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The Lawyer as Charitable Fiduciary: Public Trust or Private Gain?

Ronald Chester*

I. INTRODUCTION

Lawyers often find themselves serving as trustees of trusts or as directors of corporations because of their presumed expertise. In serving as a director or trustee, the lawyer owes fiduciary obligations to the entities involved.\(^1\) A recent article in the *ABA Journal*\(^2\) directly warns attorneys who serve as corporate directors of the heightened risks of successful malpractice claims against them, particularly if they or their firms are also legal counsel to the corporation.\(^3\) For example, an attorney who serves as a director for an organization loses the defense that, in a particular case, the corporation simply made a bad "business" decision and failed to follow the legal advice the attorney had given it.\(^4\) This is because the lawyer "is" the corporation when serving as director and is directly responsible for the

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2. Robert E. O’Malley & Harry H. Schneider, *Danger: Lawyer on Board*, 79 A.B.A. J., July 1993, at 102 (noting that “the lawyer who serves as a director is much more likely to be sued for legal malpractice than the lawyer who is not a director”). This article also illustrates that there is an increased risk of disqualification for the director-lawyer from later representation of the client in litigation. *See id.* (noting that “the lawyer’s involvement as a participant in the corporate decisionmaking probably renders the firm disqualified from representing the client in litigation, based on the lawyer-as-witness rule”). The lawyer-as-witness rule forbids “[c]ombining the roles of advocate and witness [as this] can prejudice the opposing party and can involve a conflict of interest between the lawyer and client.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 cmt. (1992). “If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also.” *Id.* The attorney-client privilege “is jeopardized when the lawyer is involved in discussions in any other capacity other than as counsel.” *Id.; see Note, Should Lawyers Serve as Directors of Corporations for Which They Act as Counsel?,* 1978 Utah L. Rev. 711, 712 (1978) [hereinafter *Lawyers as Directors*] (noting that “a lawyer-director cannot maintain his independent professional judgment due to the conflicting interests, duties, and loyalties created by his merged role, and . . . a lawyer-director cannot be sure that the attorney-client privilege will attach to the confidences and secrets of his corporate client”).

3. O’Malley & Schneider, supra note 2, at 102.

4. *Id.* "A potential conflict of interest . . . arises from the fact that a lawyer-director may be held to a higher standard of care simply because he has the legal training of an attorney.” *Lawyers as Directors, supra* note 2, at 715.
corporation's decisions. Since most lawyers' malpractice policies do not cover their service as directors, attorneys are advised to be certain that the corporation's "directors and officers" policy sufficiently covers them.

Another area the ABA Journal warns about, and the one with which the present Article is primarily concerned, is that of conflict of interest. Specifically, the ABA Journal cautions the lawyer/director to abstain from voting on any proposal under which the attorney's firm stands to make substantial gain. The ABA article notes, however, that the lawyer/director has significantly less to fear in terms of liability when serving on a charitable, in contrast to a for-profit, corporate board. The ABA Journal attributes heightened liability in the for-profit context to the threat of shareholder derivative suits. In the charitable corporation, the derivative suit is nonexistent because there are no stockholders.

Section II of this Article discusses the fiduciary duties of care and loyalty required of an attorney who serves as a director or trustee of a charitable organization. Section III sets forth the facts of a paradigm case where two attorneys, acting as both lawyers and trustees to a

5. O'Malley & Schneider, supra note 2, at 102.
6. Id.; see id. (noting that "[m]any legal malpractice policies exclude coverage for legal malpractice claims arising out of circumstances where a lawyer is acting as a director or officer"). Moreover, "[s]ervice on the board of a federally regulated financial institution today is risky . . . . Most [director and officer] policies specifically exclude coverage for claims brought by regulatory agencies with jurisdiction over financial institutions." Id. Finally, "[u]nder some [director and officer] policies, coverage exists only if the individual is serving 'solely' as an officer-director." Id.
7. "Conflict of interest" is defined as a term used in connection with public officials and fiduciaries and their relationship to matters of private interest or gain to them. Ethical problems connected therewith are covered by statutes in most jurisdictions and by federal statutes on the federal level. The Code of Professional Responsibility and Model Rules of Professional Conduct set forth standards for actual or potential conflicts of interest between attorney and client.
8. O'Malley & Schneider, supra note 2, at 102.
9. Id.; see infra notes 168-173 and accompanying text (noting some of the reasons as to why attorney-directors incur less liability in the nonprofit context). Nonprofit corporations, unlike for-profit corporations, are subject to a non-distribution constraint that prevents the organization from distributing its net earnings to those in control of the corporation. Note, Developments in the Law, Nonprofit Corporations, 105 HARV. L. REV. 1578, 1581 (1992) (hereinafter Developments). The distinction is important for liability purposes, as the nonprofit entity does not have an interest holder completely analogous to the "common stock holder" in the for-profit context. Id. By contrast, the fiduciary duties of for-profit directors are enforced through shareholder derivative suits and third-party actions. Id. at 1604-05. Enforcement of fiduciary duties in the nonprofit area is generally administered by understaffed and underfunded states attorneys general. Id. at 1595-96.
10. See supra note 9 (describing the differences in enforcement of fiduciary duties of nonprofit and for-profit corporations); infra notes 170-172 and accompanying text (noting that attorneys who handle shareholder derivative suits have sources of information not available in the nonprofit context).
11. See infra notes 15-29 and accompanying text.
charitable organization, breached their fiduciary duties to the charity. An analysis of the settlement between the attorneys in the paradigm case and the Massachusetts Attorney General is provided in Section IV. Finally, Section V discusses the recommended enforcement mechanisms for breaches of fiduciary duties by an attorney who serves as a lawyer and as a trustee or director of a charitable organization.

II. THE LAWYER AS DIRECTOR OR TRUSTEE OF A CHARITY

Charitable entities are organized either as trusts or corporations. The corporate structure has become more prevalent than the trust form largely because of the perceived and actual differences between the fiduciary standards applied in each case. Traditionally, the fiduciary duties of loyalty and care were higher in trust law than in corporation law, as the standards in the latter were largely developed in the for-profit context. Under contemporary common law and charitable corporation standards, the charitable corporation director owes higher degrees of care and loyalty than does the for-profit counterpart. The nonprofit corporate standard, however, is generally less stringent than the standard owed by the trustee.

12. See infra notes 30-71 and accompanying text.
13. See infra notes 72-96 and accompanying text.
14. See infra notes 97-221 and accompanying text.
15. Developments, supra note 9, at 1593. Many courts apply the same for-profit director standards towards nonprofit directors, since more stringent standards would deter volunteers from assuming the responsibilities of a directorship. Id. The Revised Model Nonprofit Corporation Act, adopted by the American Bar Association in 1987, includes a standard of care and standard of loyalty nearly identical to the standard applicable in the for-profit sector. Id. at 1593-94; see Revised Model Nonprofit Corporation Act § 8.30 (1988) (providing the standards of care and loyalty). “Unlike the higher standard for trustees, the Model Act does not strictly forbid transactions that implicate the interests of corporate directors if the transactions are fair to the corporation or are approved in accordance with statutory provisions.” Developments, supra note 9, at 1594; see Revised Model Nonprofit Corporation Act § 8.30 (1988) (indicating that transactions implicating the interests of corporate directors are not strictly prohibited if the transactions are fair to the corporation or approved in accordance with statute). See generally Note, The Fiduciary Duties of Loyalty and Care Associated With the Directors and Trustees of Charitable Organizations, 64 Va. L. Rev. 449, 451-57 (1978) [hereinafter Fiduciary Duties] (noting that the fiduciary standards applied to trustees of charitable organizations are higher than the standards applied to directors of charitable entities).
16. See generally Fiduciary Duties, supra note 15 (noting that the fiduciary duties required of a nonprofit corporation director are more akin to the standards required of a for-profit corporation director because of the historical similarities in organizational form). But see Philip Burling & Richard C. Allen, Mass. B. Ass’n, Liability Issues in Nonprofit Organizations 13 (Oct. 1988) (stating that “early cases tended to treat trustees of charitable corporations as indistinguishable from trustees of trusts”).
17. Burling & Allen, supra note 16, at 13-14 (noting that the fiduciary standards applied to directors and trustees of nonprofit corporations will, at a minimum, be the standards applied to for-profit directors, but the nonprofit standards will be applied with a heightened scrutiny).
of a charitable trust.\footnote{18} For the lawyer serving as charitable corporation director or charitable trustee, there is also the matter that whatever may be the general fiduciary standard for such offices, the lawyer may be held to a higher one due to the lawyer's presumed professional expertise.\footnote{19}

Traditionally, a lawyer could also name himself trustee of a testamentary trust (and thus the director of a charitable corporation) as long as the client generates the idea and is fully informed of the risks inherent in this type of transaction.\footnote{20} Specifically, the client must be forewarned of possible and actual conflicts of interest.\footnote{21} Although not explicitly prohibited by disciplinary or other rules, the attorney's conduct in being named a fiduciary does represent a potential conflict of interest violating the fiduciary obligation of loyalty to the charitable entity.\footnote{22} If the attorney is the sole trustee and subsequently is hired as the attorney for the charity, then self-dealing becomes an issue. When the trustee is self-dealing, "no further inquiry" is made as to the reasonableness of the transaction or the

\footnote{18. See generally Fiduciary Duties, supra note 15 (discussing the different standards that are required of a trustee and a director in a charitable organization).}

\footnote{19. See Note, Exculpatory Clauses in Trust Instruments and the Standard of Fiduciary Performance: Focus on the Problems for Attorneys, 5 CONN. PROB. L.J. 59, 60, 67-68 (1989) (asserting that fiduciaries who hold themselves out as having special skills or who possess special skills may be required to exercise a "higher standard of performance" than a typical fiduciary). Courts hold trustees that claim to have special expertise and ability to a higher standard of care in administering a trust, in exercising the requisite duty of care towards trust fund investments, and in delegating ministerial responsibilities. Fiduciary Duties, supra note 15, at 452 n.18; Lawyers As Directors, supra note 2, at 715 (noting that "a lawyer-director may be held to a higher standard of care simply because he has the legal training of an attorney").}


\footnote{21. See id. at 279 (indicating that the "customary practice" of an attorney-draftsman naming himself a testamentary fiduciary raises difficulty ethical issues that have not resolved by the legal profession's ethical codes). Theoretically, client initiation prevents solicitation, overreaching or undue influence on the attorney's part. Id. at 282. This "ignores [the] fact that it is virtually impossible to determine if the idea in fact originates with the client, since [the client] will usually be dead when a question arises." Id. The fiduciary's powers are derived from the trust instrument. 18 N.Y. Jur. 2d Charities § 42 (1992). If that trust instrument names the lawyer as trustee at the client's request, but not as attorney for the trust as well, the presumption that an independent counsel is required should be applied. deFuria, supra, note 20, at 276. Also, in cases where the attorney drafting the trust instrument names himself or herself the trustee at the client's request, but not the attorney for the trust as well, this presumption should be applied. See State v. Gulbankian, 196 N.W.2d 733, 737 (Wis. 1972) (suggesting presumption of ethical impropriety and undue influence when a drafting attorney is named as fiduciary). There might be an argument under Model Rule 1.9 for a successive conflict of interest if the attorney-draftsmen/trustee later appoints himself or herself as the attorney for the trust. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1992). This assumes that the lawyer's fees result in a pecuniary interest that is sufficiently adverse to the client's interests.}

