Law Firms as Trust Directors

*Raymond C. O'Brien**

The practice of permitting a third party, other than a settlor or a trustee, to give guidance to the trustee over some aspect of trust management reflects the trend of granting settlors increasing control over their transfers of wealth. In decades past, a few states enacted legislation permitting what is known as directed trusts, but in 2017, the Uniform Directed Trust Act was promulgated, seeking to provide a modicum of uniformity among the states, as wealth is now increasingly both interstate and international. Using the Uniform Directed Trust Act as a template, this Article discusses issues pertinent to directed trusts, such as the relative power of the parties involved, their responsibilities to all parties, and the fiduciary duties owed and to whom.

But the focus of this Article is to discuss the benefits derived from choosing a law firm as the person to give direction, the trust director in a directed trust. Such an arrangement may bolster a law firm's profitability, building upon an existing fiduciary relationship, while mindful of situs, drafting of the pertinent trust provisions, and considerations relevant to the powers a law firm may use advantageously. Working in tandem with a corporate wealth manager as the trustee, the law firm, as an entity better known to the settlor, is better positioned to perform administrative tasks associated with investment decisions, distributions to beneficiaries, and modification of the initial trust purpose.

Table of Contents

* Professor Emeritus, Columbus School of Law, The Catholic University of America; Visiting Professor of Law, Georgetown University Law Center. The author is grateful to Samantha Winter and Cameron Jules Collins for their expert editorial assistance.

I. Introduction

Incrementally, competent individuals are being accorded expanding freedoms regarding disposition of their wealth. The trajectory is illustrative. The 1980s witnessed a seismic shift from probate to nonprobate transfers;[1] most importantly, there developed the creative use of intervivos trusts. Then, in the decades that followed, testators were incrementally further unencumbered from the strict shackles of will formalities,[2] public policy restraints,[3] and even claims made by future, current, or former spouses.[4] Correspondingly, so as to inhibit possible contest of a testamentary disposition, today a testator is able to avoid the testamentary process altogether and create an intervivos trust in a state situs that places significant limits on any other person with standing seeking to contest the client's intervivos trusts.[5] Coupled with the abolition of the Rule Against

---

[1] *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1108 (1984); *see also* Melanie B. Leslie & Stewart E. Sterk, *Revisiting the Revolution: Reintegrating the Wealth Transmission System*, 56 B.C. L. Rev. 61, 66-74 (2015) (describing modern developments).

[2] *See* Unif. Prob. Code § 2-503 (Unif. L. Comm'n amended 2019) (stating harmless error may be proven with clear and convincing evidence); for more modern introductions, *see also* Unif. Elec. Wills Act § 6 (Unif. L. Comm'n amended 2019); Revised Unif. Fiduciary Access to Dig. Assets Act § 18 (Unif. L. Comm'n amended 2015).

[3] *See, e.g.*, Hecht v. Superior Court, 16 Cal. App. 4th 836, 837-38 (Ct. App. 1993) (holding that human cryogenically stored sperm is part of a decedent's estate subject to probate); *see also* P.M. v. T.B., 907 N.W.2d 522, 533-34 (Iowa Ct. App. 2018) (finding no public policy prohibition to enforcement of gestational surrogacy contracts).

[4] *See, e.g.*, Unif. Premarital and Marital Agreements Act (Unif. L. Comm'n 2012) (establishing a mechanism by which competent parties may disclaim another person's property at divorce or death).

[5] *See* Raymond C. O'Brien, *Freedom to Give, Devise, and Bequeath*, 37 Quinnipiac Prob. L. J. 111, 154 (2024) (suggesting South Dakota as such a situs); *see also* Thomas P. Gallanis, *Trusts and the Choice of Law: What Role for the Settlor's Choice and the Place of Administration?*, 97 Tul. L. Rev. 805, 821-830 (2023) (discussing what law should govern trusts).

Perpetuities and the accelerating legalization of self-settled asset protection statutes,[6] the parameters of "settlor's intent" are limitless.

Intervivos trusts are included among a vast array of nonprobate transfers currently available to individuals, yet they are the vehicle of choice for most estate planners because they are fast, efficient, easily modifiable, and the "settlor's intent" may be effectuated for succeeding generations, such as with dynasty trusts. In 2000, the Uniform Trust Code was promulgated, which for the first time provided a "uniform rule" and thereby unified divergent state and federal rules pertaining to trusts.[7] In a very short period of time, additional uniform laws affecting trusts were promulgated, all formulated to guarantee more efficient disposition of wealth.[8] Viewed as complementary to each other, these promulgated uniform laws illustrate how nonprobate transfers—particularly intervivos trusts—expand the options available to competent persons to allocate their wealth. Furthermore, as transfer options and choices proliferated, so too did the need for "extensive research and analysis on the market for individual stocks,"[9] precipitating the dominance of the corporate trustee,[10] replacing the more local, but also more personal, private trustee.

Greater freedom of disposition, coupled with impersonal corporate trustees, precipitated enactment of the Uniform Directed Trust Act (UDTA) in 2017, which grants to "a person other than a trustee a power over some aspect of the trust administration."[11] This designated person

---

[6] *See, e.g.*, Mark Merric et al., *Best Situs for DAPTs in 2019*, 158 Tr. & Est. 60 (2018), https://www.wealthmanagement.com/estate-planning/best-situs-for-dapts-in-2019 [https://perma.cc/SH3X-Y2BT] (illustrating how these trusts have become important to estate planning).

[7] *Uniform Trust Code Enactment Map*, Unif. L. Comm'n, https://www.uniformlaws.org/committees/community-home?CommunityKey [https://perma.cc/QQE6-UZ5V] (last visited Oct. 19, 2025).

[8] *See* Unif. Prudent Inv. Act (Unif. L. Comm'n 1994) (establishing investment practices corresponding to capital markets); Unif. Fiduciary Income and Principal Act (Unif. L. Comm'n 2018) (permitting a trustee to react efficiently when acting impartially in the administration of a trust); Unif. Tr. Decanting Act (Unif. L. Comm'n 2015) (meant to provide flexibility for a trustee seeking to effectuate the settlor's material purpose).

[9] C. Raymond Radigan & Jennifer F. Hillman, *Brief Comment on Trustee Prudence and Passive Investing*, 4 ACTEC L.J. 297, 297-99 (2019) (commenting on the extensive research involved in modern portfolio management).

[10] *See, e.g.*, S.D. Tr. Co., https://sdtrustco.com/ [https://perma.cc/VSL8-VWKS] (last visited Oct. 19, 2025) (stating the South Dakota Trust Company's assets currently total USD $165 billion).

[11] Unif. Directed Tr. Act, prefatory note (Unif. L. Comm'n amended 2019); *see also* E. Edwin Eck, *Uniform Directed Trust Act Gives Increased Flexibility Over Administration of Trusts*, 47 Mont. Law. 22 (2021) (concluding that a state's adoption of the Act grants to a trust settlor greater freedom). For a discussion of the codified evolution of a directed trust, see William D. Lucius & Shirley B. Whitenack, *Directed Trusts: A Primer on the Bifurcation*

may be termed a trust director, a trust protector, or a trust advisor,[12] the terminology being less important than the power of direction expressly given in the effective trust instrument. To illustrate, compare the UDTA with legislation in South Dakota, which has not adopted the UDTA, and instead has its own somewhat similar statute, referring to "trust protectors" and "trust advisors," and, where applicable, further separates trust advisors into "investment trust advisors" and "distribution trust advisors."[13] Essential to any statutory enactment is that the person exercising the power is someone other than a trustee—they may even be a settlor or a beneficiary—and that this person be given "a power over the investment, management, or distribution of trust property or other matters of trust administration."[14] "It is the inclusion, or absence, of a power of direction in the governing instrument that is dispositive."[15]

Most states enacting directed trust statutes specify what powers a trust director may possess, but the powers are not exclusive, as language within the trust instrument is decisive when determining what a trust director may do. Nonetheless, one commentator posits four distinct types of powers: (1) investment direction adviser, (2) special holdings direction advisors, (3) distribution adviser, and (4) an overall trust director.[16] In crafting its statute, one state, South Dakota, has a unique type, what is termed a family advisor category.[17] In modern wealth management "there may be complex assets that require a particular level of investment sophistication by the trustee, yet that same trustee may not have any familiarity with the settlor's intent with regard to the trust's dispositive provisions, such as those regarding discretionary distributions,"[18] hence the need for a family trust director.

Having multiple persons involved in the administration of a trust acknowledges the reality that "the law of trusts is catching up to the rise of flexible, multi-party trust administration by trustees in concert

---

of Trust Powers, Duties, and Liabilities in Special Needs Planning, 15 NAELA J. 71, 78-82 (2019).

[12] *See* Unif. Directed Tr. Act, Prefatory Note (Unif. L. Comm'n, Draft, Mar.17-18, 2017); *see id.* § 2(7) cmt. (illustrating the broad reach of the Act's definition of "trust director").

[13] Michael A. Sneeringer & Jordan D. Veurink, *Directions to Trust Protectors of Directed Trusts*, 36 Prob. & Prop. 30, 32 (2022) (citing S.D. Codified Laws § 55-1B (2024)).

[14] Unif. Directed Tr. Act § 2(5) (Unif. L. Comm'n amended 2017); *but see id*. § 5(b) (powers not available to a trust director).

[15] Lucius & Whitenack, *supra* note 11, at 74.

[16] Michael M. Gordon & Peter S. Gordon, *Mid-Atlantic Fellows Institute, Directed Trusts: Slicing and Dicing Trustee's Duties and Responsibilities*, Mid-Atl. Fellows Inst. (2019).

[17] S.D. Codified Laws § 55-1B-12 (2025).

