tax rate, risk-tolerance level, goals and other factors; (2) Client Scenarios: in effect, questions the client would like our guidance on, which may touch on issues such as when to retire, what his/her cash-flow stream is likely to be, whether his/her portfolio can beat inflation long-term, and how different asset allocations might impact his/her long-term security; (3) The Capital-Markets Engine: our proprietary model that uses our research and historical data to create a vast range of hypothetical market returns, which takes into account the linkages within and among the capital markets, as well as their unpredictability; and finally (4) A Probability Distribution of Outcomes: based on the assets invested pursuant to the stated asset allocation, 90% of the estimated ranges of probable returns and asset values the client could experience are represented within the range established by the 5th and 95th percentiles on "box-and-whiskers" graphs. However, outcomes outside this range are expected to occur 10% of the time; thus, the range does not guarantee results or establish the boundaries for all outcomes. Estimated market returns on bonds are derived from taking into account yield and other criteria. An important assumption is that stocks will, over time, outperform long bonds by a reasonable amount, although this is in no way a certainty. Moreover, actual future results may not meet AB's estimates of the range of market returns, as these results are subject to a variety of economic, market, and other variables. Accordingly, the analysis should not be construed as a promise of actual future results, the actual range of future results, or the actual probability that these results will be realized. The information provided here is not intended for public use or distribution beyond our private meeting. Of course, no investment strategy or allocation can eliminate risk or guarantee returns.

2. Rebalancing

Another important planning assumption is how the asset allocation varies over time. We attempt to model how the portfolio would actually be managed. Cash flows and cash generated from portfolio turnover are used to maintain the selected asset allocation between cash, bonds, stocks, REITs, and hedge funds over the period of the analysis. Where this is not sufficient, an optimization program is run to trade off the mismatch between the actual allocation and targets against the cost of trading to rebalance. In general, the portfolio allocation will be maintained reasonably close to its target. In addition, in later years, there may be contention between the total relationship's allocation and those of the separate portfolios. For example, suppose an investor (in the top marginal federal tax bracket) begins with an asset mix consisting entirely of municipal bonds in his/her personal portfolio and entirely of stocks in his/her retirement portfolio. If personal assets are spent, the mix between stocks and bonds will be pulled away from targets. We put primary weight on maintaining the overall allocation near target, which may result in an allocation to taxable bonds in the retirement portfolio as the personal assets decrease in value relative to the retirement portfolio's value.

3. Expenses and Spending Plans (Withdrawals)

All results are generally shown after applicable taxes and after anticipated withdrawals and/or additions, unless otherwise noted. Liquidations may result in realized gains or losses, which will have capital-gains tax implications.

Notes on Wealth Forecasting System

4. Modeled Asset Classes

The following assets or indexes were used in this analysis to represent the various model classes:

Asset Class	Modeled As	Annual Turnover
Municipal Cash	Municipal money-market securities	100%
Int.-Term In-State Munis	AA-rated in-state municipal bonds of 7-year maturity	30%
Int.-Term Diversified Municipals	AA-rated diversified municipal bonds of 7-year maturity	30%
Int.-Term Taxables	Taxable bonds of 7-year maturity	30%
US Diversified	S&P 500 Index	15%
US Value	S&P/Barra Value Index	15%
US Growth	S&P/Barra Growth Index	15%
US Small/Mid-Cap	Russell 2500 Index	15%
US Low-Volatility	MSCI US Minimum Volatility Index	15%
Developed International	MSCI EAFE Index (Unhedged)	15%
Emerging Markets	MSCI Emerging Markets Index	20%
High-Risk Int'l	Country Fund	15%

Notes on Wealth Forecasting System

5. Volatility

Volatility is a measure of dispersion of expected returns around the average. The greater the volatility, the more likely it is that returns in any one period will be substantially above or below the expected result. In general, two-thirds of the returns will be within one standard deviation. For example, assuming that stocks are expected to return 8.0% on a compounded basis and the volatility of returns on stocks is 17.0%, in any one year it is likely that two-thirds of the projected returns will be between (8.9)% and 28.8%. With intermediate government bonds, if the expected compound return is assumed to be 5.0% and the volatility is assumed to be 6.0%, two-thirds of the outcomes will typically be between (1.1)% and 11.5%. Bernstein's forecast of volatility is based on historical data and incorporates Bernstein's judgment that the volatility of fixed income assets is different for different time periods.

6. Technical Assumptions

Bernstein's Wealth Forecasting System is based on a number of technical assumptions regarding the future behavior of financial markets. Bernstein's Capital-Markets Engine is the module responsible for creating simulations of returns in the capital markets. These simulations are based on inputs that summarize the current condition of the capital markets as of December 31, 2017. Therefore, the first 12-month period of simulated returns represents the period from December 31, 2017, through December 31, 2018, and not necessarily the calendar year of 2018. A description of these technical assumptions is available on request.

7. Tax Implications

Before making any asset allocation decisions, an investor should review with his/her tax advisor the tax liabilities incurred by the different investment alternatives presented herein, including any capital gains that would be incurred as a result of liquidating all or part of his/her portfolio, retirement-plan distributions, investments in municipal or taxable bonds, etc. Bernstein does not provide tax, legal, or accounting advice. In considering this material, you should discuss your individual circumstances with professionals in those areas before making any decisions.

Notes on Wealth Forecasting System

8. Tax Rates

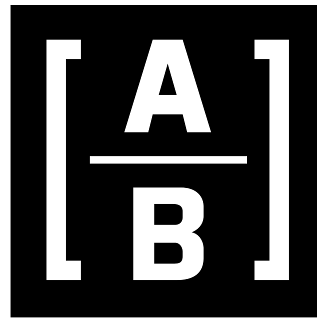
Bernstein's Wealth Forecasting System has used the following tax rates for this analysis:

Taxpayer	Scenario	Start Year	End Year	Federal Income Tax Rate	Federal Capital Gains Tax Rate	State Income Tax Rate	State Capital Gains Tax Rate	Tax Method Type
Beneficiaries	All	2018	2057	Top Marginal	Top Marginal	12.7%	12.7%	Top Marginal

The federal income tax rate represents Bernstein's estimate of either the top marginal tax bracket or an "average" rate calculated based upon the marginal rate schedule. The federal capital gains tax rate is represented by the lesser of the top marginal income tax bracket or the current cap on capital gains for an individual or corporation, as applicable. Federal tax rates are blended with applicable state tax rates by including, among other things, federal deductions for state income and capital gains taxes. The state income tax rate represents Bernstein's estimate of the 'average' rate calculated based upon the applicable state's marginal tax schedule. Where an applicable state tax code permits the exclusion of a portion of capital gain income from gross income for purposes of calculating state income tax, such exclusions have been included in the calculation.

9. Taxable Trust

The Taxable Trust is modeled as an irrevocable tax-planning or estate-planning vehicle with one or more current beneficiaries and one or more remainder beneficiaries. Annual distributions to the current beneficiary may be structured in a number of different ways, including 1) an amount or a percentage of fiduciary accounting income (FAI) (which may be defined to include part or all of realized capital gains); 2) FAI plus some amount of principal, expressed as a percentage of trust assets or as an amount; 3) an annuity, or fixed dollar amount, which may be increased annually by inflation or by a fixed percentage; 4) a unitrust, or annual payment of a percentage of trust assets, based on the trust's value at the beginning of the year or averaged over multiple years; or 5) any combination of the above four payout methods. The trust will pay income taxes on retained income and will receive an income distribution deduction for income paid to the current beneficiaries. Capital gains may be taxed in one of three ways, as directed: 1) taxed entirely to the trust; 2) taxed to the current beneficiaries to the extent the distributions exceed traditional income; or 3) taxed to the current beneficiaries on a pro rata basis with traditional income.



BERNSTEIN

ESTATE PLANNING COUNCIL OF GREATER MIAMI

WHAT HAVE WE LEARNED ABOUT ELDER ABUSE AND EXPLOITATION
TO MAKE FLORIDA A SAFE PLACE?

FEBRUARY 5, 2019
CORAL GABLES, FLORIDA

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WHAT HAVE WE LEARNED ABOUT ELDER ABUSE & EXPLOITATION TO MAKE FLORIDA A SAFE PLACE?

By Stephanie L. Schneider, Esquire, CELA

I. **INTRODUCTION**.

"Those who cannot remember the past are condemned to repeat it."[1] *"If history repeats itself and the unexpected always happens, how incapable must man be of learning from experience."*[2] The United States Bureau of Census projects that the population over age 65+ will be 80 million by the year 2040, and the population over age 85+ will be 14 million by the year 2040.[3] Clearly, the growth of our country's older population including the Baby Boomer generation is considerable. Older women outnumber older men.[4] There are various forms of elder abuse which include: financial exploitation, financial mismanagement, neglect, emotional mistreatment, physical mistreatment, and sexual mistreatment. There are varying definitions of elder abuse which include those found in the federal Elder Justice Act, the Older Americans Act, and state law. Many of the definitions, such as the National Academy of Sciences Panel, focus on intentional actions that cause harm or create a serious risk of harm to a vulnerable adult by a caregiver or, a person who stands in a position of trust with the elder (or the person with a disability). This includes failure of the caregiver to provide for the person's basic care needs. The prevalence of elder abuse is uncertain for the simple reason that there can be many incidences that go unreported.

Kathryn Havens and her daughter Amanda Havens were charged with elder abuse and second-degree murder in the death of Dorothy Jean Havens which occurred in 2015. Amanda Havens has been sentenced to 17 years in prison. Kathryn Havens is serving a sentence of 15 years to life in prison. The grandmother shared her home with her daughter and granddaughter. When she was found she had bedsores and open wounds; she died the following day of sepsis, respiratory and urinary track infections. Kathryn Havens admitted that in 2014 she was told by a doctor that the

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[1] George Santayana, philosopher.

[2] George Bernard Shaw, dramatist.

[3] National Center On Elder Abuse.

[4] Id.

elder Mrs. Havens needed full-time care, and that they were selfishly living off Mrs. Havens' social security benefit. The Havens did not apply for Medicaid because they thought Medicaid would 'take' the home. This misconception cost Mrs. Havens her life. If Mrs. Havens' family had obtained advice from an elder law attorney they would have learned that the house would be excluded as a countable resource for purposes of qualifying for Medicaid; simply stating that Mrs. Haven intended to return to her home would have qualified the home as an exempt resource. Additionally, an elder law attorney could have provided guidance on the options to protect the home from the Medicaid lien at the demise of Mrs. Havens.

II. RISK FACTORS

What factors might make someone more at risk for experiencing elder abuse?

- low social support (lack of a social network);
- dementia or cognitive impairment;[5]
- functional impairment and poor physical health[6];
- women are more likely to be abused than men[7]

People with dementia or Alzheimer's disease are more susceptible to abuse because of their impairments in memory, communication abilities and exercise of judgment. Prevalence of elder abuse can be magnified by these individuals due to inability, fear or embarrassment of reporting the

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[5] Quinn, K., & Benson, W. (2012) The states' elder abuse victim services: a system in search of support. Generations 36(3), 66-71.

[6] Friedman, B., Santos, E.J., Liebel, D.V., Russ, A.J., & Conwell, Y. (2015). Longitudinal prevalence and correlates of elder mistreatment among older adults receiving home visiting nursing. *Journal of Elder Abuse and Neglect* 27(1), 34-64. See also Lachs, M., & Pillemer, K. (2015). Elder abuse. *New England Journal of Medicine*, 373, 1947-56.

[7] Laumann, E., Leitsch, S., & Waite, L. (2008). Elder Mistreatment in the United States; prevalance estimates from a nationally representative study. *The Journals of Gerontology Series B, Psychological Sciences and Social Sciences,* 63(4), S248-S254.

abuse.[8] As dementia advances, the risk of all types of abuse increases.

People with disabilities are also more susceptible to abuse. In 2014 it was reported that an estimated 35.9% of non-institutionalized individuals over the age of 65+ and an estimated 10.5% of non-institutionalized individuals between the ages of 18-64 reported having a disability.[9] These vulnerable adults, including those people in institutions, are more susceptible to abuse committed by family members and service providers.