\footnote{22. See Jesse Dukeminier & Stanley M. Johnson, Wills, Trusts, and Estates 851-52 (4th ed. 1990) (stating that in order to fulfill the duty of loyalty, the fiduciary must administer the trust solely in the interests of the beneficiaries). A conflict of interest should not violate the duty of loyalty when the fiduciary demonstrates that the fiduciary "acted in good faith and that his actions were fair to the beneficiaries." Id. at 851.
good faith of the trustee, as would happen in the simple "conflict" situation.\textsuperscript{23}

To expand the hypothetical, suppose the lawyer/trustee hires the lawyer's firm as the attorney for the charity. In all likelihood this makes no difference; the attorney is still self-dealing.\textsuperscript{24} If there are two trustees, each of whom does legal work for the trust either alone or through his or her firm, each is self-dealing.\textsuperscript{25} In a charitable trust, unanimity of action by trustees is not required.\textsuperscript{26} Thus, if only one of the trustees or that trustee's firm does work for the charity, only that trustee would be liable for self-dealing.\textsuperscript{27} The other trustee, however, if aware of this self-dealing, would likely violate the duty of care if no action is taken.\textsuperscript{28}

Thus, if the charitable trust had three trustees and two were lawyers self-dealing with themselves or their firms, the two could "self-hire" by majority vote. The remaining trustee, however, might have a duty to pursue the matter with the probate court, provided the trustee can be charged with the knowledge that the self-dealing of the co-trustees is damaging the trust.\textsuperscript{29}

\textsuperscript{23} Id. at 852. Self-dealing occurs whenever the fiduciary bargains with himself or herself in his individual capacity. Id. at 851.

In case of self-dealing, no further inquiry is made; the trustee's good faith and the reasonableness of the transaction are irrelevant. The beneficiaries can hold the trustee accountable for any profit made on the transaction, or, if the trustee has bought trust property, can compel the trustee to restore the property to the trust, or, if the trustee has sold his own property to the trust, can compel the trustee to repay the purchase price and take back the property. The only defense the trustee has to self-dealing is that the beneficiaries consented after full disclosure; even then the transaction must be fair and reasonable. Id. at 852. Charitable trustees do not have a strong incentive to maximize value when administering a trust because they do not have a property interest in a nonprofit's assets or income. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 484 (3d ed. 1986). Thus, the trustee who additionally serves as counsel for a trust has a greater pecuniary interest than the trustee who only serves as trustee. Id. A question then arises whether this added interest has any bearing on the trustee/attorney's obligations as trustee to maximize value for the trust. Theoretically, even a well paid trustee/attorney would maintain his or her position so long as the trust estate was efficiently administered. Id.

\textsuperscript{24} O'Malley & Schneider, supra note 2, at 102.

\textsuperscript{25} Id.

\textsuperscript{26} DUKEMINIER & JOHANSON, supra note 22, at 866.

\textsuperscript{27} Id.

\textsuperscript{28} Id. at 865-66. A fiduciary's duties of care include the duty to collect and protect trust property, the duty to earmark trust property, the duty not to mingle trust funds with the trustee's own, and the duty not to delegate discretionary functions. DUKEMINIER & JOHANSON, supra note 22, at 871-74. The fiduciary must act as a prudent person in dealing with, and preserving, trust property. Id. In failing to prevent the self-dealing of a co-trustee, a trustee jeopardizes the trust property. Id.

\textsuperscript{29} See generally Burling & Allen, supra note 16, at 33-34 (discussing the trustee's duty of disclosure when faced with any conflict of interest or potential conflict of interest).
III. A PARADIGM CASE: THE CAROLINE WELD FULLER TRUST

For the purposes of this Article, a paradigm of a recent Massachusetts case, Attorney General v. Fuller Trust, Inc.,\(^{30}\) in which the two sole trustees of a charitable trust dealt with themselves or their firms as lawyers to the trust will be used. The facts of this case are as follows: Beginning in 1984, charitable trustees A and B informed the Attorney General that they were experiencing problems in attracting residents for the trust’s Fuller Retirement Home in Milton, Massachusetts.\(^{31}\) The trustees believed that the settlor’s charitable purposes would remain unfulfilled unless there was a change in the retirement facility and the services provided to the residents.\(^{32}\) The trustees proposed to modernize and expand the residential services provided by the trust.\(^{33}\)

In 1987, the trustees sought the Attorney General’s assent to a *cy pres* petition for court approval to change the purposes of the Fuller Trust.\(^{34}\) The trustees proposed to change the purposes of the trust to allow them to build a continuing care retirement community consisting of individual units, a nursing home and a main building which would be used by individuals needing “assisted living.”\(^{35}\)

The Office of the Attorney General assented to a modified proposal\(^{36}\) and the Supreme Judicial Court approved the *cy pres* proposal on February 8, 1988.\(^{37}\) The judgment gave the trustees the following authority:

1) to create and operate a congregate housing facility (life care community) to include up to 200 units; 2) to devote such of the assets of the Trust under the will of the Fuller Trust including the accumulated income and the principal of the Trust, as the Trustees in their discretion deem appropriate to accomplish the changed

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32. Sors Affidavit, supra note 31, at 11.
33. Id.
34. Id. “The rule of *cy-pres* is a rule for the construction of instruments in equity, by which the intention of the party is carried out as near as may be, when it would be impossible or illegal to give it literal effect.” BLACK’S LAW DICTIONARY 387 (6th ed. 1990).
35. Sors Affidavit, supra note 31, at 11.
36. Id. at 12. Following an investigation and several discussions and meetings, the trustees agreed to a modification of the trustees’ plan, proposed by the Attorney General, requiring the trustees to give preference to individuals of limited means. Id. at 11-12.
37. Id. at 12.
purpose, subject to the requirement that the Trustees give preference for residence to applicants of limited means; and the Trustees take all reasonable steps to seek federal state and local governmental funding to support admission of the largest number of persons whose level of financial means is less [than] eighty percent of the median income in the Boston area for the person’s household size.\textsuperscript{38}

An Attorney General’s investigation began in March 1992, when the Attorney General was approached by a Milton town official expressing concern that the Fuller Village project had not been physically started.\textsuperscript{39} This investigation revealed the following facts: In 1988, when the life care project was in its initial stages, the trustees acted upon the advice of their consultant\textsuperscript{40} and decided not to hire a developer to carry out the building of the life care community.\textsuperscript{41} In acting as developers themselves, the trustees sought to save the trust the expense of a developer’s fee.\textsuperscript{42} A and B were successful in obtaining the necessary town and state permits and meeting zoning requirements.\textsuperscript{43} When the time came to obtain financing for the project, however, the trustees encountered severe difficulties.\textsuperscript{44}

After the Bank of New England, which had a working relationship with A and B, declined to finance the project because of the bank’s own financial problems, the trustees went to the tax-exempt bond market.\textsuperscript{45} They worked closely with Herbert J. Sims and Company (hereinafter “Sims”), the largest underwriter in the country of continuing care facilities.\textsuperscript{46} Negotiations with Sims subsequently failed when the trustees

\begin{itemize}
  \item \textsuperscript{38} \emph{Id.}
  \item \textsuperscript{39} \emph{Id. at 16.}
  \item \textsuperscript{40} \emph{AG Brief, supra} note 31, at 8-9. The Fuller trustees’ consultant was Robert Chellis, a recognized expert in the life care area. \emph{Soris Affidavit, supra} note 31, at 13.
  \item \textsuperscript{41} \emph{AG Brief, supra} note 31, at 8-9.
  \item \textsuperscript{42} \emph{Id. at 9.}
  \item \textsuperscript{43} \emph{Id. In order to obtain these permits the trustees hired architects, engineers, a construction company, health care experts and others to satisfy the Milton Town Planning Board requirements and state public health licensing requirements. \emph{Soris Affidavit, supra} note 31, at 13. The scope of the project was very large, calling for between 160 and 200 units of individualized living quarters, assisted living quarters and a nursing home. \emph{Id. at 13-14. The trustees envisioned an upscale continuing care retirement community. \emph{Id. at 14. The trustees used the most qualified architects and engineers and consultants available. \emph{Id.}}}
  \item \textsuperscript{44} \emph{Soris Affidavit, supra} note 31, at 14.
  \item \textsuperscript{45} \emph{Id.}
  \item \textsuperscript{46} \emph{Id.}
\end{itemize}
were unable to meet the underwriter’s financing conditions. The trustees went to other bond underwriters, but their efforts proved unsuccessful. The magnitude of the financial difficulties was apparent by October-November 1991. By that time, the recession had taken a serious toll on the real estate market and the continuing care market. The trustees simply were not able to finance the project on their own.

Subsequently, the trustees started to negotiate with real estate developers who would be able to finance the life care project on a turnkey basis. The developer who showed the most promise demanded that the trustees mortgage thirty acres of land owned by Fuller Trust, Inc., in order to finance the project. Trustee B determined that the deal, as structured, would have unnecessarily tied up the land and have required an outflow of cash from the project. Both trustees feared that the project would be partly built and then come to a halt because of lack of financing, resulting in the loss of the trust’s primary asset, namely, the land. Thus, the trustees refused to continue negotiations based upon these terms.

In the investigation of Fuller Village, the Attorney General determined that the trustees’ actions did not cause the project to stall. During the 1980’s, it was not uncommon for owners of land, including trustees, to opt to act as their own developers. It appeared that the trustees’ decision to

47. Id. at 14-15. Sims required that 70% of the units be presold before it would finance the project. Id. at 14. In meeting the Sims condition, the trustees decided that Phase One would consist of 109 units, instead of 160 units, with 9 assisted living units, and the construction of the nursing home was postponed. Id. The trustees had also determined that a decline in the market necessitated the completion of the project in phases and that pre-selling fewer units would enhance the timely completion of the project. Id. Subsequently, another setback occurred when the bond market on life care communities declined and Sims increased the amount of pre-sales necessary to go forward. Id. Sims also wanted the project to involve a “high visibility” equity partner or $10 million dollars in reserves. Id. After the Sims deal fell through, the trustees entered negotiations with Boston University, which did not come to fruition. Id. at 14-15.