[18] Brad Dillon & Todd D. Mayo, *Practical Considerations in Designing and Administering Directed Trusts and Divided Trusts*, 49 Est. Plan. J. 5 (2022).

with trust directors."[19] It is now common for trustees to delegate duties and powers to others, most often to investment firms and money management entities.[20] But note, delegation by a trustee is distinct from when the settlor names a trust director in the trust instrument. "For example, a trustee may delegate investment powers to an agent who is a professional investment manager,"[21] but distinctively, trustees who delegate powers do not fully absolve themselves of liability arising from the exercise (or non-exercise) of the delegated power. They retain the responsibility of making prudent choices in selecting an entity, and also, maintaining prudent supervision of the entity to which they delegated responsibility. To the extent that the delegation may have been imprudent or the trustee fails to adequately monitor the agent, the trustee is potentially liable for any harm that the agent causes.[22] Courts are aware of these divided responsibilities and are parsing out fiduciary liability.[23]

Creating a trust director, rather than delegating to a third party, may have the advantage of insulating the trustee from fiduciary liability pertaining to the trust administration. And while creating a trust director may affect fee structure, the "policy issue is how to divide the law of trusteeship between a trustee with normal fiduciary duties and a non-trustee 'trust director' who may control the trustee only in certain respects but who may or may not have any fiduciary duties in the traditional sense."[24] Understandably, investment firms may welcome the opportunity to avoid fiduciary responsibility for issues such as loyalty, impartiality, administration, informing and reporting, decanting, and retention of specified trust property. Avoidance of these issues may result in reduced liability insurance fees, plus mitigate friction with beneficiaries. Such avoidance may justify the reduction in fees charged by these investment firms.

---

[19] John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Ac*t, 44 ACTEC L. J. 3, 61 (2019).

[20] *See* Unif. Tr. Code § 807 (Unif. L. Comm'n amended 2018) (requiring the trustee to use reasonable care, skill, and caution in selecting an agent and monitoring the agent's actions); *see also* Unif. Prudent Inv. Act § 9 (Unif. L. Comm'n amended 1994).

[21] Dillon & Mayo, *supra* note 18, at 6.

[22] *Id.* at 7. The distinction between delegation and direction is important. *See id.* at 8 ("For example, a trustee generally cannot delegate discretionary distribution powers. With a directed trust, a person other than the trustee can have the power to direct the trustee to make distributions. Thus, a directed trust can achieve a result-allocating discretionary distribution powers to a trust official other than the trustee which an undirected trust cannot achieve, thereby avoiding or mitigating the risks associated with delegation.").

[23] *See, e.g.*, *In re* Estate of Zeid, 2017 IL No. 1–16–2463, 2017 IL App (1st) 162463-U (Ill. App. Ct. Sept. 27, 2025) (unpublished order) (discussing the fee structure and fiduciary responsibility for the individual trustee and the individual trust director).

[24] Dan Holbrook & Amy Morris Hess, *The Rise of Directed Trusts and Why It Matters*, 57 Tenn. Bar J. 46, 50 (2021).

Throughout modern wealth transfers, there is a growing acceptance of nontraditional multiparticipant trust agreements "in which the 'powerholders' may be a potpourri of trustees, co-trustees, distribution directors, investment advisers, trust advisory committees, and trust [directors]."[25] Such division of labor has become commonplace. And while law firms may have been traditional drafters of trust instruments, this Article argues that laws firms are attractive "persons" to serve as trust directors too. Subject to individual state laws, the law firm fits within the definition in the Uniform Directed Trust Act: a trust director is an "individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity."[26]

Working in tandem with corporate investment companies, and depending on the capabilities of each law firm, the trust settlor may allocate specified "powers" in the trust instrument, establish a "situs"[27] with the most favorable laws, and structure "fees" to accommodate the "powers" given to each of the powerholders under the multiparticipant trust agreement. While firms differ, in many cases the attorneys in the firm already have a fiduciary relationship with the client, which may extend to succeeding attorneys throughout the length of the trust. "Often the designated trust protector was the client's attorney."[28]

A law firm serving as a trust director may contribute to the settlor's intent, maximize benefits to the trust beneficiaries, and better serve the law firm's goal of service to the client. After a brief summary of the possibilities inherent in directed trusts, this Article will identify the considerations pertinent to creating a multiparticipant trust agreement with a law firm serving as the trust director.

II. Directed Trust Legislation

It is the "recognition of Trustor autonomy and freedom of disposition that led to the Uniform Directed Trust Act."[29] Prior to the Act's

---

25 Lucius & Whitenack, *supra* note 11, at 72.

26 Unif. Directed Tr. Act § 2(4) (Unif. L. Comm'n amended 2017).

27 *See* Dillon & Mayo, *supra* note 18, at n.36, noting that:

Using a corporation or limited liability company as a trust advisor or trust protector can mitigate the jurisdictional risk. New Hampshire, South Dakota, and Tennessee expressly allow a corporation or limited liability company to act as a trust advisor or trust protector. NH RSA 293-A:3.05 (corporations), 304-C:22-a (limited liability companies), 564-F:8-802 (foundations), and 383-C:12-1202 (qualified trust advisors); S.D. Codified Laws section 51A-6A-66; and Tenn. Code section 35-15-1301. In other states, an entity may not be able to act as a trust advisor or trust protector unless it obtains a charter as a bank or trust company, because the entity would exercise trust powers.

28 Sneeringer & Veurink, *supra* note 13, at 30.

29 Gordon & Gordon, *supra* note 16, at 1 (noting that Delaware enacted directed trust legislation 35 years ago).

promulgation in 2017, a few states had their own version of directed trust legislation, and trust directors are also included in federal ERISA legislation as a part of its governance of retirement plans.[30] Individual states recognized the need earlier, some more recently than others,[31] experiencing the reality that clients wanted more control over the administration of their trust assets. As a result, today a settlor-client may establish a trust with the following facets:

> XYZ Trust Company as sole trustee, with full fiduciary duties; investment advisor Joe Blow to manage all the marketable securities, with full fiduciary duties as to that task; family members Aunt Bertha to make any decisions on distributions to the trustor's descendants, brother Steve to vote all the closely held company stock, and sister Act to manage all the real estate, all three such family members having fiduciary liability only for willful misconduct; and Uncle Joe to have the power to remove and replace any trustee and to appoint successors to any trust advisors, with no fiduciary duty at all except the statutory default of reckless indifference. All are excluded fiduciaries as to the other parties' duties. Each can have a separate fee structure.[32]

Modern trust law is an amalgamation of many facets. Its basis is firm, but featured today are newer elements such as the Uniform Prudent Investor Act (UPIA),[33] which better accommodates contemporary investment policies, and the Uniform Trust Decanting Act,[34] enacted to make trusts more flexible. Added to these statutory innovations is the Uniform Directed Trust Act (UDTA), currently enacted in 20 jurisdictions and introduced in one other.[35] Indicative of its acceptance is that, as of 2018, the UDTA is now incorporated into the Uniform Trust Code (UTC), replacing Section 808 of the UTC. But even prior to the UDTA, some states permitted savvy settlors to delegate duties to "persons" other than

---

[30] *See, e.g.*, Patricia Wick Hatamyar, *See No Evil? The Role of the Directed Trustee Under ERISA*, 64 TENN. L. REV. 3, 36 (1996).

[31] *See, e.g.*, Charles D. Rubin & Jenna G. Rubin, *Protectors and Directors and Advisers: Oh My! The New Florida Uniform Directed Trust Act*, 96 FLA. BAR J. 8 (2022) (discussing the elements of the Florida statute).

[32] Holbrook & Hess, *supra* note 24, at 51; *see, e.g.*, Williams v. Hardison, 704 S.W.3d 807 (Tenn. Ct. App. 2024) (excluding a corporation from any fiduciary liability when acting under the direction of a trust director).

[33] *Uniform Prudent Investor Act Enactment Map*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey [https://perma.cc/QQE6-UZ5V] (last visited Oct. 19, 2025).

[34] *See id.*

[35] *See id.*

the trustee of the settlor's trust. For example, Delaware in 1986,[36] which, along with South Dakota, Alaska, and Nevada, enacted legislation that serves a "direction" function for the settlor, which optimizes the settlor's prerogatives.[37] The effect of the UDTA, and similar laws in other states, is to allow a settlor to create a "directed trust," which grants to a person other than the trustee a power over some aspect of the trust's administration. This "trust director," if created properly, transforms the trustee of that trust into a "directed trustee." Each of these persons, director and trustee, has separate duties and concomitant fiduciary responsibilities.

A. Trust Director

The trust director is another manifestation of the settlor's authority over the management of the trust, even so far as to override the UPIA and its fiduciary requirements.[38] Based on the premise of the primacy of the settlor's intent, direction by the trust director is mandatory even if the trust director possesses no investment expertise, and furthermore, the trust protector's decisions are protected by a high liability standard, that of willful misconduct or gross negligence.[39] It is the intent of the settlor that matters, as expressed in the trust instrument. No level of expertise is required: the UDTA defines a trust director as a "person," which may be "an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity."[40] Regardless of its capabilities, it is feasible that a law firm

---

[36] *See, e.g.*, DEL. CODE ANN. tit. 12 § 3313 (2025). For a comparison of the differences among state laws, see Lucius & Whitenack, *supra* note 11, at 77 (comparing the laws of Massachusetts and Alaska).

[37] *See, e.g.*, DEL. CODE ANN. tit. 12 § 3313(b) (2025). For a description of how certain states may benefit a settlor, *see, e.g.*, O'Brien, *supra* note 5, 153-54 (discussing how South Dakota seems best in prohibiting will and trust contest); *see also* Daniel G. Worthington & Mark Merric, *Which Situs is Best in 2024?*, 163 TR. & EST. 41 (2024).

[38] Al W. King III, *Important Topics Impacting Future Trust Planning*, 163 TR. & EST. 9, 12 (2024) (referencing Redlin v. First Interstate Bank, 2 N.W.3d 729 (S.D. 2024) (holding that trustee's reliance on trust director and permitting $3 million in a trust account to sit in money market account rather than investing money more aggressively did not rise to the level of gross negligence or bad faith and thus was neither a breach of fiduciary duty nor outside the statutorily permissible waiver of liability by trust's waiver of prudent investor rule)).

[39] King III, *supra* note 38, at 13 (citing Duemler v. Wilmington Tr. Co., 2004 WL 5383927 at *1 (Del. Ch. 2004) (citing DEL CODE ANN. tit. 12 § 3313 (2025))).