III. **WHO ARE THE PERPETRATORS**

Studies have shown that the perpetrators are most likely to be family members first, followed by friends and neighbors, and by paid caregivers.[10] Perpetrators are more likely to be male, have prior criminal acts, have past or current substance abuse, be unemployed or have financial problems, be socially isolated, have physical or mental health problems, or be experiencing major stress.[11]

IV. **EARLY INTERVENTIONS TO PREVENT ELDER ABUSE**.

Early intervention is successful when it is built on a foundation of education and communication within the larger community. Frameworks are in place where agencies reach out to vulnerable adults to connect them to social service agencies such as the Agency for Disability & Resource Center (ADRC) formerly referred to as the Area Agency on Aging (AAA). Other examples of early intervention tools include:

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[8] Cooper, C., & Livingston, G. (2014). Mental health/psychiatric issues in elder abuse and neglect. *Clinic in Geriatric Medicine* 30(4), 839-50.

[9] Cornell University (2014). *Disability Statistics.*

[10] Peterson, J., Burnes, D., Cacamise, P., Mason, A., Henderson, C., Wells, M., & Lachs, M. (2014). Financial exploitation of older adults: a population-based prevalence study. *Journal of General Internal Medicine, 29(12), 1615-23.*

[11] Lachs, M., & Pillemer, K. (2015). Elder abuse. *New England Journal of Medicine* 373, 1947-56.

- Police and sheriff organizations working with social service agencies and the larger community such as T.R.I.A.D. T.R.I.A.D. is a partnership between the Broward Sheriff's Office, the Broward County Chiefs of Police, AARP and retired leadership in the community to assess the needs and concerns of older citizens, provide referrals to appropriate resources and sponsor crime prevention programs;
- Florida's Elder Abuse Prevention Program (www.elderaffairs.state.fl.us/doea/abuse) provides program resources, outreach materials and training;
- Adult Protective Services (under the Department of Children & Families);
- Jewish Family Services;
- SunServe in Wilton Manors which serves the LGBTQ+ community;
- Education of professionals and lay people to identify signs of elder abuse and take measures to report and stop the abuse. The National Center on Elder Abuse (www.ncea.acl.gov) offers webinars and podcasts on how to create a collaborative effort (i.e healthcare industry including hospital, facilities, home health agencies; financial industry including banks, credit unions, financial services firms; first responders and county/state/federal law enforcement, fire marshall);
- The National Center on Law and Elder Rights provides training and resources (www.NCLER.acl.gov) .

V. **FLORIDA STATUTES**: **PROTECTIVE SERVICES.**

A. Purpose: The "Adult Protective Services Act"provides for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations and establishes a program of protective services for all disabled adults or elderly persons in need of them. Legislative intent recognizes that there are many persons in this state who, because of age or disability, are in need of protective services. The services should allow an individual the same rights as other citizens and, at the same time, protect the individual from abuse, neglect, and exploitation. It is intended that the mandatory reporting of such cases will cause the protective services of the state to be brought to bear in an effort to prevent further abuse, neglect, and exploitation of disabled adults or elderly persons. The Legislature intended to place the fewest possible restrictions on personal liberty and the exercise of constitutional rights, consistent with due process and protection from abuse,

neglect, and exploitation, and to encourage the constructive involvement of families in the care and protection of disabled adults or elderly persons.

B. **Applicable Statutes and Rules**: F.S. 415.101-415.113.

C. **Definitions (415.102)**: Use the definitions as a checklist to determine whether abuse, neglect or exploitation has occurred. Watch for and be aware of whether the following facts exist:

1. Does the vulnerable adult have capacity to consent to protective services?

2. Look at the relationship between the vulnerable adult and alleged perpetrator - is there a fiduciary or confidential relationship. Note that the definition of a "care giver" includes guardians as well as relatives.

3. Was deception, intimidation, fraud or willful misrepresentation involved in causing physical or psychological injury to a vulnerable adult or, removal of property belonging to a vulnerable adult.

4. Be aware that a vulnerable adult is someone who is over age 18 and whose ability to perform the normal activities of daily living and provide for their own care and protection is impaired due to a mental, emotional, physical or developmental disability (retardation; cerebral palsy; autism; spina bifida; organic brain damage; Prader-Willi Syndrome), dysfunction, or brain damage or the infirmities of aging (very broad wording).

D. **Confidentiality** (415.107): All records concerning reports of abuse, neglect and exploitation are confidential and exempt from production. Note that the identity of the person making the report will not be released without their consent except to an employee of protective services, the abuse hotline, state attorney or law enforcement. A limited number of individuals/agencies can have access:

AHCA

DOEA

Criminal justice agency investigating a report

State attorney's office in the circuit where the vulnerable adult resides or the alleged abuse, neglect, exploitation occurred

Victim, victim's guardian or care giver, legal counsel or the person who might be committing the abuse, neglect, exploitation.

E. **Mandatory Reporting** (415.1034): Required of health and mental health professionals, social worker, staff at nursing, assisted living and adult day care

facilities. Also financial institutions who have a reasonable cause to suspect or, who know that a disabled person or elder is being abused neglected or exploited.

F. **Immunity (415.1036)**: There is a presumption that a person making a report has acted in good faith and so is immune from civil and criminal liability. *** There is a section that protects whistle blowers whether they are another resident or an employee who works in a facility; if there is reprisal or change in residential or employment status (i.e. discharge; demotion; transfer; reduction in pay, benefits or work privileges; that individual has a civil cause of action for compensatory and punitive damages. If the change occurs within 120 days of the report having been made it creates a rebuttable presumption that the detrimental action was retaliatory.

G. **Recovery-Civil Actions (415.1111)**:

1. Vulnerable adult who has been abused, neglected, or exploited has a cause of action against any perpetrator and may recover actual and punitive damages.

2. May be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, or by the personal representative of the estate of a deceased victim without regard to whether the cause of death resulted from the abuse, neglect, or exploitation.

3. Action may be brought in any court of competent jurisdiction to enforce such action and to recover actual and punitive damages for any deprivation of or infringement on the rights of a vulnerable adult.

4. Prevailing party may be entitled to recover reasonable attorney's fees, costs of the action, and damages.

5. The remedies are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult. A civil action for damages against any licensee or entity who establishes, controls, conducts, manages, or operates a facility licensed under part II of chapter 400 relating to its operation of the licensed facility shall be brought pursuant to s. 400.023 and 400.429.

H. **Abrogation of Privileged Communications** (415.1045): Evidentiary privileges of communication do not apply here except for the attorney-client privilege and the clergy privilege. Also they cannot be used as grounds for failure to report known or suspected abuse, neglect, exploitation, failure to cooperate with law enforcement or, failure to give evidence in a proceeding.

I. **Components of Protective Services (415.1051)**: These include:

1. on-site investigation of all reports;
2. on-site assessment of neglect not caused by a second party;
3. determining immediate risk to the vulnerable adult and the provision of emergency services which includes arranging for in home and non-emergency services;
4. evaluating the need for referrals for on-going protective services;
5. providing referrals and
6. on-going protective services.

VI. FLORIDA STATUTES: CHAPTER 825

A. "*Elderly person*" is 60+ years, suffering from the infirmities of aging to the extent that their ability to provide for their own care or protection is impaired.

"*Disabled adult*" is 18+ years, suffers from a condition of physical or mental incapacity due to developmental disability, organic brain damage, or mental illness or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living.

1. **"Abuse of an elderly person or disabled adult"**

- intentional infliction of physical or psychological injury
- intentional act that can be expected to result in physical or psychological injury
- actively encouraging a person to commit an act that can be expected to result in physical or psychological injury

2. **"Neglect of an elderly person or disabled adult"**

- care giver's failure or omission to provide care, supervision and services necessary
- to maintain the person's physical and mental health (i.e. food, nutrition, clothing, shelter, supervision, medicine, medical services)
- care giver's failure to make a reasonable effort to protect that person from abuse, neglect or exploitation by another

3. **"Exploitation of an elderly person or disabled adult"**

- using deception or intimidation to obtain that person's assets or property with the

; intent to temporarily or permanently deprive the person of possession

- could be a person standing in a position of trust and confidence
- could be a person who has a business relationship with the elder

VII. LEGAL TOOLS TO STOP EXPLOITATION

A. Emergency Temporary Guardianship (744.3031): This proceeding requires legal evidence that there is imminent danger that the physical or mental health or safety of the alleged incapacitated person will be seriously impaired or that the person's property is in danger of being wasted, misappropriated, or lost unless immediate action is taken. The authority of the emergency temporary guardian expires 90 days after the date of appointment or, when a guardian is appointed, whichever occurs first.

B. Injunction: The Probate Court can grant an injunction to prevent waste and mismanagement of the victim's assets. Under the Florida Rules of Civil Procedure the party requesting the injunction is required to post a bond.

C. Restraining Order

D. Suspension & Termination of Authority Under a Durable Power of Attorney (Florida Statute 709): When a petition to determine incapacity is filed it automatically suspends the Durable Power of Attorney executed by the alleged incapacitated person. If the alleged perpetrator position is that the Durable Power of Attorney is a less restrictive alternative to a guardianship consider Florida Statute 744.331(6)(f) ('verified statement by interested person') to establish that the legal document is invalid and is not a less restrictive alternative.

E. Civil Action for Breach of Fiduciary Duty and an Accounting: This is an option for civil monetary damages if the alleged perpetrator served in a fiduciary position such as a trustee, attorney-in-fact, or guardian.

VIII. THE FEDERAL ELDER ABUSE PREVENTION & PROSECUTION ACT

Became law October 18, 2017. The Department of Justice is charged with investigating and prosecuting elder abuse crimes and enforcing elder abuse laws. DOJ is required to:

- designate elder justice coordinators in federal judicial districts and the DOJ;
- implement comprehensive training for the Federal Bureau of Investigation agents;
- establish a working group to provide policy advice.

IX. **IDENTIFYING THE RED FLAGS**

A. Telephone scams. Tell your clients to request that the caller send them information in the mail verifying who they are and about the company. The client can call the Secretary of State or the Department of Business and Professional Regulation to find out if the company is incorporated, in good standing, dissolved and has had any complaints filed against it.

B. Door-to door salespersons. It is recommended that you tell your clients do not open your door and allow a stranger to come inside. Tell them to leave their business card and you can then verify that the company is legitimate as suggested above.

C. Sweepstakes/contests. Never send money to find out if you will win a prize.

D. Aides/care givers. Be aware that sometimes a relationship of trust and dependency can develop between the care giver and the elder and this relationship can be abused for the benefit of the caregiver. An older adult may feel that if he/she does not acquiesce to the requests of the caregiver that the caregiver might not return and then no one will care for the older adult. This type of exploitation may be difficult to detect and it is recommended that the elder be interviewed outside the presence of the caregiver.

E. Altering one's estate plan. Beware care givers including family members who say they have the elder's best interests in mind. If the elder is taken to a lawyer the elder should request to speak with the lawyer alone without any one else present. The elder should not sign any documents he/she does not fully understand.

F. Self-neglect. Sometimes the aging process affects short-term memory and a person will become neglectful of eating and appropriate hygiene habits. Look for signs of a disheveled appearance, failure to bathe, torn or dirty clothes, lack of food or rotting food in the refrigerator, failure to renew or, self-administer prescriptive medication.

X. **WHAT TO DO WHEN YOU SUSPECT ABUSE, NEGLECT OR EXPLOITATION**.

A. Call the *Florida Abuse Hotline* at (800) 96-ABUSE which is monitored by the Department of Children & Families. You may leave an anonymous report.

B. Call the *Sheriff's Department* for your county and ask for the department handling elder

abuse. In Broward County call 954-321-4489.

C. Call the *Department of Children & Families Adult Protective Services* at 800-962-2873.

D. Call the *National Fraud Information Center* regarding Internet or Telemarketing fraud at 800-876-7060 or www.fraud.org or the Federal Trade Commission Advertising Practices 202-326-3126 or the Federal Trade Commission Consumer Project 202-326-3224. Visit www.ftc.gov; 877-FTC-HELP (1-877-382-4357). To find a Federal Trade Commission Office call 202-326-2222.

E. Call the *Broward County Elderly Services Division* 954-537-2936 if you suspect an elder is being self-neglectful or Adult Protective Services, as mentioned above, 800-962-2873. http://www.broward.org/HumanServices/ElderlyAndVeterans/Elderly/Pages/ProgramsAndServices.aspx

F. *ADRC* Broward http://www.adrcbroward.org/ Broward County's ADRC Helpline 954.745.9779

G. Call the *Broward County Long Term Care Ombudsman Council* at 888-831-0404, if you suspect an elder who is living in an assisted living facility or skilled nursing facility is being abused, neglected or exploited by the facility and/or its employees.