48. Id. at 15.
49. Id.
50. Id.
51. Id.
52. Id. “Turn-key contract” is defined as a project where a private contractor completes the work to the point of readiness for occupation, at which time it is then sold to the customer at a pre-arranged price. BLACK’S LAW DICTIONARY 1516 (6th ed. 1990).
53. AG Brief, supra note 31, at 11. The trustees said that the developer’s commitment in “up-front” dollars and financing was insufficient to complete the project, which according to B, should have included the developer’s financing the first eighteen months of operation of the life care community. Soris Affidavit, supra note 31, at 15.
54. Soris Affidavit, supra note 31, at 15.
55. Id.
56. Id.
57. AG Brief, supra note 31, at 12.
58. Id.
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proceed independently was based upon a desire to save the trust from expending developer's fees. Additionally, there were two primary, intervening circumstances that the trustees might not have foreseen as they moved along in the development of the project: first, the recession; and second, the almost universal decision in the world of financing to stop lending to developers of continuing care facilities. These two events converged in 1991 after the trustees had spent $3,671,359, including their legal fees, on pre-development costs out of some $4 million in the trust.

Since the Attorney General decided that A and B had acted reasonably, although unsuccessfully, in putting the project together, the main focus of the inquiry became the payment of legal fees to the trustees for legal work performed by their respective law firms. A percentage of the work performed by the trustees, and billed at their hourly legal rate, did not qualify as legal work. That work which did qualify had to be billed at reasonable rates. Approximately half of the amounts billed were justifiable and reasonable as legal work. The Attorney General determined

59. Id. It is customary for a developer to charge as a fee a percentage of the cost of the total project. Soris Affidavit, supra note 31, at 17-18. A developer's fee can range from five to ten percent based upon the complexity of a project. Id. The projected cost of the life care project was approximately $35 million. Id. at 18. Therefore, a developer could have charged the trustees as much as $3.5 million dollars in fees by the time the project was completed. Id.

60. AG Brief, supra note 31, at 12. When the trustees began the project, they believed that the trust monies advanced to Fuller Village, Inc. and used to pay for the pre-development costs of the project would be re-paid to the Fuller Trust from profits generated by Fuller Village, Inc. Soris Affidavit, supra note 31, at 16. The auditor, Ernst & Young, allowed $2.9 million dollars advanced by Fuller Trust to Fuller Village, Inc. to be carried on Fuller Trust books as a receivable. Id. The trustees had envisioned a situation in which the Fuller Village would be profitable. Id. The profits from the project would be turned over to the Fuller Trust endowment. Id. In satisfying the cy pres judgment, the income would be used to subsidize low income individuals at the Village. Id.


63. Id. at 19. According to this analysis, the trustees were billing for work which belonged in the category of non-legal trustee tasks performed in the pursuit of the development of the project, and for which the trustees were paid $20,000 per year in trustee fees from the trust. Id. Assisting the Attorney General in its analysis of the legal fees issue was the litigation department of a CPA firm. Id. The accountant stated that the practice discussed in the text above is called “blending” and occurs when legal and non-legal tasks are mixed and the resulting fee reflects only the higher valued legal work. Id. The Attorney General also turned to development lawyers for assistance. Id. at 20. The Attorney General was advised that the lawyering involved in a development project of this scale included a number of things: (a) evaluation of existing land use and title; (b) negotiating and drawing up the contracts for engineers, architects, construction company, marketing consultants and employees, and all other consultants/employees (c) drawing up the condominium documents and (d) negotiating the determination of need process. AG Brief, supra note 31, at 13-14.

64. Soris Affidavit, supra note 31, at 19.

65. Id. at 20. This would translate to mean that approximately $345,000 in billing was reasonable. In addition to the blending issue, the Attorney General concluded that the trustees had charged the trust too much money for their legal services, especially in light of the trust's charitable purposes, and the trustees' obvious conflict of interest. Id. at 19.
that the restitution of five hundred thousand dollars to the trust was fair if accompanied by the immediate resignations of the trustees.\textsuperscript{66} The settlement with A was implemented by his resignation as trustee and director of the Fuller entities and the payment of $250,000.00 to the Fuller Trust.\textsuperscript{67} Subsequently, the Attorney General accepted B's offer to settle on the same terms as A.\textsuperscript{68}

This decision was reached in the belief that the charitable and public interest would be better served by this resolution than by litigation.\textsuperscript{69} In addition to the legal considerations which the Attorney General considered in reaching settlement with the trustees, there were the practical considerations.\textsuperscript{70} Unless the trustees could be removed quickly, and a generous amount of money infused into the Fuller Trust, the charity would cease to exist.\textsuperscript{71}

\textbf{IV. ANALYSIS OF THE FULLER SETTLEMENT}

This author would have analyzed the case in the following manner: The lawyers, and by extension their law firms, put themselves not only in a conflict position, but in one of self-dealing. Effectively, there was no one involved who had a check on what these trustees did as lawyers representing the trust. Even had there been someone involved, such as a third trustee, this would not resolve the self-dealing situation because that third trustee would still be outvoted. Although, if the two had recused themselves from lawyer selection, perhaps the third trustee, if not for any self-interest, could choose the other two. More clearly, however, self-dealing could be avoided if there were a five person board, composed of three members who were not self-interested and who voted to hire the two

\textsuperscript{66.} AG Brief, \textit{supra} note 31, at 14-15.
\textsuperscript{67.} \textit{Id.} at 15.
\textsuperscript{68.} \textit{Id.} at 15-16.
\textsuperscript{69.} \textit{Id.} at 15. The likelihood that such settlements will occur is probably factored into the "risk analysis" that a trustee would make before deciding to self-deal. The path of least resistance for attorneys general, and certainly one of fewer costs, leads to "settlement." Fiduciaries who are also attorneys are probably more aware of the likelihood that such a settlement will eventually be made than those fiduciaries who do not possess a law degree.
\textsuperscript{70.} Soris Affidavit, \textit{supra} note 31, at 22-23. In July 1992, the liquid assets of the Fuller entities before outstanding liabilities totalled $224,333. \textit{Id.} at 22. The operation of the Fuller House was costing $22,500 per month. \textit{Id.}
\textsuperscript{71.} \textit{Id.} at 22. The Attorney General believed that the charity could only survive if it were spared the consequences of protracted litigation. \textit{Id.} In addition, the uncertainty occasioned by litigation would threaten, and might destroy, the continuation or revival of a development for the benefit of the elderly on the Fuller site. \textit{Id.} at 23.
other trustees’ firms as the trust’s lawyers. Though A and B would not technically be self-dealing in such a situation, they would still have a conflict of interest. In the simple conflict situation, however, they would merely have to show their transactions and fees were both reasonable and made in good faith.\footnote{Dukeminier \& Johnson, supra note 22, at 851-52.}

By contrast, where there is self-dealing,\footnote{See supra note 23 and accompanying text (indicating that self-dealing occurs when the fiduciaries bargain with themselves in their individual capacity).} at least at common law, “no further inquiry” is made.\footnote{See supra note 23 (noting that there is “no further inquiry” into the trustee’s good faith and the reasonableness of the transaction).} The guilty trustees must return all profit to the trust\footnote{Dukeminier \& Johnson, supra note 22, at 851.} and can be removed from office.\footnote{Id. at 929-30. The only defense available to the trustee who engages in self-dealing is that the beneficiaries consented after full disclosure and the transaction was fair and reasonable. Id. at 852. This is analogous to the exceptions for conflicts of interest in Model Rule 1.7(b) which states that:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct Rule 1.7(b) (1992) (emphasis added).}

Trustees A and B could, of course, argue that their fees were the same as, or lower than, those that would have been charged by independent lawyers, and thus, there is no “profit” to them or damage to the trust. While this might be true in a simple conflict of interest situation, such as where the three trustees with no self interest voted to hire the other two as lawyers, where there is self-dealing, as in the actual case, fairness and good faith are not a defense.\footnote{Dukeminier \& Johnson, supra note 22, at 852.} The only available defense is consent by the trust,\footnote{Id. The beneficiaries can only consent after full disclosure and even then the transaction must still be fair and reasonable. Id.} which could not be obtained in this case because the only trustees who could “consent” to the self-dealing were the self-dealing lawyers themselves.

In the affidavit and brief paraphrased above, the Attorney General did not differentiate between conflict of interest and self-dealing.\footnote{See AG Brief, supra note 31; Soris Affidavit, supra note 31.} Though the situation seems to clearly involve self-dealing, the Attorney General’s inquiry into the reasonableness of the attorneys’ fees seems to suggest that the office was willing to make ‘further inquiry’ and that the Fuller case was being treated as a mere conflict situation.
This Article submits that even in a simple conflict situation, such as when members of a charity’s board do legal work by majority vote of disinterested board members, recusal by the interested members should not resolve the conflict. Charitable trust or corporation decisions are not disciplined by the marketplace nor by the corresponding threat of shareholder derivative suits to enforce that discipline. The reasonableness of the legal fees involved might best be determined by a system of competitive bidding.\textsuperscript{80} If such a system were also required in buying legal or other services for a charity, the self-interested trustee or director would have to actually show that, due to familiarity with the organization, the trustee was able to offer these services at the lowest cost to the charity.

Such a requirement would no doubt result in far fewer instances of a charity’s hiring its own board members or trustees to do legal work for them. Already beset by the problems highlighted in the \textit{ABA Journal},\textsuperscript{81} trustee or director/attorneys who are not able to get top dollar for their services through “buddy arrangements” on a board will, unless truly motivated by charitable impulses, probably defer to outside counsel.\textsuperscript{82}

Another remedy for this situation would be to require charitable board members or charitable trustees to petition the Probate Court, which requires notice to the Attorney General, whenever one of them wants to do legal work for the organization. In such a case, the entity would have to show that it was not self-dealing with its own board members or trustees, and, if only a conflict existed, that the fees being charged were reasonable and made in good faith. Although at first blush this alternative might seem to involve more time and paperwork than either the Probate Court or Attorney General would want, the cautionary effect of these filings on charitable fiduciaries will be worth any additional effort on the part of the State.

The inquiry of the Attorney General in \textit{Fuller Trust}\textsuperscript{83} was directed first at which fees charged by the lawyers to the trust were actually for


\textsuperscript{81} See supra notes 2-10 and accompanying text (noting the heightened threat of liability where an attorney serves as a director or trustee for a corporation).

\textsuperscript{82} “Buddy arrangements” may violate Model Rule 8.4 because it is professional misconduct for an attorney to commit an offense involving dishonesty or to violate the rules through the acts of another or to violate the Rules including charging unreasonable fees. MODEL RULES OF PROFESSIONAL CONDUCT Rules 8.4, 1.5 (1992). The Official Comment to Rule 8.4 states that, “[a] lawyer’s abuse . . . of positions of private trust such as trustee, . . . officer, director or manager of a corporation or other organization . . . suggest an inability to fulfill the professional role of attorney,” MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 cmt. (1992).

\textsuperscript{83} Attorney General v. Fuller Trust, Inc., No. SJC-06386 (Mass. argued Jan. 6, 1994).
legal work and which were for trustees' work, for which these individuals were already being paid a flat trustees' fee. Added to this was the Attorney General's concept of what were "reasonable" legal fees, particularly in light of the trust's charitable nature. Of the roughly $690,000 in legal fees charged the trust, the Attorney General determined that approximately half ($345,000) represented "legal" work performed "at a reasonable rate." Still, each lawyer was forced to return $250,000 to the trust, for a total of $500,000.