[40] UNIF. DIRECTED TR. ACT § 2(4) (UNIF. L. COMM'N, Draft, Mar. 17-18, 2017) (noting that South Dakota legislation does not reference a "trust director," using instead "trust protectors" and "trust advisors," and, where applicable, further separates trust advisors into "investment trust advisors" and "distribution trust advisors"); Sneeringer & Veurink, *supra* note 13, at 32 (citing S.D. CODIFIED LAWS § 55-1B (2024)).

qualifies as a person, but it is prudent to consult the law of the situs state as to the definition of a person able to exercise fiduciary responsibilities.

1. *Powers and Fiduciary Responsibility*

While the UDTA states that all trust directors are fiduciaries,[41] the UDTA and similar legislation also provide that the terms of the trust may mitigate this fiduciary obligation.[42] Therefore, the language of the trust instrument confers the level of fiduciary responsibility. Then, unless the trust states otherwise, the trust director serves in a fiduciary capacity,[43] but such capacity occurs specifically because of the duties conferred by the trust terms. If the terms do not establish precise fiduciary limits, then the duties prescribed are supplemented with the default duties inherent within that particular fiduciary relationship.[44] For example, if the trust director has power to direct investment decisions through direction of the directed trustee, then that trust director has a defined fiduciary responsibility to act prudently, in the sole interest of the beneficiaries, and impartially with due regard for the respective interests of the beneficiaries.[45] All of these duties are well established in caselaw.

But note that the terms of the trust may modify—even eliminate—these duties and, in addition, unique state statutes may affect the fiduciary duty of the trust director. Trust terms are crucial, especially because "most states thus leave open the question of what the fiduciary duties of a trust director will entail and how a settlor, trust director, directed trustee, or judge might discern them."[46] Allocation of fiduciary responsibility—powers—form a key element of directed trusts. Working in tandem with investment companies, law firms serving as trust directors will impact fees generated by the amount of responsibility the firm is willing to assume.

Section 6 of the UDTA enumerates what powers and duties may be pertinent to a trust director, but note that powers, as compared to

---

41 Unif. Directed Tr. Act § 8 (Unif. L. Comm'n amended 2017).

42 *See, e.g.*, S.D. Codified Laws §§ 55-1B-4, 55-1B-1(2) (2025).

43 Unif. Directed Tr. Act §§ 7-8 (Unif. L. Comm'n amended 2017) ("A trust director is subject to the same rules as a trustee in a like position and under similar circumstances . . . .").

44 *Id.* § 16, providing that:

Unless the terms of a trust provide otherwise, the rules applicable to a trustee apply to a trust director regarding the following matters: (1) acceptance [under Uniform Trust Code Section 701]; (2) giving bond to secure performance [under Uniform Trust Code Section 702]; (3) reasonable compensation [under Uniform Trust Code Section 708]; (4) resignation [under Uniform Trust Code Section 705]; removal [under Uniform Trust Code 706]; and (6) vacancy and appointment of a successor [under Uniform Trust Code Section 704].

45 *Id.* § 8 cmt.

46 Morley & Sitkoff, *supra* note 19, at 35.

inherent fiduciary responsibilities, do not derive from default; rather, each power must be "specified by the terms of a trust."[47] And the powers may be expansive; the trust terms could include such powers as disposing of investments, adopting a particular valuation of trust property, decanting a trust, or changing the principal place of administration governing the trust,[48] even the ability to replace a trustee.[49] The Delaware trust director statute contains an extensive list of grants of authority,[50] but beware that with some powers there may be a common law duty placed on the trust director to inform beneficiaries about the administration of a trust.[51]

State idiosyncrasies are important. The South Dakota statute complements any powers given via the terms of the trust with codified default powers.[52] But in Delaware, "the scope of a trust director's power of direction is determined by the terms of the trust. In other words, the content of a power of direction must be supplied by the terms of the trust, the statute provides no standard powers by default."[53] Also, the South Dakota statute provides for different nomenclature than that used in the UDTA, the appointment of both an "investment trust advisor" and a "distribution trust advisor," each with a different set of default powers.[54] An investment trust advisor has powers by default to direct the trustee with respect to the retention, purchase, or sale of trust property

---

47 UNIF. DIRECTED TR. ACT § 6 cmt. (UNIF. L. COMM'N amended 2017).

48 UNIF. DIRECTED TR. ACT §§ 2, 8 (UNIF. L. COMM'N, Draft, Mar. 17-18, 2017)*;* UNIF. DIRECTED TR. ACT § 2(4) (UNIF. L. COMM'N amended 2017) ("'Power of direction' over a trust "includes a power over the investment, management, or direction of trust property or other matters of trust administration."). The power to remove or appoint a trustee or trust director must conform to any valid requirements or limitations imposed by trust terms. *Id.* § 6 cmt.

49 UNIF. DIRECTED TR. ACT § 5(b)(2) cmt. 2 (UNIF. L. COMM'N amended 2017). Although the UNIF. DIRECTED TR. ACT § 5(b)(2) (UNIF. L. COMM'N amended 2017) excludes the power to appoint or remove a trustee, that power may be granted by the trust terms. *See id*. cmt. 2; RESTATEMENT (THIRD) OF TRUSTS. § 37 cmt. c (AM. LAW INST., 2003). If the terms contain no limitations, then there is no necessity for the trust director to show cause. *See id*. at cmt.

50 *See* DEL. CODE ANN. tit. 12 § 3313 (2025); S.D. CODIFIED LAWS § 55-1B-6 (2025); ALASKA STAT. § 13.36.370 (2025); *see also* NEV. REV. STAT. §§ 163.553-.557 (2025).

51 *See* Rollins v. Branch Banking & Tr. Co. of Va., 56 Va. Cir. 147, at 2 (Va. Cir. Ct. 2001) (holding that duty was breached); UNIF. DIRECTED TR. ACT § 4 (UNIF. L. COMM'N amended 2017) ("The common law and principles of equity supplement this [act], except to the extent modified by this [act] or law of the state other than this [act].").

52 *See* S.D. CODIFIED LAWS § 55-1B-6 (2020) (In addition to the powers and discretions granted to the trust protector in the governing instrument, the trust protector may also exercise any of the powers and discretions granted to a trust protector under § 55-2-13 to the extent such exercise is not prohibited under the terms of the governing instrument); *see also id.* § 55-1B-10.

53 Morley & Sitkoff, *supra* note 19, at 15.

54 *Id*.

and to vote proxies for securities held in trust; likewise, a distribution trust adviser has the power to "direct the trustee with regard to all discretionary distributions."[55]

In summary, "statutes and case law place few limits on roles or powers that can potentially be instilled in a Trust Director,"[56] but correspondingly we may conclude that the trust director is bound by fiduciary responsibilities whenever he or she performs a duty traditionally associated with a trustee.[57] And if not acting in one of these traditional roles, "a trust protector is not a fiduciary by default."[58] It is important to stress that the powers given to a trust director "may impose a duty or liability on a trust director,"[59] which may then impose fiduciary duties. In general, "the UDTA's basic approach is to place the primary fiduciary responsibility for a power on the person who holds the power."[60] Therefore, if a power belongs to a trust director, then the primary fiduciary responsibility for that power belongs to the director, rather than the directed trustee who merely facilitates the director's exercise of the power. "The UDTA thus relieves a directed trustee from the full fiduciary duties of a unitary trusteeship, and leaves a directed trustee with only a reduced duty to avoid 'willful misconduct' in deciding whether to comply with a director's directions."[61] Compare this with an average plaintiff petitioning to establish a breach of trust who need not demonstrate that the trustee acted willfully or fraudulently. Instead, breach of trust has a broader and more technical meaning. "'It is well settled that every violation by a trustee of a duty which equity lays upon him, whether wilful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.'"[62] If a law firm were to assume the power normally exercised by a trustee, then the firm accepts a heightened fiduciary responsibility. Unless, of course, the trust document exculpates the law firm.

The trust director, similar to a trustee, may be exonerated for conduct later shown to be negligent.[63] Nonetheless, "an exculpation or exoneration clause cannot protect a trustee against liability for acting in

---

55 *Id*.

56 Timothy M. Ferges et al., *Who's the Boss? Fiduciary Liability and Directed Trusts*, 57 Real Prop. Tr. & Est. L. J. 237, 242 (2022).

57 *See, e.g.*, Lewis v. Hanson, 128 A.2d 819, 835 (Del. 1957) (holding power to consent to an investment is a fiduciary power).

58 Morley & Sitkoff, *supra* note 19, at 16.

59 Unif. Directed Tr. Act § 8(c) (Unif. L. Comm'n amended 2021).

60 Morley & Sitkoff, *supra* note 19, at 31.

61 *Id.* at 32.

62 Bryan v. Chytil, 2021-Ohio- 4082, ¶ 92 (Ohio Ct. App. 2021) (citing Shuster v. N. Am. Mortg. Loan Co., 40 N.E.2d 130 (1942)).

63 *See* Unif. Tr. Code § 1008 (Unif. L. Comm'n amended 2023); *see also* Restatement (Third) of Trusts § 96 (Am. L. Inst. 2012).

bad faith or with reckless indifference."[64] But bad faith or reckless indifference requires substantial proof,[65] and thus the trust director, as well as the directed trustee, enjoy wide insulation from claims when there is an operative exculpation clause. One commentator writes that in at least one state, a "trust adviser can be totally exculpated by the agreement, even for acting in bad faith."[66] Exculpation should prompt concern. "By shifting the decision-making about distributions or investments from a trustee to a person who may or may not be a fiduciary or who may or may not have any liability exposure under the terms of the trust, there may be no one who can be held accountable if something goes awry."[67] Each state varies, but currently we can write that, "South Dakota, Nevada, and Alaska, for example, have adopted a 'no liability' standard for directed trustees."[68]

Obviously, the language of the trust instrument may mitigate the parameters of the trust director's fiduciary liability. "A trust director bears the same default and mandatory fiduciary duties as a trustee in a like position and under similar circumstances."[69] For example, in the 2006 decision of a New York appellate court, *In re Chase Manhattan Bank*,[70] a trust settlor provided in the trust instrument that the heavy concentration of one particular stock was intentional and was not to be sold unless the trustee had a compelling reason, but diversification was not such a reason.[71] Based on this retention clause, the trustees retained the stock even though the value dropped precipitously, and when the beneficiaries argued that the trustees acted imprudently by retaining the stock, the appellate court rejected their argument, holding that there was no compelling reason to sell: "a 'compelling reason' was 'any factor which should indicate to the fiduciary that the interest of any beneficiary is not being reasonably maintained or protected by the trust, or that the interest of any beneficiary would not continue to be reasonably maintained or protected by the trust, if the trustee were to continue to retain the stock.'"[72] Further, the appellate court held that the compelling reason cannot be

---

64 Unif. Directed Tr. Act § 8 cmt. (Unif. L. Comm'n amended 2021); *see* Redlin v. First Interstate Bank, 2 N.W.3d 729, 736 (S.D. 2024) (holding that there was insufficient evidence to find conduct was egregiously unreasonable).