H. Call an Elder Law Attorney who handles these types of matters. If the facts give rise to an emergency, an emergency guardianship may be necessary and appropriate to prevent continued abuse, neglect or exploitation.

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NCEA National Center on Elder Abuse NATIONAL CENTER ON ELDER ABUSE

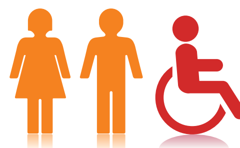
RESEARCH BRIEF

Abuse of Adults with a Disability

Sadly, people with disabilities get abused, sometimes at the hands of people who help or care for them. Care providers and personal assistants, including family members and service providers (paid or unpaid) can be abusive. When abuse occurs, a disabled person's personal health, safety and emotional well-being may be at risk, along with their ability to engage in daily life activities.

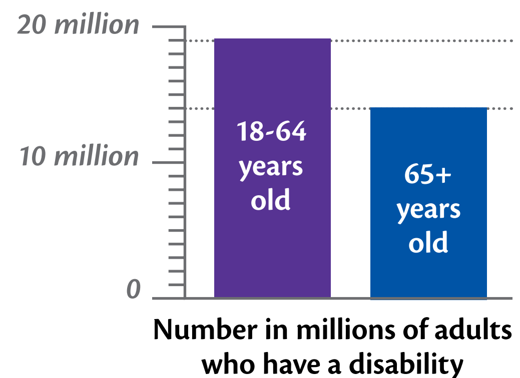
Approximately 1 in 8 of All U.S. Adults Has a Disability

1 in 8 U.S. adults aged 35 to 64 has a disability



1 in 3 adults aged 65 or older has a disability

(2010 American Community Survey – U.S. Census)



Number in millions of adults who have a disability

Who Uses Personal Assistance Service (PAS)?

PAS refers to assistance provided in performing activities associated with well-being, comfort, safety, appearance, and community interaction. Approximately 14.8 million American adults received assistance with activities of daily living in 1995. The majority of PAS users live in the community and are older than 65 years of age.

How is PAS provided?

Among community dwelling PAS consumers:

79% use volunteer/unpaid PAS only, often a family member or friend.

11% use both volunteer and paid PAS.

10% use paid PAS only.

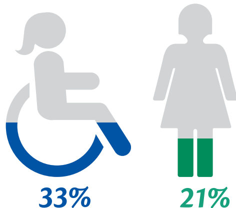
(World Institute on Disability, 2000)

What Does the Research Say?

- **30% of adults with disabilities**, who used PAS for support of activities of daily living, **reported one or more types of mistreatment** (i.e. physical abuse, verbal abuse, financial abuse) by their primary provider. Adults with lower incomes were the most likely to experience mistreatment. (Oktay & Tompkins, 2004)
- In a study of 342 adult men, **55% of men experienced physical abuse** by any person after becoming disabled. Nearly **12% of these men stated they experienced physical abuse by a PAS provider** over their lifetime. (Powers, et al, 2008)
- In a study of Canadian women and men, **97% of whom were age 25 or older, the prevalence of interpersonal violence (IPV) was greater for those with activity limitations as compared to those without them**. An activity limitation is a difficulty encountered by an individual in executing a task or action. Women and men with activity limitations, compared to those without them, were more likely to report more severe and recurring violence. When comparing men and women with activity limitations who experienced IPV, women encountered more frequent and severe violence. (Cohen, et al., 2006)
- In 2010, the age-adjusted, serious violent crime (e.g. rape, robbery, assault) victimization rate for persons with disabilities was 16 per 1000 persons. **This is triple the rate of 5 per 1,000 persons for those without disabilities**. Data was based on non-institutionalized U.S. persons age 12 or older. (Bureau of Justice Statistics, 2011)

What Does the Research Say? CONTINUED

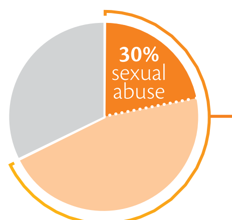
- Institutionalized adult women with disabilities reported a **33% prevalence of having ever experienced IPV** versus **21% for institutionalized adult women without disabilities**. (Barrett, et. al., 2008)



Percentage of women in institutions who have ever experienced IPV

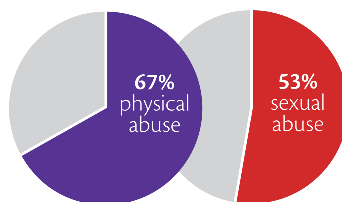
- In one sample of **sexually assaulted women age 55 and over, 33% of the women had physical disabilities** and **52% had a psychiatric diagnosis**. (Eckert & Sugar, 2008)

- In an anonymous sample, **68% of 305 adult women with disabilities reported experiencing one or more types of abuse** in the preceding year. Of those abused, 30% experienced sexual abuse in the preceding year. (Curry, et al., 2009)



68% of women with disabilities reported experiencing abuse in preceding year

- When considering lifetime abuse by any perpetrator, a sample of 200 adult women with disabilities indicated that **67% had experienced physical abuse and 53% had experienced sexual abuse**. (Powers, Curry 2002)



Abuse experienced by a sample of women with disabilities

- In a study of 78 adult men with disabilities, participants clearly indicated that **abuse occurs for men with disabilities who utilize personal assistance services**. Abuse included physical violence, neglect, withholding of care, financial, emotional, verbal, and sexual abuse. (Saxton, et. al 2006)

- In a study of 162 reports of sexual abuse or assault against adults and children with disabilities, **50% of respondents disclosed experiencing abuse or assault on more than 10 occasions**. (Sobsey & Doe, 1991)

- In a study of 691 adults with an established psychotic disorder, **16% of patients reported being violently victimized**. Those with psychosis are at considerable risk of violent victimization in the community. (Walsh, Moran, 2003)

- In a comprehensive review of literature published from 2000-2010, lifetime **prevalence of any type of IPV against adult women with disabilities was found to be 26-90%**. Lifetime **prevalence of IPV against adult men with disabilities was found to be 28.7-86.7%**. It was concluded that, over the course of their lives, IPV occurs at disproportionate and elevated rates among men and women with disabilities. (Hughes, et al, 2011)

NCEA
National Center on Elder Abuse

Keck School of Medicine of USC

For more information: **www.ncea.aoa.gov**

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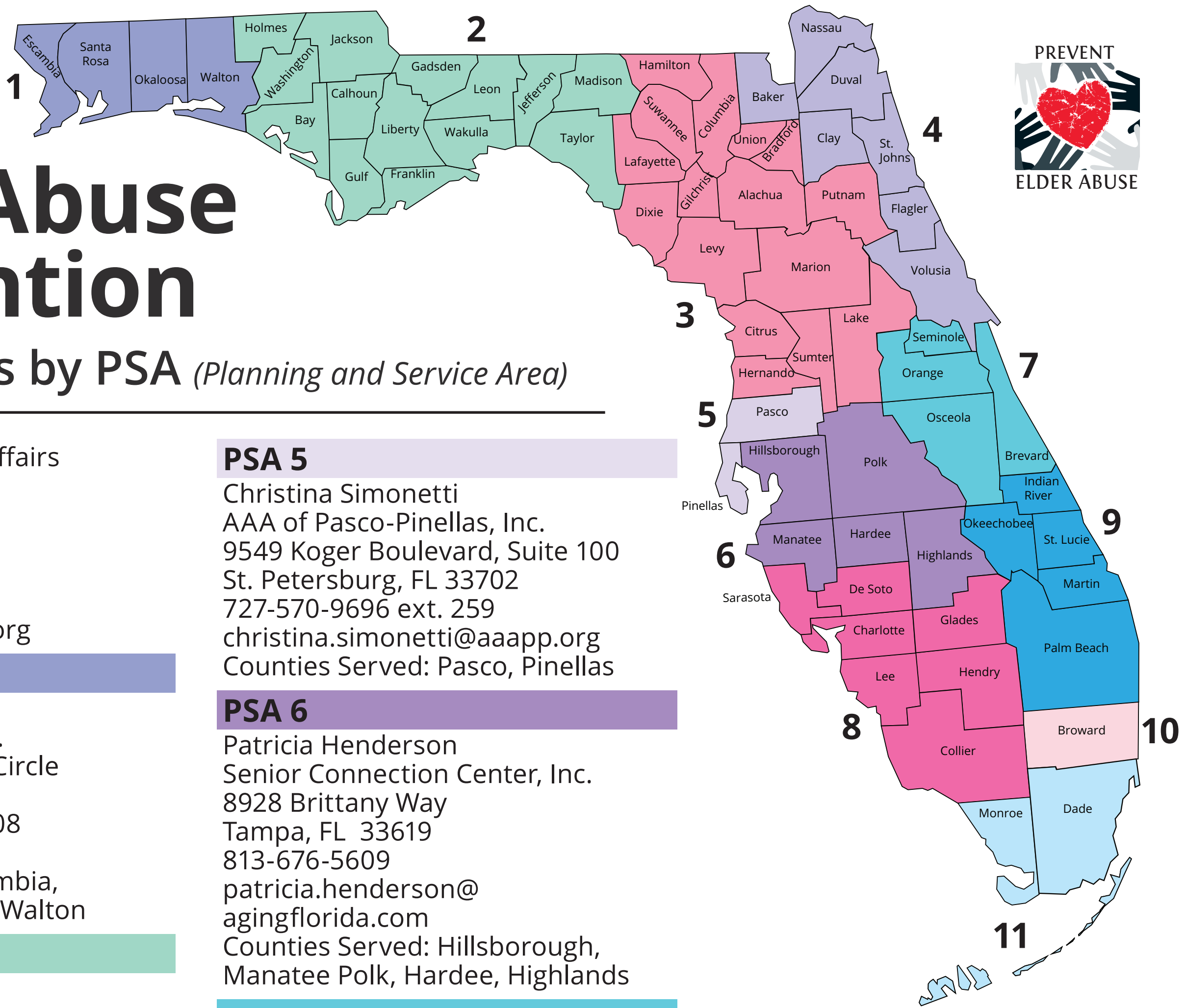

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Playing by the rules? Whose side are you really on?

Bruce Stone
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Coral Gables, Florida

Andrea Stone
Rozencwaig & Nadel, LLP
Hallandale Beach Florida

Situation One:
The Estate Planning Team

Husband and Wife have worked with CPA, Financial Planner, CLU, Trust Officer, and Lawyer on their estate planning matters. While the professionals don't get together often as a group, they do communicate among themselves by email and by telephone when various overlapping estate planning matters affecting Husband and Wife arise. Husband and Wife have periodic meetings with Financial Planner and Trust Officer to discuss their investment objectives and portfolio, and with CPA to discuss their income tax matters. Husband usually meets with Lawyer every couple of years or so to review the couple's estate planning documents, and Wife comes in with Husband to Lawyer's office to review and sign their estate planning documents once Lawyer has revised them after discussions with Husband.

One day Husband tells Financial Planner (who is a close personal friend of Husband) that he has been in an ongoing extramarital relationship, and that he has recently fathered a child from that relationship. He asks Financial Planner what type of arrangements he should make to assure the financial security of the child and the child's mother. Husband emphasizes that Wife doesn't know about this situation, and that she must not ever know about the arrangements to be made for his child and the mother of the child, even after his death. Financial Planner suggests creating a section 529 plan and purchasing additional life insurance. Financial Planner also reviews Husband's estate planning documents with Husband, and tells Husband that he should have Lawyer revise Husband's will and trust agreement so that they won't include the child as a beneficiary because of generic descriptions such as "my children" and "my descendants." Financial Planner tells Husband that Wife does not need to revise her will and trust agreement. Financial Planner has a law degree and is a member in good standing of the state bar.

Husband meets with Lawyer and tells Lawyer about the situation, and asks for Lawyer's advice and assistance. He tells Lawyer that under no circumstances can Lawyer ever let Wife know about the situation and any arrangements that Lawyer will assist Husband in setting up. Lawyer tells Husband that Lawyer represents both Husband and Wife, and that Lawyer cannot assist Husband unless Wife consents, and that in fact Lawyer may have an obligation to advise Wife of what Husband has just told Lawyer. Husband becomes irate and tells Lawyer that under no circumstances can Lawyer tell Wife anything, and that Husband just wants to make provisions to fulfill what he feels are his obligations to support his child and the child's mother,

and that he does not want to hurt Wife or endanger their marriage. When Lawyer still voices concerns about Lawyer's obligations to Wife, Husband tells Lawyer that he will go elsewhere for legal advice, and that if Lawyer breaches Lawyer's duty of confidentiality to Husband by telling Wife about Husband's child and extramarital relationship, Husband will file grievance proceedings against Lawyer. Lawyer tells Husband that Lawyer is closing Lawyer's client file for Husband and Wife. Lawyer does nothing to inform Wife about what Husband told Lawyer, and Husband and Wife never consult with Lawyer again.