On what theory or theories was the additional $155,000 extracted?

The first way to look at this is that the entire $690,000 represented "profit" to the self-dealing lawyers and that a $500,000 settlement was reached simply to avoid the costs of litigation to the trust and to the Attorney General in terms of time and money. Even if this were so, the Attorney General's brief never states that all $690,000 would have been returnable absent the settlement. There is, however, another matter that may have led to the settlement at $500,000. Although the duty of loyalty was violated by self-dealing, there is another duty here that the lawyer/trustees may have breached: the duty of care. Under this duty, trustees must, for one thing, preserve trust assets. In the Fuller case, not only was $690,000 siphoned off by the trustees to pay themselves as lawyers, but approximately $2.3 million of work was delegated by the trustees to other experts such as architects and consultants, without a shovel ever being put in the ground. Improper delegation violates the duty of care. Investigation of the fees may well have disclosed improper delegation of "discretionary," as opposed to "ministerial," matters to these experts. For example, a number of fees were charged to the trust by

84. Sors Affidavit, supra note 31, at 18-20.
85. Id. at 19.
86. Id. at 20; Peter S. Canellos, 2d Trustee Quits; To Repay Milton Trust $250,000, BOSTON GLOBE, August 21, 1992, at 21.
87. Id. at 22.
88. See DUKMINIER & JOHANSON, supra note 22, at 871-74 (stating that the fiduciary duty of care requires the trustee to collect and protect trust property, to earmark trust property, not to mingle trust funds with the trustee's own funds, and not to delegate to others the acts which the trustee can reasonably be required to perform personally).
89. Telephone Interview with Johanna Sors, Assistant Attorney General of Massachusetts (Nov. 19, 1993) [hereinafter Telephone Interview with Sors] (notes on file with the author).
90. See DUKMINIER & JOHANSON, supra note 22, at 874 (stating that, in general, the trustee's duty of care requires the trustee to personally implement the provisions in the trust instrument). The trustee can, however, delegate certain functions that are "ministerial" and not "discretionary." Id. Some examples of ministerial functions include the hiring of an attorney, accountant or real estate agent. Id.
"consultants."

Almost by definition, a consultant tends to give "advice" about choices that need to be made, rather than doing ministerial tasks that must be done. Upon examination, a lot of that advice might have been found to be within the realm of that which the trustees themselves should have investigated in exchange for their flat fee as trustees.

As far as appears from the record, the Attorney General found the entire delegation proper, despite the fact that it virtually destroyed the working capital of the trust. The Attorney General appears to be saying that A and B also acted prudently as to other matters which fell under their duty of care despite the disastrous and expensive results. This author is not as sanguine about these "mistakes" as the Attorney General seems to be. The trustees should have returned to the trust all $690,000 of hourly fees (whether or not for strictly legal work) because of their self-dealing, but they should also have returned an additional amount (to be determined from thorough investigation) from the other $2.3 million in professional fees for work they delegated out as trustees. This author is simply hard-pressed to believe that these trustees have acted as prudent persons in preserving the trust property.

On the matter of fees, had A and B been in a simple conflict position, then this author thinks that the issues addressed by the Attorney General

92. The Attorney General's settlement did not include an inquiry as to whether the trustees violated their duty of care in delegating functions to third parties. See id. 20-25.
93. Id.
94. The real problem here may be that by acceding to the trustees' earlier cy pres petition for extensive expansion of the facility, the Attorney General had already assented to a great expense to the trust, whether for a $3.5 million developer to complete the project or $3 million paid for professional services without any building. Id. at 11-12. While the Attorney General required the trustees to return $500,000 to the trust for overbilling, the Attorney General substantially excused, because of the unforeseen circumstances mentioned earlier, the other $2.5 million in professional fees which was charged to the trust and may have been wasted. Id. at 22.

On October 9, 1992, the Massachusetts Probate Court reserved and reported six questions regarding the Fuller Trust to the Massachusetts Appeals Court, and on May 6, 1993, reserved and reported one additional question regarding the settlement agreed to by the Trustees and the Attorney General. AG Brief, supra note 31, at addendum. The Trustees requested direct appellate review of these questions, and the Attorney General joined in their request, thus bypassing review in the Appeals Court and going directly to the Massachusetts Supreme Judicial Court. Fuller Trust (No. SJC-06386). The Supreme Judicial Court accepted the case and it was transferred from the Appeals Court on October 22, 1993. Id. In a phone conversation with Assistant Attorney General Soris, Ms. Soris stated that she does not expect the Supreme Judicial Court to involve itself with the substance of the settlement because of the limited nature of the instructions requested. Telephone Interview with Soris, supra note 89. Ms. Soris does not, however, entirely exclude such a possibility. Id.
in *Fuller Trust* should have been determinative. Were the fees charged fair and in good faith? If they were, the Attorney General’s rationale would make sense: the strictly legal work charged at a rate reasonable in light of the charitable nature of the client could be charged to the trust. However, since this was self-dealing, the Attorney General should have required the surcharge suggested in this Article.

**V. RECOMMENDED ENFORCEMENT MECHANISMS**

**A. Professional Discipline of Lawyer/Fiduciaries**

In addition to Attorney General action, A and B might also be subject to disciplinary charges as attorneys under Model Rules of Professional Conduct and and 1.8 and, if a proper plaintiff could be...

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95. The trustees in recent Massachusetts Attorney General investigations at Boston University and Newbury College who charged their charitable entities fees for service were in a simple conflict position. Anthony Flint, *Lucrative Tie Among College’s Hierarchy*, BOSTON GLOBE, March 25, 1993, at 25, 31; see also Anthony Flint, *AG to Scrutinize Newbury’s Records*, BOSTON GLOBE, March 27, 1993, at 14 (noting that the Massachusetts Attorney General will conduct an investigation into the business deals made by, and arguably for, the benefit of the Newbury College trustees).

96. *See supra* notes 93-94 and accompanying text.

97. More than 35 states and the District of Columbia have adopted all or significant portions of the Model Rules. *STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS* at x (1993).

98. Model Rule 1.5 sets forth an affirmative duty on the attorney’s part to charge reasonable fees. *MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5* (1992). Model Rule 1.5 outlines several factors to determine the reasonableness of fees including: (1) the fee customarily charged in the locality for similar legal services; (2) the amount involved and the results obtained; and (3) whether the fee is a fixed one or not. *Id.* The Model Code of Professional Responsibility DR 2-106(B) uses similar factors to determine whether a fee is clearly excessive. *MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B)* (1981). In any event, attorneys are advised under Rule 6.1 to do work for charities on a pro bono basis, or at least for a substantially reduced fee. *MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1* (1992).

99. Model Rule 1.7(b) prohibits an attorney from representing a client when the attorney’s own interests may “materially” limit the representation of that client. *MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)* (1992). The Rule provides an exception where “the lawyer reasonably believes the representation will not be adversely affected and ... the client consents after consultation.” *Id.* The Official Comment to Rule 1.7 states that “[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.” *MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt.* (1992). The Comment further states:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer’s resignation from the board and the possibility of the corporation’s obtaining legal advice from another lawyer in such situations. If there is a material risk that the dual role will compromise the lawyer’s independence of professional judgment, the lawyer should not serve as a director.

*Id.* By analogy, trustees or directors, who are also attorneys, should not hire themselves as attorneys for a charitable trust or charitable corporation if the concerns outlined in the Comment to Rule 1.7 are present. *Id.*
found, might be subject to a malpractice claim. If it is argued that the lawyer's interest in fees led to self-hiring in *Fuller Trust*¹⁰¹ and that this caused the trustees to try to "do it themselves" (the development) rather than hire out to a developer (or scale back the project if it was too expensive), they might be subject to discipline under Rule 1.7.¹⁰²

Further, there is also a competency issue present. If attorneys A and B were not competent to do the work they charged for, they should have delegated it to a developer. But here they arguably kept much of a "developer's work" for themselves.¹⁰³ Although the Attorney General apparently viewed their actions as reasonable, this Article questions this conclusion.¹⁰⁴

Rule 1.8 indicates that lawyers might be subject to discipline for "knowingly acquire[ing] a] . . . pecuniary interest adverse to a client" (the trust).¹⁰⁵ The exceptions to this Rule do not appear to let these lawyers off the hook because: (a) a disclosure is ineffective when made "to oneself;" (b) there was no reasonable opportunity here for the trust to get independent counsel, and (c) the trustees cannot "consent" to their own activities as lawyers.¹⁰⁶

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¹⁰⁰. Model Rule 1.8 specifically prohibits the attorney from "knowingly acquire[ing] an ownership, possessory, . . . or other pecuniary interest adverse to the client." *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.8 (1992). The Rule outlines an exception where "the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; . . . the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; . . . and the client consents in writing thereto." *Id.*


¹⁰². *See supra* note 99 (noting that Model Rule 1.7 prohibits the attorney from representing a client when the attorney's pecuniary interest in fees will adversely affect the representation of the client). When charitable trustees hire themselves as attorneys for the trust, they arguably acquire a beneficial or pecuniary interest in the trust, namely, the fees the trustees will be paid in their positions as attorneys. In the position of trustee, this amounts to self-dealing, whereas in the position as attorney, this amounts to an impermissible conflict of interest under Model Rule 1.8. *MODEL RULES OF PROFESSIONAL CONDUCT* Rule 1.8 (1992). The exceptions outlined in Model Rule 1.8 are not applicable because client consent could not be obtained; *supra* note 100 (noting an exception when the client consents after full disclosure). Two solutions might be to require the written consent of the attorney general or to permit this type of conflict where the trust instrument sets forth a waiver.

¹⁰³. *See supra* note 42 and accompanying text (noting that the trustees acted as developers to save the expense of a developer's fee).

¹⁰⁴. *See supra* notes 57-61 and accompanying text (stating that the Massachusetts Attorney General decided that the trustees had acted reasonably in developing the project themselves).


¹⁰⁶. *Id.* at Rule 1.8(a)(1)-(3). Another solution to the conflict or self-dealing situation, would be to require independent advice and written consent from the attorney general. Thereafter, continual oversight of the trustee's actions could prevent what occurred in the *Fuller Trust* case. To expect meaningful oversight might be unrealistic; however, since most attorneys general are already overburdened, understaffed, and low on resources. James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 669 (1985).
Rule 1.5 may also be violated because the fees here were too high for legal services to a charity in the Boston area or alternatively, because of the "amount involved and the results obtained."\textsuperscript{107} As to the first issue, the Attorney General implicitly found that even the amount charged by A and B for strictly legal work was too expensive.\textsuperscript{108} As to the second, the $690,000 was clearly and grossly out of proportion to the results, which were noticeably absent in the Fuller case.

Given such possible violations, Attorney General referral of self-dealing or unreasonable conflict situations to a Board of Bar Overseers or comparable State lawyer licensing board might have a strong deterrent effect. Certainly it is a mode of enforcement which should be considered.