65 S.D. Codified Laws § 55-1B-2 (2025).

66 Jeffrey Schoenblum, *Directed Trusts and the Conflict of Laws*, 97 Tul. L. Rev. 957, 960 (2023) (citing Tenn. Code Ann. § 35-15-101 (2024)).

67 Dillon & Mayo, *supra* note 18, at 9.

68 Ferges et al., *supra* note 56, at 265.

69 Morley & Sitkoff, *supra* note 19, at 33-34.

70 809 N.Y.S.2d 360 (N.Y. App. Div. 2006).

71 *Id.* at 362.

72 *Id*. at 363.

derived from hindsight.[73] By establishing a compelling standard, similar to bad faith or recklessness, the trust instrument may substantially limit fiduciary liability.

2. *Duty to Directed Trustee*

Powers pertinent to each, directed trustee and trust director, may provide opportunity for discord, but there are few precise guidelines on how to avoid them all. Overall, there is a "mutual obligation to keep each other reasonably informed by providing information reasonably related to the powers and duties of each position."[74] Oddly, "few states make any provision for communications between a trustee and a trust director,"[75] but if the terms of the trust impose specific duties on either the directed trustee or the trust director, then those terms operate in addition to those available under the UDTA.[76] Yet, the UDTA imposes only that which is reasonable; on both the trust director and the directed trustee there is a duty to provide each other with information that is reasonably related to each party's powers and duties under the trust.[77] Therefore, unless it is specifically mandated or it may be interpreted as reasonable, a directed trustee does not have a duty to monitor the decisions of the trust director, or to inform others associated with the trust of actions of the trust director with which the directed trustee disagrees.[78] Likewise, the trust director does not have a duty to monitor or inform on conduct of the directed trustee.[79]

Comments to the UDTA's pertinent sections state that information must be disclosed only if it is reasonably related to either the director's or the trustee's performance of duties—any other activity may otherwise be unknown.[80] Specifically, the Comments mention that decisions such

---

[73] *Id*. at 364 (finding "it is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge. Our courts do not demand investment infallibility, nor hold a trustee to prescience in investment decisions.").

[74] Alexis S. Gettier, Christiana N. Gianopulos & Margaret St. John Meehan, *New Direction: The Connecticut Uniform Directed Trust Act*, 33 QUINN. PROB. L. J. 274, 280 (2020); *see also* UNIF. DIRECTED TR. ACT § 10 (UNIF. L. COMM'N amended 2017).

[75] Morley & Sitkoff, *supra* note 19, at 48.

[76] *See* UNIF. DIRECTED TR. ACT §§ 8(c), 10 (UNIF. L. COMM'N amended 2017) (the UDTA defines the duty to provide information reasonably related to each party's respective duties).

[77] *See id.* § 10. The terms of a trust may specify more extensive duties of information sharing among directed trustees and trust directors. *See id.* cmt.

[78] *See id.* § 11(a).

[79] *See id.* § 11(b).

[80] *See id.* § 10 cmt.

as "asset valuations, modifications to the terms of the trust, changes to investment policy or strategy, distributions, changes in accounting procedure or valuations, and removal or appointment of trustees and trust directors" might require disclosure.[81] Professors Morley and Sitkoff comment that communications between the trustee and the director are ignored in state statutes, citing Colorado as the one exception because the state requires a trustee and trust director to share information with each other under certain circumstances.[82]

As an example of the affirmative duty imposed in relationship to what is reasonable, the UDTA provides an illustration in the 2013 New Hampshire decision of *Shelton v. Tamposi*.[83] The case addressed a trust that permitted the trustee to make asset distributions to the beneficiaries, but gave investment power to the trust director.[84] The facts of the case reveal that there was discord between the directed trustee and the trust director; therefore, when it came time for the trustee to make asset distributions to the beneficiaries, there were insufficient assets and the beneficiaries brought suit.[85] Under the UDTA "the trust director would have been under a duty to give the trustee information about the effects of the director's investment program on the trust's cash position, and the trustee would have been under a duty to give the director information about the cash requirements of the trustee's distribution program."[86]

But note that, and this may signal an effort on the part of the UDTA to reduce tension, "a trustee does not have a duty to inform or give advice to the trust director concerning instances in which the trustee would have exercised the director's powers differently."[87] Specifically, "courts have, in nearly all cases, specifically declined to impose a duty on the directed trustee to review, monitor, or evaluate the advisor's directions."[88] Furthermore, a trustee who acts in reliance on information provided by a trust director is not liable for a breach of trust unless by doing so the trustee engages in willful misconduct.[89] And correspondingly, if the trust director acts in reliance on information provided by the trustee, the director is not liable unless engaging in willful misconduct.[90]

---

81 *Id.*

82 *See* Morley & Sitkoff, *supra* note 19, at 47-48 (citing Colo. Rev. Stat. § 15-16-806(1)-(2) (2024)).

83 *See* 62 A.3d 741 (N.H. 2013).

84 *See id.* at 747.

85 *See id*. at 753.

86 Unif. Directed Tr. Act § 10 cmt. (Unif. L. Comm'n amended 2017).

87 *Id.* at cmt.

88 Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee Under the Uniform Directed Trust Act*, 44 ACTEC L.J. 207, 210 (2019).

89 *See* Unif. Directed Tr. Act § 10(c) (Unif. Law Comm'n amended 2017).

90 *See id*. § 10(d).

B. Directed Trustee

1. *Power and Fiduciary Responsibility*

Similar to the trust director, the directed trustee may be assigned powers, and from these powers will flow fiduciary responsibilities unless otherwise exculpated by the terms of the trust. Specifically, the "terms of a trust may impose a duty or liability" upon the directed trustee.[91] Although the directed trustee is expected to "take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction,"[92] sometimes that directed trustee may refuse to comply if by such action "the trustee would engage in willful misconduct,"[93] defined in the Delaware code as "intentional wrongdoing and not mere negligence, gross negligence or recklessness."[94]

The Delaware standard provides heightened protection for the directed trustee, which is important because it may may limit the fiduciary responsibility of the trustee. To illustrate, in the event that the trust director assumes the fiduciary responsibility for making investment decisions—rather than the directed trustee—fees are affected. In one 2021 Delaware decision,[95] a major wealth management company specified that it would serve as a "traditional trustee" for an annual fee of "$62,500" or it would serve as a "directed trustee" for an "annual fee of $10,000," which serves to illustrate how fees are affected by the assumption of fiduciary responsibility.

It is fair to conclude that the fiduciary responsibility of the directed trustee "is perhaps the most controversial issue in the law of directed trusts."[96] And even though the directed trustee may be exculpated when acting upon the direction of the trust director, the directed

---

[91] *Id*. § 9(e). Trust terms are dispositive. *See id*. § 11 (specifying that the terms of the trust may establish additional duties).

[92] Schoenblum, *supra* note 66, at 988 (citing UNIF. DIRECTED TR. ACT § 9(a) (UNIF. L. COMM'N amended 2017)). For a discussion of fiduciary responsibility of directed trustee, *see id.* at 965-70.

[93] UNIF. DIRECTED TR. ACT § 9(b) (UNIF. L. COMM'N amended 2017). Willful misconduct is a nebulous term—for a holding that there was no willful negligence, see Duemler v. Wilmington Tr. Co., No. 20033-NC, 2004 WL 1732275, at 3 (Del. Ch. July 30, 2004); *see also* Mennen v. Wilmington Tr. Co., No. 8432-ML, 2015 WL 1914599, at *1 (Del. Ch. Apr. 24, 2015) ("Because this disloyalty is not exculpated by the trust agreement, the trustee is liable to the beneficiaries for the losses the trust suffered.").

[94] DEL. CODE ANN. tit. 12, §§ 3301(g), 3301(h)(4) (2025); *but see* UNIF. DIRECTED TR. ACT § 9 (UNIF. L. COMM'N amended 2017). This fails to define the term, preferring to leave this to the courts to define. *See* Morley & Sitkoff, *supra* note 19, at 43.

[95] J.P. Morgan Tr. Co. v. Fisher, No. 12894-VCL, 2021 WL 2407858, at *1 (Del. Ch. June 14, 2021).

[96] Morley & Sitkoff, *supra* note 19, at 38.

trustee may be in breach for other failures, such as failing to inform the beneficiaries, which is also a trust duty.[97] No trustee wishes to be viewed as negligent, even if exculpated, and the UDTA eschews phantom violations as a means of circumventing willful misconduct. "A directed trustee has no duty to monitor a trust director or inform or give advice to others concerning instances in which the trustee might have acted differently than the director."[98] At a minimum, the directed trustee has a duty to exercise *reasonable care* in discerning whether the direction to purchase the security was within the director's power, and also to employ *reasonable care* in executing the purchase at a reasonable price, time, and manner, unless by doing so the trustee would engage in willful misconduct.[99]

Compare the UDTA's standard with Michigan's directed trust statute, which provides even more protection to the directed trustee, specifying that "if an exercise or nonexercise of a power of direction that is within the power holder's authority under the terms of the trust turns out to be improvident, a directed trustee can only be liable for complying "if the exercise or nonexercise was obtained with the directed trustee's collusion or by the directed trustee's fraud."[100] Professors Morley and Sitkoff conclude that,

> although the UDTA follows the Delaware model of applying a standard of "willful misconduct" to a directed trustee, the provision that applies the willful misconduct standard could be altered to meet the policy desires of states that prefer no fiduciary duty for a directed trustee, such as South Dakota, New Hampshire, and Nevada.[101]

Similarly, states that want to eliminate the mandatory minimum duties of a trust director also may do so. "Regardless of its preferences on the allocation of fiduciary duties, any state can achieve its preferences with a few modifications while still enjoying the many practical innovations of the UDTA."[102]

What does this mean in practice? One commentator views the Michigan statute as better to insulate the directed trustee: "following a direction that was not procured by the directed trustee's own affirmative

---

97 *See generally id.* at 42-43 (citing *Rollins*, 56 Va. Cir. 147) (holding that the directed trustee was liable for failing to inform beneficiaries).