Financial Planner continues to work with Husband and Wife on their investments and financial planning, but never mentions to Wife what Husband had told Financial Planner.

Husband dies two years after last seeing Lawyer. Wife asks Lawyer to handle the administration proceedings for Husband's estate. Lawyer declines to take the representation but doesn't say why.

Eight months after Husband dies, Lawyer receives a demand letter from another law firm, demanding copies of Lawyer's estate planning files for Husband and Wife, asking Lawyer what Lawyer knew about Husband's child and extramarital relationship, and whether Lawyer assisted Husband in setting up an offshore trust for the benefit of Husband's child and the mother of the child. Lawyer turns over the client files and truthfully advises the law firm that Lawyer was told about the extramarital relationship but refused to help Husband, and that Lawyer had no idea what Husband did after terminating the attorney-client relationship.

One year passes, and Lawyer is served with a complaint naming Lawyer, Financial Planner, CPA, and CLU as defendants in a lawsuit brought by Wife, suing each of them for professional negligence, breach of fiduciary duty, fraud, conspiracy, and tortious interference with her marital property and inheritance rights. It turns out that Husband had gone to another lawyer who helped Husband create an offshore trust for his child and the mother of the child, and that Husband had funded the trust with an investment portfolio of assets worth $500,000 selected by Financial Planner, and with a $1 million life insurance policy on his life obtained with the assistance of CLU. CPA had prepared a form 3520 for Husband to sign and file reporting the transfer of funds to the offshore trust. Wife's efforts to recover the assets held in the foreign trust have failed, and she seeks to hold the defendants liable for loss of those assets. Her suit alleges that Husband diverted marital assets to fund the foreign trust, and that if she had been advised by any one of the defendants what Husband was doing, she would have taken steps to prevent the transfers and depletion of the marital estate. She also seeks punitive damages for the alleged intentional breaches of fiduciary duty and intentional torts. She alleges that the defendants are jointly and severally liable for the damages she has suffered.

Which defendants are liable? Is the estate planning team still a team? Are their interests the same? What should each of the professionals do?

Situation Two:
Who Can You Trust?

Lawyer represents a bank in its capacity as the trustee of a testamentary QTIP trust which was drafted by another law firm. The decedent resided in Delaware at the time of death a number of years ago, and the bank's Delaware affiliate administered the QTIP trust in Delaware for several years until the surviving spouse moved to Florida, at which time administration of the trust was transferred to the bank in Florida. Lawyer's legal services as counsel to the trustee are of a routine and ongoing nature, and are usually minimal. Lawyer's fees for representation of the bank as trustee have always been paid from the trust assets and shown on the trust accountings. Lawyer does not represent the surviving spouse or any of the remainder beneficiaries in any capacity.

One day Lawyer receives a call from Trust Officer, who tells Lawyer that Trust Officer has just realized that the bank has continued to file state income tax returns in Delaware for the trust and has paid Delaware state income tax every year since the decedent's death, even after the surviving spouse became a Florida resident and after administration of the trust was moved to Florida. Trust Officer asks Lawyer what the bank should do. Lawyer performs research and finds that the statute of limitations has run on obtaining tax refunds from Delaware for a number of years, but that recent years are still open and that refunds can be obtained for those years.

Trust Officer then asks Lawyer if it is possible to seek income tax refunds for the years that are still open, account for those refunds when received as miscellaneous receipts, and not mention the years that are closed because of the statute of limitations.

What should Lawyer do? Does Lawyer owe duties to the beneficiaries of the QTIP trust?

Assume that Lawyer advises the bank that it must disclose the erroneous payment of Delaware income taxes for all years, but the bank declines to follow that advice. Instead, it gives trust accountings that disclose the refunds that are received, and it makes no mention of the erroneous tax payments that were made in prior years. Lawyer continues to represent the bank in its capacity as trustee of the QTIP trust. When reviewing the accounting, the surviving spouse notices the refunds which were characterized as miscellaneous receipts and questions what they are, which in turn leads to questions about tax payments for prior years. When the surviving spouse discovers the cover up, the surviving spouse sues the bank and Trust Officer individually for fraud and breach of fiduciary duty.

The attorneys for the surviving spouse in the litigation request production of all communications between the bank and Lawyer concerning the payment of Delaware income taxes. Are Trust Officer's communications with Lawyer confidential? What about Lawyer's advice to the bank that it should disclose everything, not just the tax refunds that were received? Does the bank have to disclose all of its communications with Lawyer to the surviving spouse? If the communications are disclosed, should the surviving spouse sue Lawyer when the surviving spouse learns that Lawyer advised the bank to make full disclosure but continued to represent the

bank as trustee after the bank declined to follow Lawyer's advice? Is Trust Officer independently and separately liable apart from the bank?

Relevant Authority and Practice Suggestions

A. <u>National Association of Estate Planners and Councils Code of Ethics</u>

<u>Preamble</u>

The National Association of Estate Planners and Councils (NAEPC) is dedicated to setting and promoting standards of excellence for professionals in estate planning.

Membership in the Association comes from one of three sources. The first source of member is one who joins the NAEPC through membership in an affiliated local council. The second source of member is an at-large member who joins the NAEPC as an individual due to the local council being unaffiliated. The third source of member is an at-large member, one who is unaffiliated with a local council, whether or not the local group is not an affiliated member of the NAEPC.

To those who meet its stringent admission standards, which include, among other things, significant prior experience in estate planning activities and material formal education in the subject matter, the NAEPC confers the Accredited Estate Planner® (AEP®) designation.

The NAEPC recognizes the importance of promulgating a code of behavior for members that emphasizes a team approach to estate planning, and relies upon the competency, knowledge, professionalism, integrity, objectivity, and responsibility of each person qualifying as a candidate for certification.

In fulfillment of this mission, the Association's Board of Directors has adopted this Code of Professional Responsibility, which embodies the professional behavior expected of all NAEPC members, and which is consistent with the Codes of Ethics of the other gateway professional designations under which a member must conduct himself/herself.

That is, the NAEPC recognizes that those who attain the AEP® designation already possess other professional designations, such as Attorney at Law, Certified Public Accountant, Chartered Life Underwriter, Chartered Financial Consultant, Certified Financial Planner, and Certified Trust and Financial Advisor. Each of those gateway designations imposes a Code of Ethics on its members. The NAEPC intends that its Code of Ethics be consistent with those Codes already imposed on its members when the AEP® title is conferred.

Professional Responsibilities

A member of the NAEPC is required to conduct himself/herself at all times in the following manner:

1. To uphold the integrity and honor of the profession and to encourage respect for it. This involves promoting the continual development of the estate planning industry, as well as the member's respective specialization.

2. To be fair. This requires that a professional treat others as he/she would wish to be treated if in the other's position. It also means that a member shall disclose conflicts of interest in providing estate planning services.

3. A member shall continually improve his/her knowledge, skill, and competence throughout his/her working life.

4. To do the utmost to attain a distinguished record of professional service based upon diligence. This means that a professional must act with patience, timeliness, and consistency, and do so in a prompt and thorough manner in the service of others.

5. To support the established institutions and organizations concerned with the integrity of his/her profession.

6. To respect the confidentiality of any information entrusted to, or obtained in the course of, the member's business or professional activities.

7. To regulate himself or herself. That is, every member has a two-fold duty to abide by his/her other applicable professional codes of ethics, and to also facilitate the enforcement of this Code of Professional Responsibility. This also means expeditiously reporting breaches of professional responsibility, including one's own, to the NAEPC. The NAEPC assumes responsibility for diligently investigating each reported breach. Confirmed Breaches will result in discipline by the Association, and can include dismissal for the most egregious offenses.

8. To comply with all laws and regulations, in particular as they relate to professional and business activities.

9 To cooperate with Association members, and other estate planning professionals, to enhance and maintain the estate planning profession's public image, and to work together to improve the quality of services rendered.

B. Restatement (Third) of Agency

§ 8.01 General Fiduciary Principle

An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.

Comment:

. . . .

b. In general. The relationship between a principal and an agent is a fiduciary relationship. See § 1.01. An agent assents to act subject to the principal's control and on the principal's behalf. The general fiduciary principle stated in this section is an overarching standard that unifies the more specific rules of loyalty stated in §§ 8.02 to 8.05. Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship. . . .

. . . .

The general fiduciary principle complements and facilitates an agent's compliance with duties of performance that the agent owes to the principal. An agent has a duty to the principal to use care in acting on the principal's behalf. See § 8.08. An agent also has a duty to use reasonable efforts to provide material information to the principal. See § 8.11. An agent's failure to provide material information to the principal may facilitate the agent's breach of the agent's duties of loyalty to the principal.

. . . .

An agent's breach of the agent's fiduciary obligation subjects the agent to liability to the principal. An agent's liability stems from principles of restitution and unjust enrichment, from the agent's duty to account to the principal, and from tort law. The agent's breach subjects the agent to liability to account to the principal. In general, an agent has the burden of explaining to the principal all transactions that the agent has undertaken on the principal's behalf. The agent bears this burden because evidence of dealings and of assets received is more likely to be accessible by the agent than the principal. Tort law subjects the agent to liability to the principal for harm resulting from the breach. See Restatement Second, Torts § 874. A third party who, knowing that the agent's conduct constitutes a breach of duty, provides substantial assistance to the agent is also subject to liability to the principal. See id. § 876(b). . . .

§ 8.11 Duty to Provide Information

An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent's duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.

Comment:

. . . .

b. In general. A principal's agents link the principal to the external world for purposes of acquiring information as well as for purposes of taking action. See § 5.03, Comment b. An agent owes the principal a duty to provide information to the principal that the agent knows or has reason to know the principal would wish to have. An agent also owes the principal a duty, subject to any manifestation by the principal, to provide information to the principal that is material to the agent's duties to the principal. The principal may direct that information be furnished to another agent or another person designated by the principal. The agent's duty is satisfied if the agent uses reasonable effort to provide the information, acting reasonably and consistently with any directions furnished by the principal. The principal has the burden of establishing that the agent's conduct breached the duty. However, the agent's duty does not extend to information when the agent owes a superior duty to another not to disclose it to the principal. . . .

. . . .

A principal's receipt of information from an agent may be beneficial to the principal in many ways, for example by enabling the principal to deal on terms that will be advantageous to the principal, as in Illustration 4. Moreover, information provided to the principal by an agent may prove beneficial to third parties because it may enable the principal to take action to avoid harm that otherwise would be inflicted on third parties. Information provided by an agent may also serve to alert the principal to exercise caution in dealings with third parties.

. . . .

If an agent breaches the duty stated in this section, the agent is subject to liability to the principal for loss caused the principal by the agent's breach. The agent's breach may also be a basis on which to terminate the agent's authority to act on the principal's behalf. Additionally, if the agent's breach of duty breaches an express or implied term of a contract between the agent and the principal, the agent is subject to liability for breach of contract.

. . . .

. . . [U]nless an agent owes a superior duty to a person to keep information confidential, how the agent came to know or have reason to know the information is not relevant to the agent's duty to furnish the information to the principal. The agent's duty, that is, is operative without regard to the provenance of the information. . . .

C. <u>Tortious Interference and Joint Liability for Torts</u>

1. Restatement (Second) of Torts

§ 870. Liability For Intended Consequences—General Principle

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This

liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Comment b.

An intentional tort is one in which the actor intends to produce the harm that ensues; it is not enough that he intends to perform the act. He intends to produce the harm when he desires to bring about that consequence by performing the act. As indicated in § 8A, he also is treated as intending that consequence if he knows or believes that the consequence is certain, or substantially certain, to result from his act. In some cases in which the claim may be entirely novel the court may decide to limit the liability to the situation in which the defendant acted for the purpose of producing the harm involved.

Comment e.

The requirement that the actor's conduct be both culpable (in general) and unjustifiable (under the circumstances) emphasizes the dual nature of the determination. The conduct must first be improper or wrongful; it must be blameworthy, not in accord with community standards of right conduct. It may involve use of physical violence or falsehood or otherwise be of a type that is suitable for the existence of prima facie liability in tort.