B. Expanding Actions to "Beneficiaries" of the Charity

Disciplinary procedures aside, attorneys general in a situation like Fuller Trust ordinarily see their responsibility, if any, as limited to an action against the lawyers as fiduciaries to return ill-gotten monies to the trust.\textsuperscript{109} If these fiduciaries feel they have been misadvised, it would be up to them to seek indemnification from the lawyers. Where the trustees are the lawyers, as in Fuller, this indemnification would of course not be sought. This would leave whatever class of "specially interested trust beneficiaries" that could be formed to bring an action against the lawyers as lawyers to the trust. If Attorney General action against the lawyers as trustees is lacking or somehow deficient,\textsuperscript{110} the trust beneficiaries could bring an action against the lawyers as fiduciaries. Even in the latter case, however, such a course faces large obstacles.

In many states, by common law or statute, the Attorney General is arguably the only party who can bring an action against the breaching fiduciaries.\textsuperscript{111} This action is equitable and, at best, can result in the

\textsuperscript{107} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1992).
\textsuperscript{108} Soris Affidavit, supra note 31, at 18-20.
\textsuperscript{109} Telephone Interview with Soris, supra note 89; see supra note 85 and accompanying text (stating that the Attorney General applied a test of reasonableness to the legal fees).
\textsuperscript{110} Expanding the class of interested beneficiaries may not result in greater enforcement. See, e.g., Developments, supra note 9, at 1607. Without greater disclosure requirements, a plaintiff's attorney will not have an incentive to sue because of high discovery costs. Moreover, beneficiaries may not have a sufficiently strong economic incentive to pursue litigation. Thus, the "frivolous suit" argument against an expansion of the standing requirements is invalid in the charitable context.
\textsuperscript{111} See Developments, supra note 9, at 1595 (noting that most state statutes and courts vest the power to enforce the duties of trustees of charitable organizations in state attorneys general). See, e.g., CAL. GOV. CODE § 12598(a) (West 1992); UNIFORM SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT § 11 (1954).
complete return to the charity of the money obtained in abuse of the trust. The argument against granting "specially interested beneficiaries" standing in these cases is particularly strong where the Attorney General has taken some (though perhaps insufficient) action against the fiduciaries. Even if this hurdle were overcome, such beneficiaries face the privity barrier in a number of states. Privity may be found under the particular state’s law on private trusts.\textsuperscript{112} If so, a real question remains whether charitable trust

\textsuperscript{112} Generally, an attorney’s obligation is toward the attorney’s client and not to a third party in the absence of fraud or collusion. Pelham v. Griesheimer, 440 N.E.2d 96, 98-99 (Ill. 1982). The primary concern in extending liability for negligence towards nonclients is the unlimited and unknown number of potential plaintiffs, id. at 99, and the possibility of "vexatious litigation and suits by irresponsible parties who do not have a tangible stake in the matter and have not conducted appropriate investigations." In the Matter of the Trust Made by DeLong, 565 N.Y.S.2d 569, 570 (1991). Moreover, when the representation is adversarial in nature, expanded liability can interfere with the lawyer’s duty of undivided loyalty towards her client. Pelham, 440 N.E.2d at 100. The trend in tort law, however, has been to abolish the privity of contract barrier towards the nonclient who is specifically intended to be the beneficiary of the attorney’s transaction. Brenda Boykin, Note, \textit{The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits}, 63 N.C. L. REV. 999, 1013 n. 114 (1985). A nonclient can successfully assert that an attorney owed him a duty of reasonable care to accomplish X when there are sufficient facts showing that the primary or direct purpose of the transaction or relationship between the lawyer and the client (or the client’s intent) was the accomplishment of X for the nonclient, third party’s benefit. Barbara L. Walker, Note, \textit{Attorney’s Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity}, 21 WASHBURN L.J. 48, 59 (1981). California courts balance the following factors in determining liability towards nonclients: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant’s conduct and the injury suffered; (5) the moral blame attached to the defendant’s conduct; and (6) the policy of preventing future harm. Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958). As in the will drafting cases, nonclient beneficiaries should be able to bring malpractice claims against negligent scriveners and/or attorney’s of private trusts. The concern for an unlimited and unknown number of plaintiffs should not deter courts in extending liability in the private trust area any more than it has in the will drafting area, as the beneficiaries are ascertained. In the charitable trust area, however, the beneficiaries are unascertained, which is one of the primary reasons why state attorneys general are given enforcement powers over charitable trusts. Kenneth L. Karst, \textit{The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility}, 73 HARV. L. REV. 452-60; see Fishman, \textit{supra} note 106, at 668-69 (1985) (noting that state attorneys general have extremely limited resources and a multiplicity of responsibility and, thus, selectively pursue suits against charitable fiduciaries leaving charities largely self-regulated). Moreover, attorneys general do not have the power to bring malpractice claims against a lawyer/fiduciary, or other tort claims.

The other concern of the courts in allowing specially interested beneficiary suits—the adversarial or nonadversarial nature of the client’s representation—would of course depend on the facts and circumstances of the particular case. The question would be whether the attorney/trustee as attorney had undertaken a duty towards the client (the trust) that was adversarial in nature. In the \textit{Fuller Trust} situation, was the attorney’s duty of loyalty towards the trust client (the primary purpose of the representation being the development of the elderly facility) adversarial in nature? In other words, would the potential for future malpractice liability towards the nonclient detract in some manner from the attorney’s representation of the trust? Probably not, because this type of transaction is precisely one in which the primary purpose of the attorney’s representation is for third party nonclients. In fact, the fiduciary’s common law duty requires the fiduciary to administer the affairs of the trust exclusively in the interests of the beneficiaries of the trust. \textit{RESTATEMENT (SECOND) OF TRUSTS} § 170 (1959).
beneficiaries are definite, ascertainable or "interested" enough to bring an action that is permissible for their private trust counterpart. This Article shall examine the possibilities under present and developing law for non-Attorney General actions against the fiduciaries of charitable organizations. Then the author will examine the possibility of suing charitable fiduciaries who are also attorneys in their role as lawyers to the charity.

1. Actions Against the Lawyer/Trustee of a Charitable Trust

The paradigm case, Fuller Trust, involved a charity originally organized as a trust. In such a case, fiduciary standards are not only high, but are clearly established. However, plaintiffs other than the Attorney General would have to be potential or actual beneficiaries of a charitable trust in order to bring an action against the lawyer-trustee.

The lawyer's role is compatible with the fiduciary's role in regard to whose interests the transaction further. **See Bryant R. Gold, Note, Should Lawyers Serve as Directors of Corporations for Which They Act as Counsel, 1978 Utah L. Rev. 711, 713** (noting that the lawyer's judgment is to be exercised solely for the benefit of the client). Moreover, there is no potential for the attorney's duty of loyalty towards the trust to be compromised by a conflict of interest between the trust client and the intended nonclient trust beneficiary because the interests of the client and beneficiary are compatible. Cf. **Pelham, 440 N.E.2d at 100-01** (asserting that "courts are more willing... to extend an attorney's duty to nonclients in cases in which the attorney's representation of his client has essentially been of a nonadversarial nature, such as drafting wills for the benefit of intended beneficiaries thereunder").

1. See **Dukeminier & Johanson, supra note 22, at 618** (stating that "(t)he only person other than the attorney general who can enforce a charitable trust is a person with a special interest as a beneficiary"). A specially interested beneficiary is one who can demonstrate that "he or she is entitled to receive a benefit under the trust that is not available to the public at large or to an average beneficiary." Id.; see, e.g., Gray v. Saint Matthews Cathedral, 544 S.W.2d 488, 490-91 (Tex. Civ. App. 1976) (holding that a parishioner can sue to enforce a trust for the benefit of his church); Gordon v. City of Baltimore, 267 A.2d 98, 101 (Md. App. 1970) (holding that a taxpayer can sue to prevent the transfer of a library held in trust from the Peabody Institute in Baltimore to the Pratt Library in that city); Jones v. Grant, 344 So. 2d 1210, 1211 (Ala. 1977) (granting standing to students to sue college trustees). But see Miller v. Aderhold, 184 S.E.2d 172, 174-75 (Ga. 1971) (denying standing to students to sue college trustees). Standing is typically denied where the plaintiff-beneficiaries claim that their "special interest" is that they are the recipients of the charitable organization's services. **Developments, supra note 9,** at 1597.

113. See **Dukeminier & Johanson, supra note 22,** at 618 (stating that "(t)he only person other than the attorney general who can enforce a charitable trust is a person with a special interest as a beneficiary"). A specially interested beneficiary is one who can demonstrate that "he or she is entitled to receive a benefit under the trust that is not available to the public at large or to an average beneficiary." Id.; see, e.g., Gray v. Saint Matthews Cathedral, 544 S.W.2d 488, 490-91 (Tex. Civ. App. 1976) (holding that a parishioner can sue to enforce a trust for the benefit of his church); Gordon v. City of Baltimore, 267 A.2d 98, 101 (Md. App. 1970) (holding that a taxpayer can sue to prevent the transfer of a library held in trust from the Peabody Institute in Baltimore to the Pratt Library in that city); Jones v. Grant, 344 So. 2d 1210, 1211 (Ala. 1977) (granting standing to students to sue college trustees). But see Miller v. Aderhold, 184 S.E.2d 172, 174-75 (Ga. 1971) (denying standing to students to sue college trustees). Standing is typically denied where the plaintiff-beneficiaries claim that their "special interest" is that they are the recipients of the charitable organization's services. **Developments, supra note 9,** at 1597.

114. See **infra** notes 116-123 and accompanying text.

115. See **infra** notes 116-123 and accompanying text.


117. **See supra** notes 30-71 and accompanying text (setting forth the facts of the Fuller Trust case).

118. **Fiduciary Duties, supra note 15,** at 451-52.

119. See **supra** note 113 and accompanying text (noting that only specially interested beneficiaries have been granted standing to sue under a charitable trust).
Such beneficiaries are, by definition, unascertained, at least to a degree. Still, a lawyer’s negligence in advising the trust to waste all this “preparation” money, or a lawyer’s misfeasance in charging excessive fees which inhibited the fulfillment of the trust’s charitable purpose, might logically be actionable in some way by those who had advanced deposits on rooms in the lifecare facility or even those who are presently staying in the existing structure. The argument is that the lawyers owed a duty to these people to advise the trust properly in the furtherance of their interests. The lawyers breached this duty, causing tort liability. Accordingly, it may make sense to a progressive court to let the “specially interested beneficiaries” have standing in a civil suit against these two attorneys for malpractice damages.

2. Actions Against the Lawyer/Director of a Charitable Corporation

Increasingly, however, charities are organized as charitable corporations and not as charitable trusts. Charitable corporations are entities whose fiduciary standards were, at least initially, lower than the fiduciary standards in charitable trust law. As the law has developed, the fiduciary standards in nonprofit corporation law and charitable trust law are now less clear. We must carefully examine those standards before proceeding to an analysis of whether attorneys advising charitable corporate fiduciaries can be held liable and to whom.