98 Unif. Directed Tr. Act § 11 cmt. (Unif. L. Comm'n amended 2017).

99 *See* Morley & Sitkoff, *supra* note 19, at 46.

100 James P. Spica, *From Strength to Strength: A Comment on Morley and Sitkoff's Making Directed Trusts Work*, 44 ACTEC L.J. 215, 216 n.9 (2019) (citing Mich. Comp. Laws § 700.7703a(7)).

101 Morley & Sitkoff, *supra* note 19, at 32.

102 *Id*.

misconduct will never in itself expose a directed trustee to liability for breach of trust."[103] Another commentator writes that under the UTDA, "the trustee must only look at himself or herself to ensure that the direction given does not cause the trustee to knowingly or intentionally engage in misconduct."[104] This same commentator then concludes that "therein lies the principal cornerstone of modern directed trusts,"[105] implying that the keystone of directed trust legislation is the shifting of fiduciary responsibility from one person to another.

Not every state has adopted this UDTA right-of-refusal provision; rather, "each state has approached it differently—not only with respect to the standard of liability it imposes on the trustee, but also on the nature and scope of the powers [of] the trust advisor."[106] The issue for the directed trustee is the scope of his or her fiduciary responsibility. In response to this issue, "much like the Restatement (Second) of Trusts, Restatement (Third) of Trusts, and Uniform Trust Code § 9, the Uniform Directed Trust Act requires a directed trustee to comply with a powerholder's exercise (or nonexercise) of a power of direction and is not liable for doing so."[107] Notable is the fact that the directed trustee "does not have a duty to (1) monitor the powerholder or (2) inform or advise the settlor or beneficiary concerning an instance in which the trustee may have acted differently from the powerholder."[108] And note too, South Dakota's legislation provides that a directed trustee has no duty or liability for complying with an exercise of a power of direction.[109]

There are financial benefits associated with limiting liability. For the directed trustee, the ability to surrender investment responsibilities to a trust director may result in a reduction in its fees: "following directions is less onerous than exercising discretion, the directed professional trustee's standard fee should be adjusted."[110] For an illustration, the Illinois decision of *In re Estate of Zeid*[111] involves a managed account where plaintiff directly manages and orders trades for the account, and "the fee rate is 1.45% for the first $1 million, 1.15% for the next $2 million, 0.90% for the next $2 million, 0.70% for accounts over $5 million, and a negotiable rate

---

103 Spica, *supra* note 100, at 217.

104 Lucius & Whitenack, *supra* note 11, at 81.

105 *Id*.

106 Amy Kanyuk, *It's a Nice Place to Visit, But Do You Want to Live There?*, 57 Ann. Heckerling Inst. On Est. Plan. 18, 20 (2023).

107 Lucius & Whitenack, *supra* note 11, at 81.

108 *Id.* at 82.

109 *See* S.D. Codified Laws § 55-1B-2 (2025); *see also id.* § 55-1B-1(5) (South Dakota does not use the term "directed trustee," rather it uses "excluded trustee".).

110 Spica, *supra* note 100, at 216.

111 *See In re* Estate of Zeid, No. 1–16–2463, 2017 WL 4340392 (Ill. App. Ct. Sept. 27, 2017).

for accounts over $10 million."[112] But for directed accounts, where plaintiff is directed to make investments but does not take an active role in managing the account, "the fee rate is 1.00% for the first $1 million, 0.75% for the next $2 million, 0.55% for the next $2 million, 0.40% for accounts over $5 million, and a negotiable rate for accounts over $10 million."[113]

An argument may be made that the introduction of a trust director—possessing whatever powers the trust dictates—has weakened the traditional duty owed by a trustee to the trust's beneficiaries. That is, trust directors may "take the place of the trustee while potentially avoiding the same high level of fiduciary duty."[114] Is this a bad development? A cogent argument is made that it is because by permitting the directors to direct investments, a core principle of trust law is violated: "That is, the trustee owes certain nonwaivable fiduciary obligations to the beneficiaries with regard to the management of the trust estate and also with respect to distributions."[115] This argument then follows that the trust director, under terms created in the trust document, may order the directed trustee to ignore key elements of the UPIA, such as portfolio management and diversification, concentrating instead on specific goals and ignoring even the requirement to maintain impartiality among beneficiaries.[116] If the trust instrument provides express authorization to the trust director to make investment decisions, then the directed trustee must cooperate or resign. "In determining whether a trustee complied with the prudent investor standard in the management of trust assets, a court's initial focus must be on the terms of the trust,"[117] and these terms may relieve the directed trustee of fiduciary responsibility and limit or eliminate fiduciary responsibility for the trust director.

2. *Duty to Trust Director*

But providing unfettered discretion to a competent trust director could be exactly what was intended by the settlor, and there are cogent reasons for this. First, a directed trustee may welcome relief

---

112 *Id*. ¶ 5.

113 *Id*. ¶ 7.

114 Schoenblum, *supra* note 66, at 958 (advising caution when selecting a trust situs because of differing state provisions).

115 *Id*. at 957.

116 *See, e.g.*, Redlin v. First Interstate Bank, 2024 SD 5, ¶ 20, 2 N.W.3d 729, 735 (holding that trust provisions properly granted trustee and trust director permission to ignore investment prudence).

117 Romualdo P. Eclavea et al., *Prudent Investor Rule*, in 76 Am. Jur. 2d Trusts § 472 (2025); *see also* Stuart v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi., 369 N.E.2d 1262, 1271 (Ill. 1977) ("It is axiomatic that the limits of a trustee's powers are determined by the instrument which creates the trust.").

from delegating to a separate investment manager and then having to monitor investment performance. This is undoubtedly true when monitoring is likely to be onerous for any number of reasons. "An increase in regulatory and litigious activity, complex dispositive provisions, the consequences of improper distributions, and portfolios that contain significantly concentrated positions in assets that are not traditional marketable securities—which have long plagued wary fiduciaries—become more palatable through a directed trust arrangement."[118] Second, in the hands of a competent trust director, a trustee may avoid seeking committee consensus on common practical matters such as: (1) permitting retention of a concentration of assets, (2) managing impartiality between income and remainder beneficiaries, (3) managing asset valuations, (4) removing and appointing trustees, and (5) compelling or prohibiting distributions.[119] Depending on the terms of the trust and applicable state law, "[d]irected trusts tend to be preferable arrangements—at least from the directed trustee's perspective—only when state law imposes a lower standard on a trustee acting at the powerholder's direction."[120] Some states, for example Alaska, absolve the directed trustee from liability under the following circumstances:

> [I]f, by the terms of the trust instrument, a trustee is designated to follow the directions of an advisor who is not designated in the trust instrument as being a trustee, the trustee who, by the terms of the trust instrument, is required to follow the directions of the advisor is not liable, individually or as a fiduciary, to a beneficiary for a consequence of the trustee's compliance with the advisor's directions, regardless of the information available to the trustee, and the trustee does not have an obligation to review, inquire, investigate, or make recommendations or evaluations with respect to the exercise of a power of the trustee if the exercise of the power complies with the directions given to the trustee.[121]

Similar to Alaska, South Dakota eliminates the liability of a directed trustee: "If an instrument appoints a trust protector, the excluded fiduciary is not liable for any loss resulting from any action taken upon such trust protector's direction."[122] Other states permit directed trustees

---

118 Lucius & Whitenack, *supra* note 11, at 76.
119 *See id.* at 76-77.
120 *Id.* at 83.
121 Alaska Stat. Ann. § 13.36.375(c) (West 2025).
122 S.D. Codified Laws § 55-1B-5 (2025).

to be excluded from fiduciary liability, too.[123] Obviously, even though shifting responsibilities to a trust director will result in lower fees, this loss of revenue may be compensated for with a reduction in liability insurance premiums and fewer administrative hassles.

The responsibilities of a trustee, in general, most often include investment planning, administration, and monitoring the established investment plan and its results.[124] Regardless of the trust's situs, modern estate planning makes it apparent that the trustee must "determine whether other fiduciaries and advisors need to be included in the investment decision making and oversight process and to create a process for collaboration and communication with these parties."[125] And foremost, the trustee needs to ascertain the competency of the settlor and whether the settlor has been adequately informed of consequences resulting from the terms of the trust.[126] And certain duties, though mundane, are necessary, as the trustee must "inventory the asset, retain certain information and conduct other due diligence on the asset, periodically value the asset and potentially be able to custody the asset."[127] These matters must be discussed with the settlor, if possible, and the trust director, prior to assuming trust responsibilities.

What would be the incentive for a trustee, especially a prestigious trust company with billions of dollars in assets,[128] to take direction from a trust director? One answer is that "directed trusts tend to be preferable arrangements–at least from the directed trustee's perspective–only when state law imposes a lower standard on a trustee acting at the powerholder's direction."[129] And as discussed *supra*, states continue to differ in their approach to the fiduciary liability of the directed trustee. The majority of states isolate the directed trustee's fiduciary responsibility vis-à-vis the

---

123 *See, e.g.*, *In re* Estate of Zeid, No. 1–16–2463, 2017 WL 4340392 ¶ 11 (Ill. App. Ct. Sept. 27, 2017) ("If a governing instrument provides that a fiduciary as to one or more specified matters is to act, omit action, or make decisions only with the consent of a directing party, then such fiduciary is an excluded fiduciary with respect to such matters.") (citing to then-existing state statute, replaced now by 760 Ill. Comp. Stat. 3/808(f) (2024)).