2. Goldberg and Sitkoff, Torts and Estates: Remedying Wrongful Interference With Inheritance, July 2012, Discussion Paper No. 720, The Harvard John M. Olin Discussion Paper Series, http://www.law.harvard.edu/programs/olin_center/papers/:

> Spurred by an innovative Restatement *[author's note: (Second) of Torts]* provision, and given salience by two U.S. Supreme Court decisions in a case involving former "Playmate" Anna Nicole Smith, courts, lawyers, and legal scholars are today increasingly inclined to recognize a tort cause of action for wrongful interference with an expected inheritance. An extension of actions for interference with contract and commercial expectancies, the interference-with-inheritance tort subjects to liability one who, by tortious means, intentionally prevents another from receiving an inheritance.

3. Restatement (Second) of Torts

§ 876. Persons Acting In Concert

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

4. Florida Administrative Code

61H1-21.002 Integrity and Objectivity.

A certified public accountant shall not knowingly misrepresent facts, and, when engaged in the practice of public accounting, shall not subordinate his/her judgment to others including but not limited to clients, employers or other third parties. In tax practice, a certified public accountant may resolve doubt in favor of his/her client as long as there is reasonable support for his/her position.

61H1-21.006 Communication with Client of Another Certified Public Accountant.

If a client of one certified public accountant or firm requests a second certified public accountant or firm to provide professional advice on accounting or auditing matters in connection with an expression of opinion, the second certified public accountant or firm must consult with the first certified public accountant or firm, after obtaining the client's consent, to make certain that the (the second certified public accountant or firm) is aware of all the relevant facts.

D. <u>Confidentiality</u>

1. Model Rules of Professional Conduct

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b). (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

2. ACTEC Commentaries on the Model Rules of Professional Conduct

Commentary on MRPC 1.6

. . . .

Consultants and Associated Counsel. The lawyer should obtain the client's consent to the disclosure of confidential information to other professionals. However, the lawyer may be impliedly authorized to disclose confidential information to other professionals and business consultants to the extent appropriate to the representation. Thus, the client may reasonably anticipate that a lawyer who is preparing an irrevocable life insurance trust for the client will discuss the client's affairs with the client's insurance advisor. . . . .

. . . .

Disclosures by Lawyer for Fiduciary. The duties of the lawyer for a fiduciary are affected by the nature of the client and the objectives of the representation. . . . . Special care must be exercised by the lawyer if the lawyer represents the fiduciary generally and also represents one or more of the beneficiaries of the fiduciary estate.

As indicated in the ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), the lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court any action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an agreement, the lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary

estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court certain acts of misconduct committed by the fiduciary. See MRPC 3.3(b) (Candor toward the Tribunal), which requires disclosure to the court "even if compliance requires disclosure of information otherwise protected by Rule 1.6." In any event, the lawyer may not knowingly provide the beneficiaries or the court with false or misleading information. See MRPCs 4.1-4.3 (Truthfulness in Statements to Others; Communications with Person Represented by Counsel; Dealing with Unrepresented Person).

Disclosure of a Fiduciary's Commission of or Intent to Commit a Fraud or Crime. When representing a fiduciary generally, the lawyer may discover that the lawyer's services have been used or are being used by the client to commit a fraud or crime that has resulted or will result in substantial injury to the financial interests of the beneficiary or beneficiaries for whom the fiduciary is acting. If such fiduciary misconduct occurs, in most jurisdictions, the lawyer may disclose confidential information to the extent necessary to protect the interests of the beneficiaries. The lawyer has discretion as to how and to whom that information is disclosed, but the lawyer may disclose confidential information only to the extent necessary to protect the interests of the beneficiaries.

Whether a given financial loss to a beneficiary is a "substantial injury" will depend on the facts and circumstances. A relatively small loss could constitute a substantial injury to a needy beneficiary. Likewise, a relatively small loss to numerous beneficiaries could constitute a substantial injury. In determining whether a particular loss constitutes a "substantial injury," lawyers should consider the amount of the loss involved, the situation of the beneficiary, and the non-economic impact the fiduciary's misconduct had or could have on the beneficiary.

. . . .

Example 1.6-1. Lawyer (L) was retained by Trustee (T) to advise T regarding administration of the trust. T consulted L regarding the consequences of investing trust funds in commodity futures. L advised T that neither the governing instrument nor local law allowed the trustee to invest in commodity futures. T invested trust funds in wheat futures contrary to L's advice. The trust suffered a substantial loss on the investments. Unless explicitly or implicitly required to do so by the terms of the representation, L was not required to monitor the investments made by T or otherwise to investigate the propriety of the investments. The following alternatives extend the subject of this example:

(1) L, in preparing the annual accounting for the trust, discovered T's investment in wheat futures, and the resulting loss. T asked L to prepare the accounting in a way that disguised the

investment and the loss. L may not participate in a transaction that misleads the court or the beneficiaries with respect to the administration of the trust--which is the subject of the representation. L should attempt to persuade T that the accounting must properly reflect the investment and otherwise be accurate. If T refuses to accept L's advice, L must not prepare an accounting that L knows to be false or misleading. If T does not properly disclose the investment to the beneficiaries, in some states L may be required to disclose the investment to them. In states that neither require nor permit such disclosures the lawyer should resign from representing T. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information).

(2) L first learned of T's investment in commodity futures when L reviewed trust records in connection with preparation of the trust accounting for the year. The accounting prepared by L properly disclosed the investment, was signed by T, and was distributed to the beneficiaries. L's investment advice to T was proper. L was not obligated to determine whether or not T made investments contrary to L's advice. L may not give legal advice to the beneficiaries but may recommend that they obtain independent counsel. In jurisdictions that permit the lawyer for a fiduciary to make disclosures to the beneficiaries regarding the fiduciary's possible breaches of trust, L should consider whether to make such a disclosure.

. . . .

Confidences Imparted by One Joint Client. A lawyer who receives information from one joint client (the "communicating client") that the client does not wish to be shared with the other joint client (the "other client") is confronted with a situation that may threaten the lawyer's ability to continue to represent one or both of the clients. As soon as practicable after such a communication the lawyer should consider the relevance and significance of the information and decide upon the appropriate manner in which to proceed. The potential courses of action include, inter alia, (1) taking no action with respect to communications regarding irrelevant (or trivial) matters; (2) encouraging the communicating client to provide the information to the other client or to allow the lawyer to do so; and, (3) withdrawing from the representation if the communication reflects serious adversity between the parties. For example, a lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one of the spouses regarding a past act of marital infidelity need not be communicated to the other spouse. On the other hand, the lawyer might conclude that he or she is required to take some action with respect to a confidential communication that concerns a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement I intend to leave her"; or, "All of the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or a new will, that might damage the other client's economic interests or otherwise violate the lawyer's duty of loyalty to the other client.

In order to minimize the risk of harm to the clients' relationship and, possibly, to retain the lawyer's ability to represent both of them, the lawyer may properly urge the communicating

client himself or herself to impart the confidential information directly to the other client. See ACTEC Commentary on MRPC 2.1 (Advisor). In doing so the lawyer may properly remind the communicating client of the explicit or implicit understanding that relevant information would be shared and of the lawyer's obligation to share the information with the other client. The lawyer may also point out the possible legal consequences of not disclosing the confidence to the other client, including the possibility that the validity of actions previously taken or planned by one or both of the clients may be jeopardized. In addition, the lawyer may mention that the failure to communicate the information to the other client may result in a disciplinary or malpractice action against the lawyer.

If the communicating client continues to oppose disclosing the confidence to the other client, the lawyer faces an extremely difficult situation with respect to which there is often no clearly proper course of action. In such cases the lawyer should have a reasonable degree of discretion in determining how to respond to any particular case. In fashioning a response the lawyer should consider his or her duties of impartiality and loyalty to the clients; any express or implied agreement among the lawyer and the joint clients that information communicated by either client to the lawyer or otherwise obtained by the lawyer regarding the subject of the representation would be shared with the other client; the reasonable expectations of the clients; and the nature of the confidence and the harm that may result if the confidence is, or is not, disclosed. In some instances the lawyer must also consider whether the situation involves such adversity that the lawyer can no longer effectively represent both clients and is required to withdraw from representing one or both of them. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule). A letter of withdrawal that is sent to the other client may arouse the other client's suspicions to the point that the communicating client or the lawyer may ultimately be required to disclose the information.

Disclosures by Lawyer for Fiduciary.

Cases *[author’s note: only selected cases have been included in this outline]*

California:

Wells Fargo Bank v. Superior Court (Boltwood), 91 Cal. Rptr. 2d 716 (Ca. 2000). This case holds that since the attorney for the trustee of a trust is not, by virtue of that relationship also the attorney for the beneficiaries of the trust, the beneficiaries are not entitled to discover the confidential communications of the trustee with the trustee’s counsel, regardless of whether or not the communications dealt with trust administration or allegations of trustee misconduct. In addition, the work product of trustee’s counsel is not discoverable. These results obtain regardless of the fact that the fees for the attorney’s services are paid from the trust.

Delaware *[author’s note: the following case comes from the commentary to rule 1.2]*:

Riggs Nat'l Bank v. Zimmer, 355 A.2d 709 (Del. Ch. 1976). This case involved a successful motion by the beneficiaries of a trust to compel the trustee to produce legal memoranda prepared by the lawyers for the trustee:

> As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that he is personally being served. And, the beneficiaries are not simply the incidental beneficiaries who chance to gain from the professional services rendered. The very intention of the communication is to aid the beneficiaries. 355 A.2d at 713–714.

New York:

Hoopes v. Carota, 531 N.Y.S.2d 407 (App. Div. 1988), aff 'd mem., 543 N.E.2d 73 (N.Y. 1989). In this case the court allowed the beneficiaries of a trust to discover communications between the defendant trustee and the lawyer who advised the defendant generally with respect to administration of the trust. The opinion recognizes the distinction between a representation of the trustee qua trustee and a representation of the trustee "in an individual capacity." The Appellate Division opinion states that the lawyer-client evidentiary privilege:

> [D]oes not attach at all when a trustee solicits and obtains legal advice concerning matters impacting on the interests of the beneficiaries seeking disclosure, on the ground that a fiduciary has a duty of disclosure to the beneficiaries whom he is obligated to serve as to all his actions, and cannot subordinate the interests of the beneficiaries, directly affected by the advice sought to his own private interests under the guise of privilege. 531 N.Y.S.2d at 410.

3. Florida Statutes

90.5021 Fiduciary lawyer-client privilege.—

(1) For the purpose of this section, a client acts as a fiduciary when serving as a personal representative or a trustee as defined in ss. 731.201 and 736.0103, an administrator ad litem as described in s. 733.308, a curator as described in s. 733.501, a guardian or guardian ad litem as defined in s. 744.102, a conservator as defined in s. 710.102, or an attorney in fact as described in chapter 709.

(2) A communication between a lawyer and a client acting as a fiduciary is privileged and protected from disclosure under s. 90.502 to the same extent as if the client were not acting as a fiduciary. In applying s. 90.502 to a communication under this section, only the person or entity acting as a fiduciary is considered a client of the lawyer.

(3) This section does not affect the crime or fraud exception to the lawyer-client privilege provided in s. 90.502(4)(a).

473.316 Communications between the accountant and the client privileged. –

(1) For purposes of this section:

(a) An “accountant” is a certified public accountant.

(b) A “client” is any person, public officer, corporation, association, or other organization or entity, either public or private, who agrees with an accountant or accountant’s employer to receive professional services.

(c) A communication between an accountant and her or his client is “confidential” if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of accounting services to the client.

2. Those reasonably necessary for the transmission of the communication.

(d) A “quality review” is a study, appraisal, or review of one or more aspects of the professional work of an accountant in the practice of public accountancy which is conducted by a professional organization for the purpose of evaluating quality assurance required by professional standards, including a quality assurance review. The term includes a peer review as defined in s. 473.3125.

(e) A “review committee” is any person or persons who are not owners or employees of an accountant or firm that is the subject of a quality review and who carry out, administer, or oversee a quality review.

(2) A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications with an accountant when such other person learned of the communications because they were made in the rendition of accounting services to the client. This privilege includes other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.

(3) The privilege may be claimed by:

(a) The client.

(b) A guardian or conservator of the client.

(c) The personal representative of a deceased client.

(d) A successor, assignee, trustee in dissolution, or any similar representative of an organization, corporation, or association or other entity, either public or private, whether or not in existence.