120. See Karst, supra note 112, at 436-37 (stating that in a typical charitable organization, “no one knows who a beneficiary will be until the charity confers a benefit on him, and after such a benefit is conferred he has no right to expect further benefits, and thus no remaining interest in the charity’s funds”). By definition, a charitable trust “is a trust whose ‘beneficiaries’ are from start to finish uncertain as to identity.” GEORGE G. BOGERT, TRUSTS AND TRUSTEES § 363 (2d ed. rev. 1991). In Pelham, the court discussed instances where the privity barrier would not be applied, namely, where the attorney client relationship arose for the benefit of a third party and where the third party “could have justifiably relied” on the attorney’s duty to exercise reasonable care. Pelham v. Griesheimer, 440 N.E.2d 96, 101 (Ill. 1982). Certainly the beneficiaries in the Fuller Trust case “could have justifiably relied.” Id.

121. Fiduciary Duties, supra note 15, at 449-50; see Fishman, supra note 106, at 618 (noting that the charitable corporation rather than the charitable trust has become the predominant organizational form for charitable and benevolent activities in the United States).

122. Fishman, supra note 106, at 651.

123. Developments, supra note 9, at 1593.
3. Fiduciary Standards for Directors of Charitable Corporations

Under state statutory and common law, directors of for-profit corporations must satisfy the fiduciary duties of care and loyalty.\(^\text{124}\) Under the first duty, corporate fiduciaries must discharge their obligations "with the care an ordinarily prudent person in a like position would exercise under similar circumstances."\(^\text{125}\) In discharging the duty of loyalty, such fiduciaries must act in "good faith" and in a manner they reasonably believe to be in the best interests of the corporation.\(^\text{126}\)

Some courts have indicated that nonprofit directors should be held to the high standards typically imposed upon trustees.\(^\text{127}\) One case stated that "all property held by a benevolent corporation is impressed with the charitable trust."\(^\text{128}\) It has been argued that fiduciary duties are especially important in the nonprofit sector because the common stockholder, who can bring a derivative suit against for-profit, corporate fiduciaries, has no strict analogue in the nonprofit sector.\(^\text{129}\) The fact that no profits are distributed in a nonprofit context leaves no one financially interested in being sure that corporate assets are used for proper corporate purposes. Thus, strict standards of care and loyalty are needed to constrain fiduciaries where the market, or bottom line, does not.

In Massachusetts, the Director of the Attorney General's Charities Division has indicated that he believes the nonprofit director standard is somewhere in between the strict trustee standard and the lenient for-profit director standard.\(^\text{130}\) A number of states, however, have been unwilling to scrutinize the actions of nonprofit directors closely lest stringent standards discourage volunteers from assuming directorships.\(^\text{131}\) In fact, the Revised Model Nonprofit Corporation Act of 1987 includes standards nearly identical to those used in the for-profit context.\(^\text{132}\) "Unlike the higher standard for trustees, the Model Act does not strictly forbid transactions that implicate the interests of corporate directors if the

\(^{125}\) \textit{Id.}
\(^{126}\) \textit{Id.} at § 8.30(a)(1), (3).
\(^{127}\) \textit{Developments, supra} note 9, at 1593.
\(^{128}\) \textit{Samarkand of Santa Barbara, Inc. v. County of Santa Barbara, 216 Cal. App. 2d 341, 355, 31 Cal. Rptr. 151, 159 (1963).}
\(^{129}\) \textit{Developments, supra} note 9, at 1591.
\(^{130}\) \textit{Burling & Allen, supra} note 16, at 13-14.
\(^{131}\) \textit{Developments, supra} note 9, at 1593; see, e.g., \textit{Cal. Corp. Code} §§ 5239, 7231.5 (West Supp. 1994) (providing additional protection to volunteer directors).
\(^{132}\) \textit{Developments, supra} note 9, at 1593-94.
transactions are fair to the corporation or are approved in accord with statutory provisions."\textsuperscript{133}

Many commentators, however, have not been pleased with the adoption of for-profit fiduciary standards by nonprofit codes.\textsuperscript{134} For example, they have argued that such standards ignore in the charitable area, "the absence of specific beneficiaries or shareholders to act as watchdogs of directors."\textsuperscript{135} Whatever hurdles exist due to lower fiduciary standards for a charitable corporation's directors than would be true of a charitable trustee, questions of standing are even more problematic for those who would enforce fiduciary duties in either type of charitable entity.

4. Standing for Suits Against Charitable Fiduciaries

Common law states that "specially interested beneficiaries" of a charitable trust may have standing to sue trustees for breach of fiduciary duty.\textsuperscript{136} Cases which have so held, however, are strictly limited both in number and in their definitions of appropriate plaintiffs.\textsuperscript{137} Moreover, many jurisdictions effectively vitiate this general rule by giving the Attorney General exclusive, or at least primary, power in this area.\textsuperscript{138} Thus, the private actions that are allowed may only lie where the Attorney General has either failed or refused to act. Still, there is caselaw stating that the Attorney General does not have exclusive power to enforce charitable trusts in California.\textsuperscript{139} In addition, influential commentators, such as Jesse Dukeminier and Stanley Johanson, have argued for expanding the possibility of private enforcement suits, at least where the Attorney General does not act.\textsuperscript{140}

\textsuperscript{133} Id. at 1594.

\textsuperscript{134} See, e.g., Fiduciary Duties, supra note 15, at 460 (noting that the for-profit fiduciary standard does not account for the absence of specially interested beneficiaries and shareholders to police the nonprofit organization).

\textsuperscript{135} Id.

\textsuperscript{136} DUKEMINIER & JOHANSON, supra note 22, at 618. Donors, however, are generally denied standing. See Developments, supra note 9, at 1596-97 (noting that the restriction against donor standing may stem from a concern that too many frivolous suits will be brought by many small donors).

\textsuperscript{137} Developments, supra note 9, at 1598.

\textsuperscript{138} Id. at 1595-96 n.32. Massachusetts is one state where the Attorney General has exclusive power to sue nonprofit fiduciaries for breaches of trust. Id. at 1596 n.31.

\textsuperscript{139} Holt v. College of Osteopathic Physicians and Surgeons, 61 Cal. 2d 750, 754, 394 P.2d 932, 935, 40 Cal. Rptr. 244, 247 (1964).

\textsuperscript{140} JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES, TEACHERS' MANUAL 174-75 (1990).
Some courts have held that "[t]he rule that parties especially interested may sue to compel performance is as applicable to the law of charitable corporations as to the law of charitable trusts."\textsuperscript{141} Under the Revised Model Nonprofit Corporation Act, "members"\textsuperscript{142} may have a statutorily defined suit, as well as those with a "‘special relationship’ to the corporation, including beneficiaries of the corporation’s activities."\textsuperscript{143} Moreover, directors have not been specifically prohibited from bringing such a suit.\textsuperscript{144} The New York Not-For-Profit Corporation Law permits "specific groups enumerated in the corporation’s charter to bring actions against breaching directors."\textsuperscript{145}

The case of \textit{Jones v. Grant}\textsuperscript{146} is often cited as an example of expanded standing since it allowed students at a nonprofit college to bring a class action against its board of directors for misuse of funds.\textsuperscript{147} Moreover, in \textit{Stern v. Lucy Webb Hayes National Training Center School for Deaconesses and Missionaries},\textsuperscript{148} a case closer to the facts of the \textit{Fuller Trust} case, a hospital’s patients were allowed to sue the hospital’s trustees because they had a "‘special interest to challenge the conduct of the trustees.’"\textsuperscript{149} A broadened conception of standing would permit any beneficiary of a charitable organization’s services to sue that organization’s fiduciaries.\textsuperscript{150} Some courts have criticized the \textit{Stern} court’s broadened conception of standing and have commented on its limited use in charitable trust and nonprofit corporation law.\textsuperscript{151} In \textit{Christiansen v. National Savings and Trust Company},\textsuperscript{152} the court dismissed a class action brought by beneficiaries who sought private damages

\begin{footnotes}
\item[142.] \textit{See Revised Model Nonprofit Corp. Act} § 6.30(a)(i) (1988) [hereinafter RMNCA] (noting that "any member or members having five percent or more of the voting power or . . . fifty members" can bring an action on behalf of the corporation).
\item[143.] \textit{Developments, supra} note 9, at 1594-95.
\item[144.] \textit{John v. John}, 450 N.W.2d 795, 802-03 (Wis. App. 1989).
\item[145.] \textit{N.Y. Not-For-Profit Corp. Law} § 720(b) (McKinney 1970).
\item[146.] 344 So. 2d 1210 (Ala. 1977). \textit{But see} Miller v. Alderhold, 184 S.E.2d 172 (Ga. 1971) (denying standing to students who brought suit against the trustees of a private college that was organized as a charitable corporation).
\item[147.] \textit{Jones}, 344 So. 2d at 1211.
\item[149.] \textit{Attorney General v. Fuller Trust, Inc.}, No. SJC-06386 (Mass. argued Jan. 6, 1994).
\item[150.] \textit{Stern}, 367 F. Supp. at 540.
\item[151.] \textit{Developments, supra} note 9, at 1597-98.
\item[152.] \textit{Id.} at 1598.
\item[153.] 683 F.2d 520 (D.C. Cir. 1982).
\end{footnotes}
rather than equitable enforcement against a nonprofit corporation's directors.\textsuperscript{154}

One reason for the \textit{Christiansen} court's disinclination to expand standing in the charitable arena appears to be that "[r]ecipients of services, the beneficiaries of corporate activities," did not have a sufficient interest in the organization to call board members to account since they have no right to the services.\textsuperscript{155} If this privilege/right distinction is important to courts, it is perhaps not an impediment on facts such as those in \textit{Fuller Trust}, where existing "home" occupants were paying for their accommodations, and many others had put down $1,000 deposits on units which were planned to be built.\textsuperscript{156} Thus, one way to expand standing in the charitable area, while keeping it within traditional conceptual limits, would be to allow those recipients of services who could show some contractual or financial stake in the services to sue.