124 *See* Anne Gifford Ewing & Jeffay Chang, *Trustee Investing Traps*, 163 Tr. & Est. 49 (2024); *see also* S.D. Codified Laws §§ 55-2-1 to -24 (2025).

125 Ewing & Chang, *supra* note 124, at 50.

126 *See, e.g.*, Williams v. Hardison, 704 S.W.3d 807 (Tenn. Ct. App. 2024) (concerning trust's exculpatory clause). For discussion about the trustee's powers under a durable power of attorney, see Raymond C. O'Brien, *Creating a Trust Through Delegation*, 36 Quinnipiac Prob. L. J. 411 (2023).

127 Ewing & Chang, *supra* note 124, at 54.

128 *See, e.g.*, *About South Dakota Trust Company*, S.D. Tr. Co., https://sdtrustco.com/about/ [https://perma.cc/UEW6-6QXK] (last visited Oct. 13, 2025) (noting South Dakota Trust Company has more than $165 billion in assets under administration).

129 Lucius & Whitenack, *supra* note 11, at 13.

trust director,[130] and in those that do not, the language contained in the trust terms may limit or eliminate the directed trustee's liability. Plus, often that directed trustee's liability is only for whenever that directed trustee, in complying with the trust director, engages in "willful misconduct,"[131] and otherwise the trustee is governed by prudence.

III. Law Firm Considerations

A. Profitability

Larger law firms may serve as trustees for clients, but more often large firms represent a client's estate in litigation concerning the validity of documents, especially protracted and expensive litigation over a susceptible client's testamentary capacity, or the undue influence of an estate beneficiary over a susceptible client. For example, Seward Johnson died in 1983 with an estate totaling $402,824,971. His estate plan was drafted by attorneys at Shearman & Sterling, who meticulously prepared his estate documents prior to his death. After his death, when contest was brought to disallow his estate plan, Shearman & Sterling retained an attorney at another law firm, Sullivan & Cromwell, to defend the estate against charges of undue influence allegedly exerted by Seward's wife upon Seward.[132] The principal contestants in the litigation were Seward's children, who were represented by Milbank, Tweed, Hadley & McCloy, another large firm. All of the law firms involved were prestigious, based in New York City, and correspondingly very expensive. By the time the Johnson litigation settled, attorney fees and related costs amounted to $25 million,[133] generated by staggering hourly rates and multiple personnel needed to sustain litigation. No attorney arrives at a deposition alone.

Other than elite firms, the vast majority of law firms work with clients to draft estate plans, including drafting and executing wills and intervivos trusts. Today's aging clients also seek springing powers of attorney and health care directives, plus some draft and execute pre-marital or

---

130 *See id.* at 13, at n. 66 (identifying Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida (only if powerholder is a co-trustee), Georgia, Idaho, Illinois, Indiana, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming, and Texas).

131 Unif. Directed Tr. Act §§ 9(b)-(c), 10(c)-(d) (Unif. L. Comm'n amended 2017); *but see id.* § 9(e) (noting "the terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this [act].").

132 *See* O'Brien, *supra* note 5, at 118-19.

133 *Id.* at 121.

marital agreements, and a rarefied few may draft a self-settled domestic asset protection trust,[134] special needs trusts, or increasingly popular, dynasty trusts. Throughout the process of drafting an estate plan, most often the client develops a relationship of trust with the law firm, generating a client's knowledge of the firm's capabilities and a firm's knowledge of client's wishes. The disadvantage is that at this level attorney-client interaction seldom generates profitability in and of itself when viewed from the perspective of: (1) revenue versus costs, (2) attorney utilization, and (3) market rates and adjustments.[135] Always the issue is how may a law firm practicing trusts and estates, without a significant litigation component, generate added profitability while remaining committed to client interaction?

"Profitability is one of the most critical measures of success for any law firm."[136] In today's legal market, services such as "litigation, investigations, antitrust, and work related to funds and investment management practices" are growing rapidly.[137] "Among the top 50 firms in the first half of this year [2024], 68% reported demand growth . . . . Of that group, 29% reported increases greater than 5%."[138] And explosive growth generated greater profits, especially for equity partners in very successful firms. "The average profits per equity partner at the 100 largest firms grew more than 5% in 2023 compared from 2022 . . . . Simpson Thatcher confirmed . . . it would pay its top partners more than $20 million a year."[139]

Law firms providing services to an aging population, often categorized as trusts and estates firms, are also experiencing growth, primarily generated by baby boomers seeking to pass their significant accumulated wealth to their descendants. Those "boomers," over the age of 65, form a segment of the population that has quadrupled in number since

---

134 *See generally* Mark Merric & Daniel G. Worthington, *Best Situs for DAPTs in 2023*, 162 Tr. & Est. 58 (Jan. 2023) (writing that 20 states have enacted DAPTs statutes); *see also In re* Mortensen, Case No. A09-00565-DMD, Adv. No. A09-90036-DMD, 2011 WL 5025249, at *2 (Bankr. D. Alaska 2011) (describing how DAPTs work).

135 Debbie Foster, *Maximize Law Firm Profitability with Practice Area Analysis*, Centerbase, https://centerbase.com/blog/maximize-law-firm-profitability-with-practice-area-analysis/ [https://perma.cc/2EXH-V4W9] (last visited Oct.13, 2025).

136 *Understanding the Basics of Law Firm Profitability*, Centerbase, https://centerbase.com/blog/understanding-the-basics-of-law-firm-profitability/ [https://perma.cc/P43Y-6PK8] (last visited Oct. 13, 2025).

137 Roy Strom, *Big Law's Surprisingly Good Numbers Hint at Possible Great 2024*, BL (Aug. 22, 2024), https://news.bloomberglaw.com/business-and-practice/big-laws-surprisingly-good-numbers-hint-at-possible-great-2024 [https://perma.cc/KZP8-7JNZ].

138 *Id.*

139 Meghan Tribe, *Law Firms' Embrace of Non-Equity Partners Brings Management Risk*, BL (May 28, 2024, at 5:16 EDT), https://news.bloomberglaw.com/business-and-practice/law-firms-embrace-of-non-equity-partners-brings-management-risk [https://perma.cc/V8C9-GQKA].

1900—reaching 17% of the population in 2020—and expanding numerically more than seventeen times, from 3.1 million to 55.7 million people; for those over the age of 85, called the "older old," this number will more than double from 6.7 million in 2020 to 14.4 million in 2040.[140] "In recent years, for many firms, it's been impossible to ignore the opportunities that come from an active trusts and estates group, also categorized in many firms as a private wealth practice."[141]

A significant portion of services provided by trusts and estates firms consists of tax planning, drafting and execution of estate planning documents, and litigation associated with contests over wealth distribution and disputes involving disappointed heirs. Many disappointed relatives, who think "they're in line for distribution of an estate, become plaintiffs. They're willing to dig their feet in the mud and drag out the matter because they feel they're entitled to part of the estate that may have changed over the past 30 years."[142] Even though profits may be made from trust and estate litigation, many attorneys have stopped practicing in this area of the law because of the risks involved. Insurance brokers "say underwriters are skittish about the high value claims that mistakes can generate."[143] "The big firms that have gotten out because of insurance costs did so because they were maintaining small boutiques in the firm, not as an engine for the firm but as a courtesy to corporate clients so they could do planning for these corporate clients."[144] Eventually, the profit generated by the boutique practice of trusts and estates failed to justify the insurance costs.

Stand-alone profitability for trusts and estates firms is an issue, especially when compared to other areas of law practice.[145] Profits seem available. Demographics—and the significant amount of wealth owned by older persons—indicate greater opportunities, especially as many of these ultra-high worth individuals are domiciled in a small number of states, chosen because of favorable tax laws. Nonetheless, trusts and estates practice is labor intensive, drafting documents, client meetings, and assembling data all demand time and hour billables are not common. And yet, time spent with clients generates a fiduciary relationship of trust that can

---

140 Admin. for Cmty. Living, U.S. Dep't of Health & Hum. Servs., 2021 Profile of Older Americans 4-5 (Nov. 2022).

141 Dan Packel, *Big Law Trusts & Estates Work Risky But Rising*, Am. Law (May 18, 2022), https://www.law.com/americanlawyer/2022/05/18/big-law-trusts-estates-work-risky-but-rising/?slreturn [https://perma.cc/TQT2-95LG].

142 *Id.*; *see* Raymond C. O'Brien, *Proposing a Model Antilapse Clause*, 48 ACTEC L.J. 257, 266-68 (2023) (describing the uncertainties associated with application of antilapse statutes).

143 Packel, *supra* note 141.

144 *Id.*

145 *See* Strom, *supra* note 137.

generate passive income when the firm becomes a trust director. A client may enter a law office seeking a health care directive, but leave with an estate plan, tax advice, and a fiduciary relationship with the attorney who drafted it all.[146] So too, a client may execute a trust document, intervivos or testamentary though a validly executed last will and testament, which names the firm as trust director, responsible for services that the client now knows the law firm can perform.

Logic suggests that the client's law firm is in a perfect position to contribute a valuable insight as a trust director. Being a trusts and estates attorney is more than being a purveyor of documents. As one attorney wrote, "estate planning is about the choices we make during life that impact our legacy. It's about what we've inherited, what needs to be healed, and how we create a new future reality for our loved ones. Life & Legacy planning is about the counsel needed to create and maintain a plan that will work when families need it."[147] The client's attorney is often the consigliere, someone the wealthy business owner trusts.[148] If he or she is in a firm that has transactional practices, they are likely to keep it all in one shop, or keep most of it in one shop.[149]

The top law firms are adept at retaining clients within their multifaceted, transactional shop. As illustration, Skadden, Arps, Slate, Meagher & Flom defines its parameters as:

> Attorneys in the Private Clients/Trusts and Estates Group at Skadden have extensive experience in all aspects of estate planning and the administration of trusts and estates. The group is skilled in the complicated tax and state laws governing the transfer and management of assets and is sensitive to the many family and personal issues related to this practice area.[150]

---

146 For suggestions on how to structure the first meeting with a potential client, see Avi Z. Kestenbaum, *How to Handle the First Meeting with a Clien*t, 163 Tr. & Est. 22 (2024); *see also* Kim Kamin & James Grubman, *How to Become a Wealth 3.0 Attorney*, 163 Tr. & Est. 66 (2024) (discussing professional ethics concerns).