(e) The accountant, but only on behalf of the client. The accountant’s authority to claim the privilege is presumed in the absence of contrary evidence.

(4) There is no accountant-client privilege under this section when:

(a) The services of the accountant were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or should have known was a crime or fraud.

(b) A communication is relevant to an issue of breach of duty by the accountant to her or his client or by the client to her or his accountant.

(c) A communication is relevant to a matter of common interest between two or more clients, if the communication was made by any of them to an accountant retained or consulted in common when offered in a civil action between the clients.

(5) Communications are not privileged from disclosure in any disciplinary investigation or proceeding conducted pursuant to this act by the department or before the board or in any judicial review of such a proceeding. In any such proceeding, a certified public accountant or public accountant, without the consent of her or his client, may testify with respect to any communication between the accountant and the accountant's client or be compelled, pursuant to a subpoena of the department or the board, to testify or produce records, books, or papers. Such a communication disclosed to the board and records of the board relating to the communication shall for all other purposes and proceedings be a privileged communication in all of the courts of this state.

(6) The proceedings, records, and workpapers of a review committee are privileged and are not subject to discovery, subpoena, or other means of legal process or to introduction into evidence in a civil action or arbitration, administrative proceeding, or state accountancy board proceeding. A member of a review committee or person who was involved in a quality review may not testify in a civil action or arbitration, administrative proceeding, or state accountancy board proceeding as to any matter produced or disclosed during the quality review or as to any findings, recommendations, evaluations, opinions, or other actions of the review committee or any members thereof. Public records and materials prepared for a particular engagement are not privileged merely because they were presented during the quality review. This privilege does not apply to disputes between a review committee and a person subject to a quality review.

4. Florida Administrative Code

61H1-23.001 Confidential Client Information.

A certified public accountant shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client. This rule shall not be construed to contravene or contradict any of the provisions of chapter 473, F.S., or the rules promulgated thereto, or to relieve a certified public accountant of his or her obligation provided in these laws and rules. Furthermore, this rule shall not prohibit either a confidential review of a certified public accountant's professional practice as a part of a peer review program or compliance with a lawful court or Board order.

5. AICPA Professional Standards

Code of Professional Conduct and Bylaws

a. ET Section 301 Confidential Client Information

.01 Rule 301—Confidential client information A member in public practice shall not disclose any confidential client information without the specific consent of the client.

This rule shall not be construed (1) to relieve a member of his or her professional obligations under rules 202 [ET section 202.01] and 203 [ET section 203.01], (2) to affect in any way the member's obligation to comply with a validly issued and enforceable subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations, (3) to prohibit review of a member's professional practice under AICPA or state CPA society or Board of Accountancy authorization, or (4) to preclude a member from initiating a complaint with, or responding to any inquiry made by, the professional ethics division or trial board of the Institute or a duly constituted investigative or disciplinary body of a state CPA society or Board of Accountancy.

Members of any of the bodies identified in (4) above and members involved with professional practice reviews identified in (3) above shall not use to their own advantage or disclose any member's confidential client information that comes to their attention in carrying out those activities. This prohibition shall not restrict members' exchange of information in connection with the investigative or disciplinary proceedings described in (4) above or the professional practice reviews described in (3) above.

b. ET Section 391

Ethics Rulings on Responsibilities to Clients

16. Disclosure of Confidential Client Information

.031 Question—A member has prepared a married couple's joint tax returns for several years. The member was engaged by and has dealt exclusively with spouse A. Divorce proceedings are now under way and spouse B has approached the member with requests for confidential information relating to prior tax returns. Spouse A has directed the member not to comply with spouse B's requests. Would release of this information by the member to spouse B constitute a violation of rule 301 [ET section 301.01]?

.032 Answer—As defined by the Code of Professional Conduct, spouse B would be considered to be a client with respect to the prior tax returns in question. Therefore, release of the requested information to spouse B would not be prohibited by rule 301 [ET section 301.01]. The member should consider, however, reviewing the legal implications of such a disclosure with an attorney.

6. Certified Financial Planner Board of Standards, Inc. Standards of Professional Conduct

a. Code of Ethics and Professional Responsibility

CFP Board adopted the Code of Ethics to establish the highest principles and standards. These Principles are general statements expressing the ethical and professional ideals certificants and registrants are expected to display in their professional activities. As such, the Principles are aspirational in character and provide a source of guidance for certificants and registrants. The Principles form the basis of CFP Board's Rules of Conduct, Practice Standards and Disciplinary Rules, and these documents together reflect CFP Board's recognition of certificants' and registrants' responsibilities to the public, clients, colleagues and employers.

. . . .

Principle 5 – Confidentiality

Protect the confidentiality of all client information.

Confidentiality means ensuring that information is accessible only to those authorized to have access. A relationship of trust and confidence with the client can only be built upon the understanding that the client's information will remain confidential.

b. Rules of Conduct

Rule 3. Prospective Client and Client Information and Property

3.1 A certificant shall treat information as confidential except as required in response to proper legal process; as necessitated by obligations to a certificant's employer or partners; as required to defend against charges of wrongdoing; in connection with a civil dispute; or as needed to perform the services.

3.2 A certificant shall take prudent steps to protect the security of information and property, including the security of stored information, whether physically or electronically, that is within the certificant's control.

7. Sample clause for law firm's client engagement letter permitting disclosure to other persons:

The ethics rules require us to keep information that you disclose to us confidential and not to disclose it to persons outside our firm without your permission. The lawyer primarily responsible for your work may disclose information to other persons in our firm as needed to do your work, on a "need to know" basis, but we will not make unnecessary disclosures. Generally at least two of our lawyers will be aware of the provisions of your estate planning documents,

because of our policy to have documents reviewed by a second attorney for quality control purposes.

If persons outside our firm work with us with your permission (such as your accountant, a bank trust officer, a financial planner, an insurance agent, or another law firm), you agree that we can disclose information to them that they need to fulfill their role in your estate planning. Unless you instruct otherwise, you agree that we can disclose information to them that in our judgment we think is necessary for your best interests.

E. **Conflicts of Interest When Representing Spouses Jointly in Estate Planning**

1. Model Rules of Professional Conduct

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

2. ACTEC Commentaries on the Model Rules of Professional Conduct

Commentary on MRPC 1.7

. . . .

Joint or Separate Representation. As indicated in the ACTEC Commentary on MRPC 1.6 (Confidentiality of Information), a lawyer usually represents multiple clients jointly.

However, some experienced estate planners regularly represent husbands and wives as separate clients. They also undertake to represent other related clients separately with respect to related matters. Such representations should only be undertaken with the informed consent of each client, confirmed in writing. See ACTEC Commentaries on MRPC 1.0 (e)) (defining "informed consent") and MRPC 1.0 (b) (defining "confirmed in writing"). The writing may be contained in an engagement letter that covers other subjects as well.

Example 1.7-1. Lawyer (L) was asked to represent Husband (H) and Wife (W) in connection with estate planning matters. L had previously not represented either H or W. At the outset L should discuss with H and W the terms upon which L would represent them, including the extent to which confidentiality would be maintained with respect to communications made by each. Many lawyers believe that it is only appropriate to represent a husband and wife as joint clients, between whom the lawyer could not maintain the confidentiality of any information relevant to the representation. The representation of a husband and wife as joint clients does not ordinarily require the informed consent of either or both of them. However, some experienced estate planners believe that a lawyer may represent a husband and wife as separate clients between whom information communicated by one spouse will not be shared with the other spouse. In such a case, each spouse must give his or her informed consent confirmed in writing The same requirements apply to the representation of others as joint or separate multiple clients, such as the representation of other family members, business associates, etc.

3. Florida Bar Ethics Opinion 95-4 (May 30, 1997)

In a joint representation between husband and wife in estate planning, an attorney is not required to discuss issues regarding confidentiality at the outset of representation. The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.

Note: This opinion was approved by the Board of Governors at its May 1997 meeting.

RPC: 4-1.4, 4-1.4(b), 4-1.6, 4-1.7(a), 4-1.7(b), 4-1.9, 4-1.16

Opinions: 92-5, American Bar Association Formal Opinion 91-361; New York State Bar Opinions 555 and 674; Monroe County (N.Y.) Bar Opinion 87-2

Cases: Alexander v. Superior Court, 684 P.2d 1309 (Ariz. 1984); Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); Buntrock v. Buntrock, 419 So.2d 402 (Fla. 4th DCA 1982); Campbell v. Pioneer Savings Bank, 565 So.2d 417 (Fla. 4th DCA 1990); Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957); Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.Va. 1995); Luthy v. Seaburn, 46 N.W.2d (Iowa 1951); X Corp. v. Doe, 805 F.Supp. 1298 (E.D.Va. 1992);

Statute: F.S. § 90.502(4)(e)

Misc: American College of Trusts and Estates, Commentaries on the Model Rules of Professional Conduct (2d ed. 1995); Restatement of the Law Governing Lawyers, sec. 112, comment l. (Proposed Final Draft); Report of the Special Study Committee on Professional Responsibility, 28 Real Prop., Prob. & Tr. L.J. 765 (1994); Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence, 28 Real Prop., Prob. & Tr. L.J. 683 (1994); Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351 (1989).

The Estate Planning, Probate, and Trust Law Professionalism Committee (the "RPPTL Professionalism Committee") of the Florida Bar's Real Property, Probate, and Trust Law Section has requested a formal advisory opinion regarding some ethical issues that trusts and estates practitioners face in day-to-day practice. The RPPTL Professionalism Committee has presented the following generalized situation, reflecting a common type of estate planning representation. The RPPTL Professionalism Committee states that it has found little guidance in the Florida Rules of Professional Conduct, ethics opinions, or case law in Florida and requests that the Professional Ethics Committee address the ethical issues presented.

SITUATION PRESENTED

Lawyer has represented Husband and Wife for many years in a range of personal matters, including estate planning. Husband and Wife have substantial individual assets, and they also own substantial jointly-held property. Recently, Lawyer prepared new updated wills that Husband and Wife signed. Like their previous wills, the new wills primarily benefit the survivor of them for his or her life, with beneficial disposition at the death of the survivor being made equally to their children (none of whom were born by prior marriage).

Husband, Wife, and Lawyer have always shared all relevant asset and financial information. Consistent with previous practice, Lawyer met with Husband and Wife together to confer regarding the changes to be made in updating their wills. At no point since Lawyer first started to represent them did either Husband or Wife ever ask Lawyer to keep any information secret from the other, and there was never any discussion about what Lawyer might do if either of them were to ask Lawyer to maintain such a separate confidence.

Several months after the execution of the new wills, Husband confers separately with Lawyer. Husband reveals to Lawyer that he has just executed a codicil (prepared by another law firm) that makes substantial beneficial disposition to a woman with whom Husband has been having an extra-marital relationship. Husband tells Lawyer that Wife knows about neither the relationship nor the new codicil, as to which Husband asks Lawyer to advise him regarding Wife's rights of election in the event she were to survive Husband. Lawyer tells Husband that Lawyer cannot under the circumstances advise him regarding same. Lawyer tells Husband that Lawyer will have to consider Lawyer's ethical duties under the circumstances. Lawyer tells Husband that, after consideration, Lawyer may determine to withdraw from representing Husband and Wife. Lawyer further tells Husband that, after consideration, Lawyer may

determine to disclose to Wife the substance of Husband's revelation if Husband does not do so himself.

ISSUES PRESENTED

The following ethical questions have been asked by the RPPTL Professionalism Committee:

1. Prior to Husband's recent disclosure, did Lawyer owe any ethical duty to counsel Husband and Wife concerning any separate confidence which either Husband or Wife might wish for Lawyer to withhold from the other?

2. Assuming that Husband does not make disclosure of the information [referred to in Issue 1.] to Wife:

a) Is Lawyer required to reveal voluntarily the information to Wife?

b) May Lawyer in Lawyer's discretion determine whether or not to reveal the information to the Wife? If so, what are the relevant factors which Lawyer may or should consider?

c) If Lawyer does not reveal the information to Wife, is Lawyer required to withdraw from the representation? If so, what explanation, if any, should Lawyer give to Wife?

3. May Lawyer continue to represent Husband alone if Lawyer notifies Wife that Lawyer is withdrawing from the joint representation and will no longer represent Wife? If so, is disclosure to Wife necessary in order to obtain her informed consent to Lawyer's continued representation of Husband?

4. Assuming that adequate disclosure is made to Wife, may Lawyer continue to represent both Husband and Wife if they both wish for Lawyer to do so?