\textbf{C. Obligations of Charitable Fiduciaries Under the Internal Revenue Code}

Other than state attorneys general and a limited group of specially interested beneficiaries, only the Internal Revenue Service (IRS) can enforce charitable fiduciary duties, in this case largely the duty of loyalty.\textsuperscript{157} The typical charity is granted its immunity from federal taxation under Internal Revenue Code section 501(C)(3), which provides that "no part of the net earnings of [the charity] inures to the benefit of any private shareholder or individual."\textsuperscript{158} Courts have construed this language to prohibit self-dealing by charitable fiduciaries.\textsuperscript{159} "The inurement prohibition of Internal Revenue Code section 501(C)(3) is generally directed at payments that are made to shareholders or individuals for purposes other than as reasonable compensation for goods or services."\textsuperscript{160} Internal Revenue Code section 503(b) also denies tax exemption to

\begin{thebibliography}{9}
\item \textsuperscript{154} Christiansen, 683 F.2d at 527-29.
\item \textsuperscript{155} Kristen M. Brown, \textit{The Not-For-Profit Corporation Director: Legal Liabilities and Protection}, 28 \textit{FED'N INS. COUNS. Q.}, 57, 61 (1977).
\item \textsuperscript{156} Peter S. Canellos, 2d Trustee Quits; To Repay Milton Trust $250,000, \textit{BOSTON GLOBE}, August 21, 1992, at 21.
\item \textsuperscript{157} \textit{Developments, supra} note 9, at 1598.
\item \textsuperscript{158} I.R.C. § 501(c)(3) (1988).
\item \textsuperscript{159} \textit{Developments, supra} note 9, at 1598.
\item \textsuperscript{160} \textit{See} [1990] 6 Stand. Fed. Tax Rep. (CCH) para. 3033.0227 (CCH explanation).
\end{thebibliography}
organizations that engage in specified "prohibited transactions," including the payment of excessive compensation to fiduciaries.\textsuperscript{161}

Private foundations, a subclass of charity among which nearly all the charitable trusts (as opposed to corporations) are found, are subject to even more rigorous Internal Revenue Code treatment.\textsuperscript{162} For example, private foundations cannot receive tax-exempt status unless their charters prohibit the foundation from engaging in any act of self-dealing.\textsuperscript{163} Internal Revenue Code section 4941 imposes an absolute prohibition on almost every conceivable transaction between a private foundation and a "disqualified person" including "payment of compensation" involving that person.\textsuperscript{164} Disqualified persons include, inter alia, foundation managers, owners of more than 20\% of the total combined voting power of the corporation, or owners of more than 20\% of the beneficial interest of a trust or unincorporated enterprise.\textsuperscript{165} Whereas directors of non-private foundations bear no personal risk of liability (the single IRS remedy being removal of the charity's tax exemption), self-dealing fiduciaries in private foundations can be assessed individual tax penalties (an excise of at least 5\% of the amounts involved in the acts of self-dealing for each year).\textsuperscript{166} This "excise tax" can in some cases reach 200\% of the amount involved.\textsuperscript{167}

D. Inefficiencies of Current Sanctions Against Charitable Fiduciaries

A recent comment in the Harvard Law Review concludes that neither attorney general action, nor nonprofit corporation statutes authorizing suits, nor Internal Revenue enforcement "sufficiently deter" charitable fiduciaries from violating their obligations.\textsuperscript{168} Low staffing is a key problem for attorneys general and the IRS, as is the lack of effective remedies.\textsuperscript{169} A big deterrent to suits by private parties against charitable fiduciaries is the lack of cheaply obtainable information regarding potential causes of action

\begin{footnotesize}
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\item[161.] I.R.C. § 503(b) (1988).
\item[162.] Private foundations receive their funds from, and are controlled by, an individual, a family, a corporation or a group of a limited number of members. VIRGINIA A. HODGKINSON & MURRAY S. WEITZMAN, DIMENSIONS OF THE INDEPENDENT SECTOR: A STATISTICAL PROFILE 216-217 (3d ed. 1989).
\item[163.] Developments, supra note 9, at 1599 nn.56-57.
\item[164.] Id. at 1599 n.57.
\item[166.] Id.
\item[168.] Developments, supra note 9, at 1600.
\item[169.] Id.
\end{enumerate}
\end{footnotesize}
for what the article styles the "entrepreneurial attorney."  Whereas attorney driven stockholder derivative litigation can be effective in the for-profit context, often because the attorney is able to "piggyback" onto Securities and Exchange Commission (SEC) investigations, it is rarely undertaken in the nonprofit sector.  Added to this lack of information (which is being remedied to some extent by IRS disclosure requirements for charities) are the major standing problems outlined above.

Since increased effectiveness of sanctions on charitable fiduciaries can be more cheaply purchased by strengthening the duties themselves than by adding huge numbers of enforcement personnel, commentators have argued that the trustee standard for the duty of loyalty (which should have been in play in the Fuller Trust case) should be applied to all forms of charity.  Such a standard prohibits self-dealing and would have "an enormously salutary effect."

However, the Model Act rejects the trustee standard for the duty of loyalty, because a strict duty "may cause a nonprofit corporate director to forego opportunities that would benefit the corporation" or decline to serve altogether for fear of liability, especially in the case of volunteers.

Likewise, the Act adopts the lenient for-profit duty of care, which is permitted to be supplemented by the "business judgment" rule, which imposes liability only in cases of "gross negligence or willful misconduct." Some courts have argued that there should be a stricter duty of care for nonprofit directors, such as the simple negligence standard

170.  Id.
171.  Id.
173.  See supra notes 136-156 and accompanying text (noting the standing limitations in suits against charitable fiduciaries).
175.  See generally Fiduciary Duties, supra note 15, at 460 (asserting that the for-profit fiduciary standard in the nonprofit context ignores the absence of specially interested beneficiaries and shareholders in charitable organizations).
177.  Developments, supra note 9, at 1603; RMNCA, supra note 142, at § 8.31 & cmt. 1.
179.  Developments, supra note 9, at 1601; RMNCA § 8.31 (1988).
applied to trustees.\textsuperscript{180} This stricter duty of care was rejected by the Model Act\textsuperscript{181} for the same reasons as was a stricter duty of loyalty.\textsuperscript{182}

As mentioned above, the \textit{Stern} case gives some hope for broadened standing to bring a suit in the first place.\textsuperscript{183} However, a subsequent federal case interpreted \textit{Stern} as saying that the fiduciary duties of the directors of a hospital are owed to the charity and not directly to the patients as beneficiaries.\textsuperscript{184} Thus, a recent \textit{Harvard Law Review} article concludes that these cases mean standing should not be given in such situations to nonpaying patients or beneficiaries, but only to those whose "'special relationship' to the organization was that of a patron or a paying customer. This approach would increase the class of potential plaintiffs yet limit the class to those who have shown a prior [financial] commitment in support of [the charity's] activities."\textsuperscript{185} The \textit{Harvard} article also concludes, however, that relaxation of standing requirements is "unlikely to enhance enforcement of fiduciary duties" and "might result in frivolous suits."\textsuperscript{186} The \textit{Harvard} article focuses instead on the problem of damages against the breaching fiduciary.\textsuperscript{187} If the maximum remedy is for the fiduciary simply to return her improperly obtained profits to the charity,\textsuperscript{188} unscrupulous fiduciaries will continue to behave dishonestly as long as the probability of getting caught is less than 100\%.\textsuperscript{189} The commentator suggests that judicially proclaimed punitive damages would be ineffective as a deterrent because of their unpredictability.\textsuperscript{190} However, a statutorily enacted system of fines that reimburses charities in an amount equal to three times the fiduciary's ill-gained profits might well

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\item \textsuperscript{180} \textit{See}, e.g., \textit{Lynch v. John M. Redfield Found.}, 9 Cal. App. 3d 293, 298, 88 Cal. Rptr. 86, 89 (1970) (noting that directors must perform their duties in compliance with strict trust principles). \textit{See also} \textit{Boston Athletic Assoc. v. International Marathons}, 467 N.E.2d 58, 64 (Mass. 1984) (suggesting that the corporate trustee will be judged by the standards applied to directors of nonprofits, and that those standards will be applied with a heightened scrutiny).
\item \textsuperscript{181} \textit{RMNCA}, \textit{supra} note 142, at § 8.30.
\item \textsuperscript{182} \textit{See supra} notes 177-178 and accompanying text (noting that a heightened standard would prevent volunteers from becoming directors and cause directors to be overly cautious in investing corporate funds).
\item \textsuperscript{183} \textit{See supra} notes 148-150 and accompanying text (allowing hospital patients to sue the trustees because the patient-beneficiaries had a special interest).
\item \textsuperscript{184} \textit{Christiansen v. National Sav. & Trust Co.}, 683 F.2d 520, 528 (D.C. Cir. 1982).
\item \textsuperscript{185} \textit{Developments, supra} note 9, at 1606.
\item \textsuperscript{186} \textit{Id.} at 1607.
\item \textsuperscript{187} \textit{Id.}
\item \textsuperscript{188} \textit{Id.} at 1607-08. Not even this was accomplished in the \textit{Fuller Trust} case. \textit{See supra} note 94 and accompanying text (noting that the Fuller trustees were merely required to return their excessive fees).
\item \textsuperscript{189} \textit{Developments, supra} note 9, at 1608.
\item \textsuperscript{190} \textit{Id.} at 1610. "Because punitive damages are likely to be awarded without any reference to the level of underenforcement, they are not likely to deter sophisticated but unethical directors." \textit{Id.}
\end{itemize}
work. The analogy here is the treble damages that are available for private enforcement of antitrust violations.

If the recommended statutory damages were paid completely or even partially to such plaintiffs, instead of to the charitable corporations themselves, this might encourage private actions via entrepreneurial plaintiffs' attorneys, partially curing underenforcement. However, there is the problem that such provisions might increase frivolous suits.

If the actions were brought solely by the attorney general and all monies returned to the charity, the higher statutory fines would have a deterrent effect. As with IRS enforcement of its “excise tax” against breaching fiduciaries, however, the problem of understaffing (and, thus, underenforcement of the penalty) would remain. Thus, this author would prefer enlisting the services of private attorneys in such actions by returning only the base amount taken to the charity, with penal damages being divided between the plaintiffs and their attorneys.

E. Potential Liability of Attorneys for Charitable Fiduciaries Who Breach Their Duties of Loyalty and Care

It should be clear by this point in the argument that counsel to charitable organizations who also choose to serve as trustees or directors of those organizations bear relatively little actual, as opposed to potential, risk of being caught for disloyalty or mismanagement and that, if they are caught, the penalties they face are relatively slight (even in such an obvious case as Fuller Trust). Of course, the members of the exclusive “club” that control charitable organizations, a number of whom are lawyers, will be the first to claim that this really does not matter all that much because mere allegations of wrongdoing will be enough to deter members of an elite group that are quite concerned with their individual reputations for propriety. They are so concerned with appearing “respectable” that they will try very hard to be respectable when carrying out their fiduciary obligations to the charity.

191. Id. at 1611. One commentator noted that such a system of “mandatory treble damages might induce juries to acquit defendants whose violations of the law do not seem 'severe.'” Id. at 1611 n.118. There is usually no problem under such a statute with juries letting defendants off when the breach is relatively minor, because derivative suits brought in state courts are tried by a judge in equity proceedings. Id.
192. Id. at 1611.
193. Id.
This author is confident that many lawyer/fiduciaries do feel so constrained regardless of their fear of being caught for wrongdoing. However, I am equally sure that lawyers are human and that they believe that by virtue of their status they are entitled to a certain standard of living. Because of their of training, lawyers as a group are probably more aware of both the risks and financial opportunities involved in serving tax-exempt organizations. If they see profitable self-dealing and “backscratching” going on all around them, many lawyers will decide to join in, uncertain, one supposes, of just how unrespectable such conduct is actually considered to be.