147 Ali Katz, *Legaltech: Why Wealth Managers Should Refer to Attorneys Instead*, 163 Tr. & Est. 32 (2024).

148 *See* D. Vance Barse, *The Financial Advisor as Quarterback*, 163 Tr. & Est. 60 (2024) (stressing that attorneys should serve as the client's most trusted advisor for dollar-sign-related decisions).

149 Packel, *supra* note 141.

150 *Private Clients/Trusts and Estates*, Skadden, Arps, Slate, Meagher & Flom LLP, https://www.skadden.com/capabilities/practices/private-clients-trusts-and-estates [https://perma.cc/KY5Z-A54Z] (last visited Sept. 19, 2025).

Other law firms are more comprehensive. For example, Holland & Knight:

> The Holland & Knight Trusts, Estates and Fiduciary Litigation Team represents corporate, institutional and individual clients in disputes related to wills, trusts, estates and fiduciary issues. We also address pre-death disputes, such as issues of capacity, undue influence and financial elder abuse. Our attorneys represent clients in matters related to breaches of fiduciary duty, including improper asset management, self-dealing, conflicts of interest, and improper administration and distributions, as well as accounting disputes, petitions for court instructions, reformation of instruments and removal of fiduciaries, contests on the grounds of undue influence, lack of capacity, fraud, duress and forgery, and claims involving international succession matters.[151]

Still other firms emphasize a more personal approach, such as Pillsbury:

> Pillsbury's Trusts & Estates team advises individuals, families, family-owned businesses and charitable foundations in the planning and administration of complex trusts and estates, and in U.S. and international estate, trust and tax planning. Our Trusts & Estates lawyers develop cutting-edge, customized transfer tax and estate plans, utilizing trusts, wills, and various entity structures, such as partnerships and LLCs, and domestic and cross-border plans, to preserve and enhance our clients' wealth for current and future generations. Serving clients globally, we maintain a strong bicoastal presence in the U.S., particularly in San Francisco, Silicon Valley, Los Angeles, New York, Washington DC, and Palm Beach, FL. Highly regarded for a deep sense of caring, attention to detail, extensive experience and knowledge of estate, trust and tax laws, Pillsbury's Trusts & Estates lawyers listen closely to clients to understand their needs, and provide sophisticated advice and well-crafted estate and trust plans to accomplish their goals. We prepare plans designed to minimize transfer and income taxes, take advantage of planning opportunities occasioned by tax law changes and withstand third-party attacks. We have achieved massive transfer and income tax

---

151 *Trusts, Estates and Fiduciary Litigation*, HOLLAND & KNIGHT, https://www.hklaw.com/en/services/practices/private-wealth-services/trusts-estates-and-fiduciary-litigation [https://perma.cc/8DQ6-BT9W] (last visited Sept. 18, 2025).

> savings, enabling the efficient transfer of extremely valuable and appreciating assets for the benefit of younger generations.[152]

Local firms, smaller in size, are still eager to provide a wide range of services to a client and develop a relationship of trust. For example, Shulman Rogers:

> Effective estate planning requires not only drafting the essential documents, such as a will, revocable trust, financial power of attorney, health care power of attorney and living will, but also designing a comprehensive plan that provides for the transfer of assets and the minimization of taxes and related costs. In designing our clients' estate plans, we utilize sophisticated planning strategies, including the use of charitable lead trusts, charitable remainder trusts, dynasty trusts, grantor retained annuity trusts, insurance trusts and qualified personal residence trusts, as well as other planning and tax reduction tools, such as the formation of family limited partnerships and limited liability companies. We work with our clients to design a customized estate plan and are always available to manage the ongoing implementation of that plan to ensure that it continues to support our clients' goals and needs. We are pleased to work with our clients' other advisors, such as financial planners, investment advisors, accountants and insurance agents to ensure that our clients' estate plans succeed within their existing financial frameworks.[153]

For each of these illustrative firms, the bottom line is pursuit of profitability: "You have a limited amount of time and energy each day. To boost your firm's profitability, you need to focus your time, energy, and attention to billable work—and outsource the rest."[154] And many long-established firms have files of wills, health care directives, and powers of attorney executed by clients still alive and amenable to additional services the firm may provide, especially services that generate project-based billing, rather than billable hours.[155] For some of the firm's clients, a perfect fit would be

---

[152] *Trusts & Estates*, Pillsbury, https://www.pillsburylaw.com/en/services/corporate-and-transactional/trusts-estates.html [https://perma.cc/U28V-37LC] (last visited Sept. 18, 2025).

[153] *Wills, Trusts, Estates and Probate*, Shulman Rogers, https://www.shulmanrogers.com/personalservices/estates-trusts-probate/ [https://perma.cc/LAL4-5VU2] (last visited Sept. 18, 2025).

[154] Sharon Miki, *10 Tips to Improve Law Firm Profitability*, Clio: Clio Blog (Oct. 9, 2024), https://www.clio.com/blog/law-firm-profitability/ [https://perma.cc/8DX4-PJ5X] (last visited Sept. 18, 2025).

[155] Russ Alan Prince, *How Trusts and Estates Lawyers Can Double Their Revenues in a Year*, Forbes (Mar. 17, 2016), https://www.forbes.com/sites/russalanprince/2016/03/17/

to build upon the fiduciary relationship already established by retaining their law firm to serve as a trust director.

B. Recommendations

1. *Persons*

For a law firm to qualify as a trust director, the firm must meet the definition of a "person" under state law, which may occur as a result of a validly executed trust conferring on an entity, other than the trustee, a power of direction. For example, the UDTA defines a person as "an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other entity."[156] And that person, in accordance with, for example, a Tennessee Code provision, "may be a committee of more than one person, other than a trustee, who under the terms of the trust, an agreement of the qualified beneficiaries, or a court order has a power or duty with respect to a trust, including but not limited to" performance of certain powers.[157]

While governed under state law, there are few restrictions on that "person," other than that he or she may not be a trustee of the same trust, but the person may be a beneficiary or a settlor under the terms of the trust. And the UDTA specifies five powers that are excluded from what the trust director may do; these center on designating an "ownership interest" of trust property in another person.[158] Once established as a legal entity in the state, a person assumes the identity of a trust director because of the powers derived from the language of a legal trust document.

2. *Situs*

It is necessary to be attentive to the law firm's situs concerning responsibilities for providing information and liability for both trust director and directed trustee. "Although the statutory landscape of directed trusts may appear to be adapting and evolving, the inconsistencies among state laws, especially regarding directed trustee liability, require increased due diligence by drafting attorneys and fiduciaries operating in this space."[159] State laws vary significantly; some have adopted the UDTA, some have

---

how-trusts-and-estates-lawyers-can-double-their-revenues-in-a-year/ [https://perma.cc/9AJF-F6SF] (last visited Sept. 18, 2025).

156 Unif. Directed Tr. Act § 2(3) (Unif. L. Comm'n, Draft, Mar. 17-18, 2017); *see also* Unif. Directed Tr. Act § 103(10) (Unif. L. Comm'n, amended 2010).

157 Tenn. Code Ann. § 35-15-120(a) (2025).

158 Unif. Directed Tr. Act § 5 (Unif. L. Comm'n, amended 2017).

159 Lucius & Whitenack, *supra* note 11, at 84.

adopted a modified version of the Act (e.g., Florida), and some demonstrate little interest in adopting it at all (e.g., South Dakota).[160] But if a law firm were to assume the responsibilities of a trust director, it should clearly establish the state jurisdiction that will govern the trust director's actions, as this will determine fiduciary responsibility to include reporting, monitoring, and investment procedures. Furthermore, prior to the execution of any trust limiting the fiduciary responsibilities of any party, a firm should be certain that the agreement is fair and not in breach of confidentiality.[161]

The UDTA specifies that its provisions apply in a state in which a trust has "its principal place of administration."[162] Furthermore, terms of a trust that establish a sufficient connection with a designated jurisdiction are valid and controlling if that state is the trustee's or the trust director's principal place of business.[163] But the UDTA leaves open the possibility that jurisdiction over the trustee and the trust director may be established by "other means."[164] If all parties are located in one state, concentrating both trust corpus and trust administration, situs is more simple. But if the trust corpus is located in one state, e.g. South Dakota, and the trustee in a second state, e.g. New York, and the trust director is located in a third, e.g., Virginia, the applicable state law may be more elusive.[165] Hence, the applicable state law must be precisely established in the trust documents.

3. *Powers*

Powers of a trust director derive from the applicable trust document, supplemented with varying state statutes. Delaware, for example, permits the settlor to grant the trust director whatever the settlor thinks is appropriate, and a fiduciary responsibility only attaches to what is given; there is no default fiduciary duty. But an "off the rack" statute, such as South Dakota's, carries with it default duties corresponding to whatever was

---

160 Sneeringer & Veurink, *supra* note 13, at 31-34 (describing the distinctive features of Florida and South Dakota directed trust legislation).

161 *See, e.g.*, Williams v. Hardison, 704 S.W.3d 807, 823 (Tenn. Ct. App. 2024) (citing Tenn. Code Ann. § 35-15-1008(b) (2024): "An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.").

162 Unif. Directed Tr. Act § 3(a) (Unif. L. Comm'n 2017).

163 *Id.* § 3(b).

164 *See id.*

165 *See* Hanson v. Denckla, 357 U.S. 235, 247-49 (1958). For a discussion of jurisdiction over a trust and the use of a trust director, see *id.* (holding that the actions of the trustee control jurisdictional status).

given to the trust director in the terms of the trust. Hence, be attentive to the powers given in the trust and the law of the situs that may establish duties; fiduciary duties may attach and this pivotal issue should be addressed in the creating instrument. "A settlor can tailor the powers of a director in the terms of the trust by adding or subtracting powers and adjusting the fiduciary duties as the settlor likes. Under an enabling statute, by contrast, the scope of a trust director's powers and duties is set by the terms of the trust."[166] Be precise.