The RPPTL Professionalism Committee views Lawyer's representation of Husband and Wife as a "joint representation." The committee concurs in this view in reaching the opinion expressed below.

DISCUSSION

From the inception of the representation until Husband's communication to Lawyer of the information concerning the codicil and the extra-marital relationship (hereinafter the "separate confidence"), there was no objective indication that the interests of Husband and Wife diverged, nor did it objectively appear to Lawyer that any such divergence of interests was reasonably likely to arise. Such situations involving joint representation of Husband and Wife do not present a conflict of interests and, therefore, do not trigger the conflict of interest disclosure-and-consent requirements of Rules 4-1.7(a) and 4-1.7(b), Rules Regulating The Florida Bar. It is important to recognize, however, that some spouses do not share identical goals in common matters, including estate planning. For example, one spouse may wish to make a Will providing substantial beneficial disposition for charity but the other spouse does not. Or, either or both of them may have children by a prior marriage for whom they may wish to make different beneficial

provisions. Given the conflict of interest typically inherent in those types of situations, in such situations the attorney should review with the married couple the relevant conflict of interest considerations and obtain the spouses informed consent to the joint representation.

In view of the conclusions reached in the remainder of this opinion, we conclude that, under the facts presented, Lawyer was not ethically obligated to discuss with Husband and Wife Lawyer's obligations with regard to separate confidences. While such a discussion is not ethically required, in some situations it may help prevent the type of occurrence that is the subject of this opinion.

We now turn to the central issue presented, which is the application of the confidentiality rule in a situation where confidentiality was not discussed at the outset of the joint representation. A lawyer is ethically obligated to maintain in confidence all information relating to the representation of a client. Rule 4-1.6. A lawyer, however, also has a duty to communicate to a client information that is relevant to the representation. Rule 4-1.4. These duties of communication and confidentiality harmoniously coexist in most situations. In the situation presented, however, Lawyer's duty of communication to Wife appears to conflict with Lawyer's duty of confidentiality to Husband. Thus, the key question for our decision is: Which duty must give way? We conclude that, under the facts presented, Lawyer's duty of confidentiality must take precedence. Consequently, if Husband fails to disclose (or give Lawyer permission to disclose) the subject information to Wife, Lawyer is not ethically required to disclose the information to Wife and does not have discretion to reveal the information. To the contrary, Lawyer's ethical obligation of confidentiality to Husband prohibits Lawyer from disclosing the information to Wife.

The lawyer-client relationship is one of trust and confidence. Gerlach v. Donnelly, 98 So.2d 493 (Fla. 1957). Rule 4-1.6 recognizes a very broad duty of confidentiality on the part of a lawyer. Save for a few narrow exceptions set forth in the rule, a lawyer is prohibited from voluntarily revealing any "information relating to the representation" of a client without the client's consent. Rule 4-1.6. The duty of confidentiality "applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source" and "continues after the client-lawyer relationship has terminated." Comment, Rule 4-1.6.

It has been suggested that, in a joint representation, a lawyer who receives information from the "communicating client" that is relevant to the interests of the non-communicating client may disclose the information to the latter, even over the communicating client's objections and even where disclosure would be damaging to the communicating client. The committee is of the opinion that disclosure is not permissible and therefore rejects this "no-confidentiality" position. The argument for a "no-confidentiality" approach -- which is a departure from the usual rule of lawyer-client confidentiality -- is premised on two bases: (1) that joint clients have an expectation that everything relating to the joint representation that is communicated by one client to the joint lawyer will be shared by the lawyer with the other client (i.e., that joint clients have

no expectation of confidentiality within the joint representation); and (2) that the law governing the evidentiary attorney-client privilege sets (or should set) the standard for the lawyer's ethical duties in the joint representation setting. Both of these foundations, in the committee's opinion, are flawed.

Significantly, existing Rule 4-1.6(c)(1) allows the joint clients' lawyer to share information received from one client with the other client, without the need to obtain consent from the communicating client, when such disclosure is reasonably necessary to further the interests of the joint representation. Thus, a presumption of "no confidentiality" is not needed to facilitate representation of joint clients with a mutual goal. Rather, such a presumption would serve only to permit the lawyer to reveal an adverse separate confidence, against the communicating client's wishes and outside the parameters of Rule 4-1.6. At that point in time, it is clear that a conflict of interests has arisen and any "community of interests" has been damaged or destroyed. See Report of the Special Study Committee on Professional Responsibility prepared by the American Bar Association Section of Real Property, Probate and Trust Law, 28 Real Prop., Prob. & Tr. L.J. 765, 776-77 (1994) (hereinafter the "Study Committee Report") ("Because these expectations [of joint clients] may change, the lawyer must reassess these expectations as the representation progresses.").

Furthermore, accurately predicting the expectations of a typical client in a given situation is risky business. See, e.g., Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351 (1989). This would seem to be especially true concerning separate confidences imparted by one joint client to the lawyer that are in some way adverse to the other joint client. Even commentators who oppose maintaining the usual confidentiality rule in the joint client setting acknowledge that client expectations concerning confidentiality may be different in the case of separate confidences that are adverse to the non-communicating client than they are when the communication clearly furthers the objectives of the joint representation. See, e.g., Study Committee Report, at 788 ("Most [separate] confidences would not be imparted if the client were mindful of the lawyer's competing duty [of communication] to the other spouse."); Collett, Disclosure, Discretion, or Deception: The Estate Planner's Ethics Dilemma from a Unilateral Confidence, 28 Real Prop., Prob. & Tr. L.J. 683 (1994) (hereinafter, Collett), at 684 ("Absent agreement concerning the nature of the relationship, clients may have different expectations concerning the lawyer's obligation to maintain individual confidences."). Moreover, a leading case in the area of attorney-client privilege in joint representations states, "As between joint clients, there can be no 'confidences' or 'secrets' *unless one client manifests a contrary intent*." Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 173 (5th Cir. 1979) (emphasis added). The committee is of the opinion that it would be inadvisable to rely on such a speculative basis as "joint client expectations" to justify altering the usual lawyer-client confidentiality rule when applied to joint representation situations. This is especially true where confusion or misunderstanding on the part of the clients may be minimized or eliminated by means of a

discussion between the lawyer and the clients at the outset of the representation. See Collett, at 738-39.

The second basis advanced for a no-confidentiality rule is the law governing the evidentiary attorney-client privilege. See Restatement of the Lawyer Governing Lawyers (Proposed Final Draft) (hereinafter the "Restatement"), sec. 112, comment l. Communications relevant to a matter of common interest between joint clients generally are not privileged as a matter of law. See, e.g., F.S. sec. 90.502(4)(e). Case law cited in support of a no-confidentiality rule invariably is grounded in the law of attorney-client privilege. See, e.g., Alexander v. Superior Court, 685 P.2d 1309 (Ariz. 1984); Luthy v. Seaburn, 46 N.W.2d 44 (Iowa 1951).

It is important to note that the ethical duty of confidentiality is broader than the evidentiary attorney-client privilege. Campbell v. Pioneer Savings Bank, 565 So. 2d 417 (Fla. 4th DCA 1990); Buntrock v. Buntrock, 419 So.2d 402 (Fla. 4th DCA 1982); Opinion 92-5. This distinction holds true even in a joint client setting. Lawyer Disciplinary Board v. McGraw, 461 S.E.2d 850 (W.Va. 1995). The Comment to Rule 4-1.6 clearly explains the difference between confidentiality and privilege:

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law.

The ethical duty of confidentiality assures a client that, throughout the course of the representation and beyond, the lawyer ordinarily may not voluntarily reveal information relating to the representation to anyone else without the client's consent. In contrast, the evidentiary privilege becomes relevant only after legal proceedings have begun. The privilege is a limited exception to the general principle that, in formal legal proceedings, the legal system and society should have all relevant information available as part of the search for truth. Thus, there are different purposes underlying the concepts of confidentiality and privilege. See, e.g., Brennan's, Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168 (5th Cir. 1979); X Corp. v. Doe, 805 F.Supp. 1298 (E.D.Va. 1992); Study Committee Report, at 774. The committee is of the opinion that the law of privilege does not, and should not, set the ethical standard of lawyer-client confidentiality.

It has been argued in some commentaries that the usual rule of lawyer-client confidentiality does not apply in a joint representation and that the lawyer should have the discretion to determine whether the lawyer should disclose the separate confidence to the non-

communicating client. This discretionary approach is advanced in the Restatement, sec. 112, comment l. This result is also favored by the American College of Trusts and Estates in its Commentaries on the Model Rules of Professional Conduct (2d ed. 1995) (hereinafter the "ACTEC Commentaries"). The Restatement itself acknowledges that no case law supports the discretionary approach. Nor do the ACTEC Commentaries cite any supporting authority for this proposition.

The committee rejects the concept of discretion in this important area. Florida lawyers must have an unambiguous rule governing their conduct in situations of this nature. We conclude that Lawyer owes duties of confidentiality to both Husband and Wife, regardless of whether they are being represented jointly. Accordingly, under the facts presented Lawyer is ethically precluded from disclosing the separate confidence to Wife without Husband's consent.

The conclusion we reach is consistent with the Rules of Professional Conduct and with prior committee decisions. For example, the Comment to Rule 4-1.6 notes:

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.2, 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. *Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession*. [Emphasis added.]

Additionally, in Opinion 92-5 we concluded that a lawyer who was faced with a federal law purporting to require the lawyer to disclose client information that was confidential under Rule 4-1.6, but not protected by the attorney-client privilege, could not disclose the information without client consent until compelled to do so by legal process.

Our conclusion is also supported by out-of-state authorities. Facing an issue quite similar to that presented by the instant inquiry, the Committee on Professional Ethics of the New York State Bar Association in its Opinion 555 concluded that the lawyer's duty of confidentiality to the communicating joint client (a partner in a two-partner partnership) must take precedence over the lawyer's duty to provide relevant information to the non-communicating joint client (the other partner). That committee reasoned that the mere joint employment of a lawyer does not imply consent on the part of the joint clients to reveal a communication to the non-communicating joint client where disclosure would be adverse to the communicating client. See American Bar Association Formal Opinion 91-361; New York State Bar Association Opinion 674; Monroe County (N.Y.) Bar Association Opinion 87-2. See also Study Committee Report, at 788.

The committee further concludes that Lawyer must withdraw from the joint representation under the facts presented. An adversity of interests concerning the joint representation has arisen. This creates a conflict of interest. Many conflicts can be cured by obtaining the fully informed consent of the affected clients. Rule 4-1.7. Some conflicts, however,

are of such a nature that it is not reasonable for a lawyer to request consent to continue the representation. The Comment to Rule 4-1.7 provides in pertinent part:

> A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (b)(1) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

In the situation presented, the conflict that has arisen is of an personal and, quite likely, emotionally-charged nature. Lawyer's continued representation of both Husband and Wife in estate planning matters presumably would no longer be tenable. Rule 4-1.16 thus requires Lawyer's withdrawal from representation of both Husband and Wife in this matter.

In withdrawing from the representation, Lawyer should inform Wife and Husband that a conflict of interest has arisen that precludes Lawyer's continued representation of Wife and Husband in these matters. Lawyer may also advise both Wife and Husband that each should retain separate counsel. As discussed above, however, Lawyer may not disclose the separate confidence to Wife. The committee recognizes that a sudden withdrawal by Lawyer almost certainly will raise suspicions on the part of Wife. This may even alert Wife to the substance of the separate confidence. Regardless of whether such surmising by Wife occurs when Lawyer gives notice of withdrawal, Lawyer nevertheless has complied with the Rules of Professional Conduct and has not violated Lawyer's duties to Husband.

Finally, whether Lawyer ethically may represent Husband or Wife in other matters will be governed by Rule 4-1.9.

4. AICPA Professional Standards

Code of Professional Conduct and Bylaws

a. ET Section 102 Integrity and Objectivity

.01 Rule 102—Integrity and objectivity. In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others.

b. Interpretations under Rule 102—Integrity and Objectivity

.03 102-2—Conflicts of interest. A conflict of interest may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate parties as impairing the

member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed to and consent is obtained from such client, employer, or other appropriate parties, the rule shall not operate to prohibit the performance of the professional service. When making the disclosure, the member should consider Rule 301, Confidential Client Information [ET section 301.01].

Certain professional engagements, such as audits, reviews, and other attest services, require independence. Independence impairments under rule 101 [ET section 101.01], its interpretations, and rulings cannot be eliminated by such disclosure and consent.