Attorneys general or others might turn in such lawyers to bar oversight boards for violation of disciplinary rules. So far, this practice has been infrequently used to remedy the violations described herein. Of course, not only a cynic would be forced to observe that the general, often permissive, language of these rules is drafted by lawyers, and that the boards are staffed by more of the same.\textsuperscript{195}

Malpractice litigation against attorneys representing trusts or corporations may thus prove to be a more promising avenue of enforcement. Perhaps in part because plaintiff’s attorneys benefit from such litigation (and there is an oversupply of lawyers seeking work), modern decisions have favored expanding liability beyond the privity barrier and attorney-client relationship.\textsuperscript{196} There has been an “explosive development in the field of legal malpractice [in] . . . the scope of liability of attorneys to those individuals other than the immediate client.”\textsuperscript{197} In general, this is true where it was foreseeable that the plaintiff would rely on the lawyer’s counsel, or where the plaintiff was the intended beneficiary of the lawyer’s retention.\textsuperscript{198}

Thus, in appropriate cases, “beneficiaries might be found to have rights against counsel to trustees . . . who [have] allegedly made some error which affects them.”\textsuperscript{199} Beneficiaries of a trust must rely on the trustee and the trustee’s attorney for proper carrying out of trust objectives, as

\begin{footnotes}
\item \textsuperscript{196} RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.11 at 381-90 (3rd. ed. 1989); Holly Metz, Blind Justice, Student Law., May 1993, at 26, 29.
\item \textsuperscript{197} DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 93 (1980).
\item \textsuperscript{198} Id. at 107; MALLEN & SMITH, supra note 196, § 7.11 at 381-85 & § 7.12 at 390-92.
\item \textsuperscript{199} E. Lund & C. Smith, Problem Areas in Estate & Trust Administration, The Best of M.C.L.E., Aug. 1992, at 43, 50.
\end{footnotes}
they have no independent control or power. Under Craig, Rae and their progeny "life or term beneficiaries of a trust, whose interest is diminished . . . may have a claim on the theory that they are foreseeable persons to whom the [fiduciaries'] attorney owes a duty of care." In fact, it is hard to imagine an attorney-client relationship more explicitly dedicated solely to benefit third parties than that of a fiduciary and the fiduciary's counsel.

Let us take the Fuller Trust case as an example. It is arguable that a duty of care was owed by A and B as attorneys to those who already inhabited the old age home and to those who had put down deposits on accommodations in the planned expanded facility. Though A and B would be quick to argue that their duty of loyalty to the client (the trust) might conflict with duties to these nonclients, here as in most charitable organization cases, the duties sit comfortably beside each other. Besides the duty not to self-deal at the expense of the trust and of these beneficiaries, A and B would owe both the trust and beneficiaries a duty of care not to diminish trust assets.

There are two main tests for attorney liability to nonclients: the so-called California balancing test for defining the scope of the lawyer's tort liability and the third party beneficiary test. If one could get over the standing problems for charitable (as opposed to private) trust beneficiaries discussed above, the present and future rest home inhabitants in Fuller...
Trust would seem to meet either test. As in Lucas v. Hamm, the main purpose of the transaction between the attorney and trustees was the maintenance of trust principal for the benefit of trust beneficiaries. Thus, under the California test, the trustees could be held liable for negligence in advising the near destruction of trust assets in violation of the duty of care. They were also intended third party beneficiaries of the trust/attorney relationship since the principle purpose of the attorney’s retention was to provide legal services for their benefit. The fact that the attorneys in Fuller Trust were also trustees implicates the duty of loyalty as well as the duty of care. Had the attorneys in fact been independent, they might still be held liable for negligence.

Counsel to a charitable trust might also be found liable on the theory that they aided and abetted the breach of fiduciary duty of their clients. According to section 876(b) of the Restatement 2nd of Torts, a person is liable for harm resulting to a third party from the tortious conduct of another, if that person “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.” Thus, the general rule is that a person who participates in the breach of trust by a fiduciary is responsible for the damage resulting to the trust if the person knew that the fiduciary was committing such a breach of trust or if the person had knowledge of the facts such that the person can reasonably be held to have acted in bad faith. Moreover, the person is liable “to those for whose benefit . . . the fund should have been administered.”

At least in the field of private trusts, it is clearly established that, as was said in the Massachusetts case of Kaltsas v. Kaltsas, “where the [trustee] cannot be expected to bring an action [against the attorney] for the return of assets to the [trust], ‘by reason of his interest or otherwise,’ such an action may be brought by ‘. . . a person beneficially interested in a trust fund . . . to enforce a claim in favor of such fund.’” Moreover, where the plaintiff’s petition alleged breach of fiduciary duty on the part

208. Lucas, 56 Cal. 2d at 589-90, 364 P.2d at 688, 15 Cal. Rptr. at 824.
209. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

1383
of the fiduciary, "... [t]hat is sufficient to show that the [fiduciary] is ‘unable’ [to bring an action against the attorney] ‘by reason of his interest.’"\(^{214}\)

In *Fuller Trust*, since the trustees were also the attorneys for the trust, they could hardly be expected, because of their “interest,” to sue themselves for malpractice. In addition, the language of *Kaltsas* seems to include the case where an independent attorney is being sued for assisting the fiduciary in breaching the fiduciary’s obligation.\(^{215}\) Thus, even if A and B had hired outside counsel, the present and future nursing home occupants might, by suing them for breach of fiduciary duty, establish that if the fiduciaries were as imprudent as alleged, they would not sue their own counsel under *Kaltsas*. This would allow the nursing home occupants to sue the attorney in lieu of such a suit by the trustee. Of course, as mentioned earlier, these occupants would have to establish that they had standing because of a “beneficial interest in the trust,” which is a difficult leap in a charitable rather than a private trust case.\(^{216}\)

Admittedly, no case has been found where the lawyer for a charitable trust has been successfully sued for malpractice by recipients of that trust’s services. Still, if the case can be made in the private trust area (as above) for such third party liability, I see no reason not to extend the liability to situations such as *Fuller Trust*, where the plaintiffs have a financial stake in the services of the charitable trust, and the trustee cannot or will not seek indemnification itself from the lawyer.

If liability were so extended, I see no conceptual difficulty in imposing it where the attorney is advising the director of a charitable corporation rather than the trustee of a charitable trust. Since the standards of fiduciary care and loyalty, however, are generally lower in the charitable corporate area than in the charitable trust area, the lawyer would have correspondingly lower duties to ensure the reliability of the advice that the attorney gave.

Since common law self-dealing, as opposed to conflict of interest, would be relatively rare in the charitable corporate area (because of the possibility of recusal from relevant votes), any payment by directors to themselves or their firms would only have to be *reasonable* to satisfy the duty of loyalty. State statutory definitions of self-dealing and conflict of

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214. Walsh v. Mullen, 50 N.E.2d 1, 3 (Mass. 1943) (quoting Jones v. Jones, 7 N.E.2d 1015, 1020 (Mass. 1937)).


216. *See supra* notes 136-156 and accompanying text (discussing standing limitations to suits by beneficiaries against charitable organization fiduciaries).
interest also tend to allow such transactions where the transactions are fair to the charitable corporation.\textsuperscript{217} However, if a director as “insider” self-deals for “private inurement,” the charity can lose its tax exemption.\textsuperscript{218} In the case of a private foundation, the self-dealer as a disqualified person could incur a fine.\textsuperscript{219} An attorney/director could not afford to be negligent in this area with regard to the interests of any definable group with standing.

The charitable corporation director still owes a duty of care to any group or person with standing.\textsuperscript{220} However, under the Model Act and many state statutes, this duty is merely to exercise the skill an ordinary prudent person might possess in managing the affairs of the company, a considerably lower standard than that owed by trustees.\textsuperscript{221} This situation, however, raises interesting questions when the directors are also attorneys.

Suppose first of all that the director is a lawyer, but the director and the rest of the board are being advised by independent counsel. A question certainly arises here of whether the attorney, because of the attorney’s professional expertise, owes a higher duty than the typical director. Now, suppose this attorney/director is also a member of the law firm advising the charitable corporation. If the board as a whole owes only a duty of simple prudence, can it be said that this lawyer and this lawyer’s firm owe a higher duty to beneficially interested plaintiffs than is due them by the board itself? Conceptually, this would only make sense if the duty owed to these beneficiaries was a direct one and not derivative of the firm’s duties to the board. If the lawyer’s duties to the beneficiaries were direct, nursing home occupants and hopefuls such as those in \textit{Fuller Trust} might argue as follows if the charitable entity there were a corporation: that while the law firm may have only had to advise the board to manage with simple prudence, because of their professional expertise the firm’s lawyers owed a separate, higher duty to foreseeable plaintiffs such as these beneficiaries.

\textsuperscript{217} \textit{Fiduciary Duties, supra} note 15, at 452-54.
\textsuperscript{218} \textit{Hopkins, supra} note 172, at 264-99.
\textsuperscript{219} \textit{Id.} at 453.
\textsuperscript{220} \textit{Fiduciary Duties, supra} note 15, at 453-54.
\textsuperscript{221} \textit{See supra} notes 124-126 and accompanying text (discussing the fiduciary standards of trustees and directors in charitable organizations). \textit{But see generally} Builing & Allen, \textit{supra} note 16 (stating that the standard is between a corporate and a trustee standard).
VI. CONCLUSION

Lawyers representing a charitable trust or corporation generally should not serve as trustees or directors of that organization. Though their risks of liability are less in the charitable than in the for-profit arena, these attorneys may be required by state attorneys general to return monies to the charitable entity which were obtained by abuse of the duties of care or loyalty.

Currently, however, the chance of such enforcement action is considerably less than 100%, so if risks to a personal reputation are ignored, it will always "pay" for the dishonest fiduciaries to abuse their position. At worst, they will have to return to the trust 100% of the monies dishonestly obtained. Any Internal Revenue Service action will be limited to loss of the entity's tax exempt status or, rarely, in the case of a "private foundation," will involve a fine for the director involved.

Still there is movement toward a more effective enforcement policy which should concern attorneys. "Specially interested beneficiaries" have been allowed to sue for breach of fiduciary duty and this could be expanded to suits for malpractice against the attorney in a professional role.222 Failing increased court support for such suits, overworked attorneys general could still refer lawyer fiduciary abuses to state lawyer licensing boards for professional disciplinary procedures.

Finally, some commentators have suggested statutory fines equal to more than 100% of the money dishonestly taken, or penal damages against charitable fiduciaries in private actions.223 In any event, lawyers serving as charitable fiduciaries face an increased risk of meaningful regulation amidst an atmosphere of heightened general concern over abuses of "trust" by both fiduciaries and legal professionals.

222. See supra notes 196-221 and accompanying text (describing how malpractice suits may be brought against attorneys when the attorneys have breached a fiduciary duty).

223. See supra notes 186-188 and accompanying text (recommending a system of fines that would reimburse charities in an amount equal to three times the fiduciary's improperly-gained profits).