The following are examples, not all-inclusive, of situations that should cause a member to consider whether or not the client, employer, or other appropriate parties could view the relationship as impairing the member's objectivity:

• A member has been asked to perform litigation services for the plaintiff in connection with a lawsuit filed against a client of the member's firm.

• A member has provided tax or personal financial planning (PFP) services for a married couple who are undergoing a divorce, and the member has been asked to provide the services for both parties during the divorce proceedings.

. . . .

• A member provides tax or PFP services for several members of a family who may have opposing interests.

5. Sample clause for client engagement letter concerning conflicts between spouses:

We will represent both of you jointly in your estate planning. We owe duties to each of you, and each of you has an obligation to disclose to us all information that is relevant to both spouses' estate planning. You agree that among us (the two of you and our firm), there will be no confidentiality of communications or information, unless and until one of you instructs us otherwise. If one of you discloses information to us that is relevant to the other spouse's estate planning, we can disclose that information to the other spouse if we think it is necessary to fulfill our duties to the other spouse in your estate planning.

Either of you can terminate your permission for us to disclose information to the other spouse at any time, if you give us clear directions not to disclose. However, if you do terminate that permission, we must then decide if a conflict of interest has arisen that prevents us from adequately representing the other spouse. We will make that decision in our sole professional judgment. If we believe that we cannot adequately represent the other spouse without the disclosure, we will notify each of you separately in writing that a conflict of interest has arisen that prevents us from representing either one of you in your estate planning. We could not represent either one of you in your estate planning after that without the consent of both of you.

Even if you revoke our permission to disclose information, you should be aware that if there is ever litigation between the two of you, we could be compelled to testify about information we obtained from you or about advice that we gave to you in your estate planning.

F. **Liability of Trust Officer For Breach of Trust**

1. Fletcher Cyclopedia of the Law of Corporations

§ 1135. Statement of the general rules

It is the general rule that an individual is personally liable for all torts the individual committed, notwithstanding the person may have acted as an agent or under directions of another. This rule applies to torts committed by those acting in their official capacities as officers or agents of a corporation. It is immaterial that the corporation may also be liable.

Under the responsible corporate officer doctrine, if a corporate officer participates in the wrongful conduct, or knowingly approves the conduct, the officer, as well as the corporation, is liable for the penalties. The responsible corporate officer doctrine applies to public welfare offenses that impose strict liability by plain language and intent. The person injured may hold either liable, and generally, the injured party may hold both as joint tortfeasors.

Corporate officers are liable for their torts, although committed when acting officially, even though the acts were performed for the benefit of the corporation and without profit to the officer personally. Corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming they did not authorize and direct what was done in the regular course of that business, with their knowledge and with their consent or approval, or such acquiescence on their part as warrants inferring such consent or approval. However, more than mere knowledge may be required in order to hold an officer liable. The plaintiff must show some form of participation by the officer in the tort, or at least show that the officer directed, controlled, approved, or ratified the decision that led to the plaintiff's injury. If an officer or director has constructive knowledge of fraudulent acts, it may be enough to attach personal liability. Circumstantial evidence, such as the way a corporation transacts business, can be used to prove constructive knowledge, and direct evidence may not be needed. A corporate officer or director may not seek shelter from liability in the defense that he or she was only following orders. Personal liability attaches regardless of whether the breach was accomplished through malfeasance, misfeasance or nonfeasance. However, there is authority that a corporate officer cannot be held personally liable for nonfeasance.

Personal liability for the torts of officers does not depend on the same grounds as “piercing the corporate veil,” that is inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with the formalities of corporate organization. The true

basis of liability is the officer's violation of some duty owed to a third person that injures such third person. *[author's note: footnotes omitted]*

2. Beaubien v. Cambridge Consolidated, Ltd, 652 So.2d 936 (Fla .5th DCA 1995).

(SHARP, W., J.) Garrett Blake Beaubien, Scott Carhart Beaubien, Taylor Stuart Beaubien, Kelly Lynn Casperone, and Kennedy Wilde Casperone, the alleged beneficiaries of a trust established by Joseph Casperone, appeal from an order granting both Cambridge Consolidated Limited's motion to dismiss for lack of personal jurisdiction over it, and Carr's motion to dismiss as to him for failure to state a cause of action. Cambridge is the trustee of the alleged trust and Carr was alleged to have acted as Cambridge's director and manager at all relevant times. We reverse.

Count One of the complaint seeks an accounting from Cambridge for trust assets. Appellants allege the trustee has a duty under the trust documents to render an accounting to the trust beneficiaries, but it has failed to do so. . . .

With regard to Carr the complaint alleged that in addition to the facts recited above, Carr breached his fiduciary duty to appellants by mismanaging the trust business and failing to account for the Antoinette bank account, which was zeroed out after the suit was filed, while Carr was in control of the account. They alleged:

Carr has acted with personal, conscious bad faith in failing to protect and administer the Trust assets, despite the fact that he accepted the responsibility for doing so, on behalf of Cambridge. Carr's conduct in administering or failing to administer the Trust assets falls below the standard of care required for one who is administering the assets of another. His actions and/or failure to act are the direct and proximate cause of any loss to the Trust assets.

I. Whether the Complaint States a Cause of Action Against Carr

Whether a complaint states a cause of action against a party, when challenged by a motion to dismiss, as in this case, must be addressed by looking solely at the complaint itself. . . . Carr's motion to dismiss states simply that the complaint wholly fails to show any fiduciary duty on the part of Carr to the plaintiffs:

The complaint only alleges that Carr was U.S. Director for the Cambridge Corporation and does not show anything further as to Carr's relationship to the Plaintiffs or any duty owed to the Plaintiffs by Carr.

Carr stated in his motion to dismiss that his authority to act for Cambridge was as a nonexecutive director, solely with *[author's note: another corporate director's]* prior written consent. He also filed an affidavit in which he swore he acted solely in his capacity as a practicing attorney, representing the corporate entity, Cambridge. Carr's deposition of record reiterates this position.

Carr's allegations in his motion to dismiss counter the allegations of the amended complaint, putting at issue the nature of Carr's relationship to the corporate trustee and the capacity in which he was acting. At this point in the case, the appellant-beneficiaries did not have to file counteraffidavits opposing Carr's affidavit and deposition testimony, since no motion for summary judgment had been made by Carr. . . .

But even if Carr had moved for summary judgment, the appellants had other proofs of record which put at issue the nature of Carr's activities on behalf of Cambridge. . . . . For example, Carr did not deny he wrote a letter to the settlor of the trust dated Sept. 18, 1989, in which he declared [the prior trustee] was no longer a director of Cambridge, that he was ``the U.S. Director of the Company," and that all further mail regarding the trust should be addressed to him. Further, Margaret Casperone, the wife of the trust settlor, stated in her deposition which is filed in the record, that Carr told her he was the managing director of Cambridge and that he was the trust administrator and operator. And, according to the deposition of the attorney retained to foreclose the Texas real estate mortgage, Carr directed his actions and made business decisions for the trust.

At this point in the proceedings, the trial court should not have dismissed the amended complaint for failure to state a cause of action against Carr. It is well settled that an individual acting for a corporate trustee may be personally liable to third persons injured by his actions even if the individual was acting as agent for the corporation. Such corporate agents owe duties not only to the corporation, but also to the beneficiaries of a trust administered by the corporation. William Fratcher, IV Scott on Trusts, sec. 326.3 (1989). In this case, the plaintiffs clearly alleged that Carr was acting as the corporate trustee's agent -- manager -- administrator -- and that his actions or inactions caused them a loss. Under Florida law, such an individual may be held personally liable where a tort has been committed. [citations omitted]

3. Sample clause for trust agreement governing liability of trustee and trust officers:

Each individual Trustee is relieved from all liability for his or her actions or failures to act as Trustee, unless that individual acts in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries.

Each institutional Trustee will be liable for his, her, or its actions or failures to act that are negligent or that breach his, her, or its fiduciary duty. No individual officer, director, member, partner, employee, or agent of an institutional Trustee will be personally liable to any beneficiary, Trustee, or other person for his or her actions or failures to act on behalf of the institutional Trustee for which that individual would otherwise be liable under applicable law unless the individual acts in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries, as established by clear and convincing evidence, even if the individual's actions or failures to act cause the institutional Trustee to be liable for negligence or breach of fiduciary duty.

If a beneficiary brings proceedings against a Trustee for breach of fiduciary duty or some other reason, the Trustee may have a conflict of interest that ordinarily would prevent it from paying legal fees and costs from the trust estate to defend itself. That could result in a financial burden on someone named to serve as a Trustee, make someone who has been selected to serve as a Trustee reluctant to accept the position, and make it possible to cause someone serving as Trustee to be intimidated in the performance of the Trustee's duties because of the threats of proceedings that might force the Trustee to pay fees and costs from the Trustee's personal or institutional resources. For those reasons, any such conflict of interest is deliberately and intentionally waived so that the Trustee and each individual officer, director, member, partner, employee, or agent of an institutional Trustee can hire counsel to defend himself, herself, or itself if proceedings are threatened or brought against him, her, or it for any reason (whether by a beneficiary or by someone else) and pay all reasonable fees and costs for his, her, or its defense from the trust estate while the proceeding is pending without approval or permission from any person, tribunal, or authority, regardless of any law to the contrary. The Trustees are not required to notify the beneficiaries or any other person, tribunal, or authority of these payments except through annual or other periodic accountings required by law. Fees may be awarded, disallowed, or allocated in whole or in part upon conclusion of the proceedings, as provided by law. The Trustee and each individual officer, director, member, partner, employee, or agent of an institutional Trustee will account for all such fees and costs paid by him, her, or it as provided by law, subject to the following.

No fees or costs that have been incurred by any individual Trustee shall be disallowed, and no fees or costs of any other person shall be assessed or charged to that individual Trustee personally, unless that individual Trustee acted in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries.

No fees or costs that have been incurred by any individual officer, director, member, partner, employee, or agent of an institutional Trustee shall be disallowed, and no fees or costs of any other person shall be assessed or charged to that individual personally, unless that individual acted in bad faith or with reckless indifference to the purposes of the trust or the beneficial interests of the beneficiaries with respect to a matter for which that individual would otherwise be liable under applicable law.

G. Obligations of Lawyers Performing Other Services

Model Rules of Professional Conduct

Rule 5.7 Responsibilities Regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Rule 5.7 Responsibilities Regarding Law-Related Services - Comment

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling,

legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

H. Potential Conflicts of Interest Created by Referral Relationships

Sample clause for law firm's client engagement letter disclosing existence of referral relationships:

Our firm works with a number of banks, trust companies, and other financial institutions. Sometimes we may represent those institutions as clients, either in a fiduciary capacity such as when they serve as personal representatives or trustees, or directly such as when defending them in litigation matters. Those institutions may refer potential clients to our firm, and we may recommend their services to our clients. If you ask us to recommend a financial institution for your estate planning arrangements, it is possible that we may have separate attorney-client relationships with the institution or institutions we recommend. If you name a corporate fiduciary to serve as your personal representative or trustee, it is possible that the corporate fiduciary might retain our law firm in the future to represent it in performing its duties (assuming that there are no conflicts of interest). You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations.

Florida law does not fix compensation for personal representatives or trustees, although statutory guidelines are given for fees for personal representatives. You are free to negotiate the amounts that will be paid as compensation to your personal representative or trustee, and do not have to agree that fees (including termination fees) will be paid to a corporate fiduciary based on its standard fee schedule.

In addition, some corporate fiduciaries may wish to have provisions included in wills and trust agreements that have the effect of holding them to a lesser standard of responsibility or liability than Florida law would otherwise impose on them. For example, a corporate trustee might wish to be liable only for gross negligence or fraud, and not liable for acts or omissions that are negligent but not grossly negligent. The corporate trustee might want provisions allowing it to invest trust assets in investment products sold by its affiliates, which can result in increased revenues to the financial institution's overall group of affiliated companies. Florida law generally would not permit these types of results in the absence of a specific waiver or authorization by you in your will or trust agreement. If a particular corporate fiduciary asks for these types of provisions to be included in your estate planning documents, we will discuss them with you so that you can make an informed decision whether you wish to use the services of that corporate fiduciary if it won't agree to modify or waive those provisions, even if you were referred to us by that corporate fiduciary or if we separately represent that corporate fiduciary in other matters.