States vary widely in describing powers of a trust director; as such, corresponding fiduciary responsibilities may become confusing. Delaware has suggested powers a trust director may exercise, and South Dakota has its own process, too. Alaska has separate categories for a "trustee adviser," who may be given the power to direct a trustee's actions, and a "trust protector," who has the power to (among other things) remove a trustee or to modify a trust instrument. A trust adviser may be required to be a fiduciary, but a trust protector by default is not. "Nevada has four categories: a trust protector, a distribution trust adviser, an investment trust adviser, and a directing trust adviser."[167]

Compare the pertinent Florida statute with the UDTA. "Fla. Stat. § 736.1406(2) provides that the trust director has only the powers granted by the terms of the trust. There are no default terms granted to a trust director; the terms must be within the trust itself."[168] In comparison,

> the UDTA does not contain a provision identical to Fla. Stat. § 736.1406(2), but the Comment to section 6 states the same intention: "This subsection does not provide any powers to a trust director by default. Nor does it specify the scope of a power of direction. The existence and scope of a power of direction must instead be specified by the terms of a trust."[169]

By comparison, South Dakota has not adopted the UDTA but it has its own similar legislation providing enumerated powers available to a trust director:

> (1) Direct the trustee with respect to the retention, purchase, sale, exchange, tender, or other transaction affecting the ownership thereof or rights therein of trust investments. These powers include the pledge or encumbrance of trust property, lending of

---

166 Morley & Sitkoff, *supra* note 19, at 16. Professors Morley and Sitkoff prefer the Delaware approach, which is also the approach of the UDTA. *See id.* at 20-21.

167 *Id.* at 16.

168 Sneeringer & Veurink *supra* note 13, at 31.

169 *Id.* (citing Unif. Directed Tr. Act § 19 (Unif. L. Comm'n 2017)).

> trust assets, either secured or unsecured, at terms defined by the investment trust advisor to any party including beneficiaries of the trust and the investment and reinvestment of principal and income of the trust; definition;
> (2) Vote proxies for securities held in trust;
> (3) Select one or more investment advisers, managers, or counselors, including the trustee, and delegate to them any of its powers;
> (4) Direct the trustee with respect to any additional powers and discretions over investment and management of trust assets provided in the governing instrument;
> (5) Direct the trustee as to the value of nonpublicly traded trust investments;
> (6) Direct the trustee as to any investment or management power referenced in chapter 55-1A; and
> (7) Exercise the powers granted to an investment trust advisor in S.D. Codified Laws § 55-2-13 (2025).[170]

Another state, Colorado, lists the following as available powers pertinent to a trust director:

> (1) acquire, dispose of, exchange, or retain an investment; (2) make or take loans; (3) vote proxies for securities held in trust; (4) adopt a particular valuation of trust property or determine the frequency or methodology of valuation; (5) adjust between principal and income or convert to a unitrust; (6) manage a business held in the trust; (7) select a custodian for trust assets; (8) modify, reform, terminate, or decant a trust; (9) direct a trustee's or another director's delegation of the trustee's or other director's powers; (10) change the principal place of administration, situs, or governing law of the trust; (11) ascertain the happening of an event that affects the administration of the trust; (12) determine the capacity of a trustee, settlor, director, or beneficiary of the trust; (13) determine the compensation to be paid to a trustee or trust director; (14) prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust; (15) grant permission before a trustee or another director may exercise a power of the trustee or other director; or (16) release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other director.[171]

---

[170] S.D. Codified Laws § 55-1B-10 (2025).
[171] Colo. Rev. Stat. § 15-16-806 cmt. (2025).

The UDTA specifically excludes certain powers, such as a power of appointment. Morley and Sitkoff write that this exclusion is intentional because otherwise it would be disruptive of a frequently used estate planning tool.[172] Also, the trust director cannot remove a trustee.

> Under the exclusion of § 5(b)(2), such a power is not a power of direction, and the person holding the power is not a trust director. In consequence, a person who holds a power to appoint or remove a trustee is not subject to the fiduciary duties of a trust director.[173]

For the law firm assuming the role of a trust director, the "powerholder's and trustee's respective powers under the governing instrument must be clearly delineated to avoid confusion, ineffective trust administration, and most important, overlap, which could give rise to additional trustee liability."[174] Be attentive to responsibilities of each party. For example, a trust director "who is vested with the investment powers under the terms of a divided trust can act in any matter involving the management of the trust property, such as opening a brokerage account, executing the account opening documents, and buying and selling securities in the account."[175] Be specific as to: (1) operating cash accounts, (2) use of trust property, (3) loans to beneficiaries, (4) power to add beneficiaries, (5) power to determine beneficiaries and permissible appointees, (6) power to modify the terms of the trust, (7) power to decant, (8) sharing information, (9) supervisory duties, (10) jurisdictional situs, (11) fiduciary status, and (12) potential conflicts of interest.[176]

The UDTA provides for a statute of limitations on actions that may be brought against a trust director (Section 13),[177] defenses that may be used by a trust director (Section 14),[178] and establishing personal jurisdiction over a trust protector (Section 15).[179] Furthermore, as to fees:

> a trust director would have a power to incur and be indemnified for attorney's fees and other expenses "appropriate" to the exercise of the director's expressly granted powers. Such a direction would normally be appropriate if a trustee in a like position

---

172 *See* Morley & Sitkoff, *supra* note 19, at 21-25 (discussing exclusions).
173 *Id*. at 25. For a discussion of medical exclusions under the UDTA, *see id*. at 36-37.
174 Lucius & Whitenack, *supra* note 11, at 85.
175 Dillon & Mayo, *supra* note 18, at 9.
176 *Id.* at 9-12.
177 Morley & Sitkoff, *supra* note 19, at 56.
178 *Id.*
179 *Id.* at 55 n.195.

> and under similar circumstances would be entitled to indemnification of costs and expenses.[180]

4. *Drafting*

Although litigation concerning directed trusts is nascent, it is already axiomatic that the terms of the trust by which the direction is established is paramount. In drafting an effective trust document,

> considerations should include at a minimum: (a) whether the powerholder should be held to a fiduciary standard; (b) whether the trustee should have a continuing duty to monitor the powerholder's actions; and (c) if state law allows, whether the trustee's liability should be limited to either willful or intentional misconduct or gross negligence.[181]

Of particular concern should be the level of responsibility of each party. Directed trusts "can potentially create confusion in determining the responsible party for a particular action, because two or more persons are involved in administering the trust."[182] Where do fiduciary responsibilities lie?

The UDTA implements the policy that a trust director is a fiduciary in § 8, and the basic rule of § 8(a) is that "a trust director has the same fiduciary duty and liability" as a "trustee in a like position and under similar circumstances." It follows that if the trust director holds the power individually, then the director bears the fiduciary duty of a sole trustee. Likewise, if the director holds the power jointly with a trustee or another director, the director bears the fiduciary duty of a cotrustee. Throughout, the terms of the trust are dispositive. In accordance with UDTA § 8(a)(2),

> the terms of the trust may vary the director's duty or liability to the same extent the terms of the trust could vary the duty or liability of a trustee in a like position and under similar circumstances. In other words, duties that are default for a trustee are default for a similarly situated trust director, and duties that are mandatory for a trustee are mandatory for a similarly situated trust director. If the terms of a trust include an exoneration clause or a grant of extended discretion, those terms would

---

[180] *Id.* at 57; *see e.g.*, Williams v. Hardison, 704 S.W.3d 807, 810 (Tenn. Ct. App. 2024) (permitting indemnification of attorney fees for directed trustee).

[181] Lucius & Whitenack, *supra* note 11, at 85-86.

[182] Dillon & Mayo, *supra* note 18, at 9.

> have the same effect on the duty and liability of the director as they would for a trustee. If they go too far, they would be ineffective.[183]

5. *Fees*

In determining fees for a trustee and for a trust protector, the reasonable compensation standard should be commensurate with the level of expertise each party possesses and the degree of responsibility each party assumes. "Reasonable compensation for a trust director will vary based on the nature of the director's powers, and in some circumstances may well be zero." [184] As we previously discussed, a professional wealth management firm may reduce its fees in proportion to the responsibility accepted by the directed trustee; responsibilities to be assumed may include administrative tasks such as addressing the personal support needs of beneficiaries, or the vast array of prudential investment responsibilities inherent in managing a portfolio. "Although the Uniform Directed Trust Act applies the reasonable compensation standard of the Uniform Trust Code and Restatement (Third) of Trusts to powerholders, the Uniform Directed Trust Act Drafting Committee understood that fees in a directed trust arrangement may be higher, yet reasonable nonetheless."[185] Based upon what the parties agree to be reasonable compensation, there is the opportunity to accomplish the intent of the settlor in establishing the trust and assist the beneficiaries by minimizing friction and angst.

IV. Conclusion

The polestar of wealth transfer has always been governed by the intent of the donor, testator, settlor. The modern age offers an expanding list of transfer options to these transferors, and included among them is the directed trust. By utilizing a trust director, the transferor may achieve a modicum of personal particularity in distributing assets to beneficiaries and evading protective prudent investment mandates, while still utilizing the professionalism of corporate wealth managers. Because directed trusts are nascent, they carry risks and opportunities. Most onerous of all is the fact that wealth transfer, for the most part, is governed by state laws, which may vary from state-to-state, catching transferors, beneficiaries,

---

183 Morley & Sitkoff, *supra* note 19, at 34.

184 *Id.* at 55 (emphasizing the need for reasonable compensation appropriate to the work performed).

185 Lucius & Whitenack, *supra* note 11, at 87.

wealth managers, and attorneys unaware. The Uniform Directed Trust Act is evolving, but it provides a blueprint of what each state statute values.

The goal of this Article is to suggest that law firms are suitable for serving as trust directors. Furthermore, if the law firm is attentive to the laws of a known situs, a directed trust may provide an effective means by which there is benefit for many: the transferor, the transferee, the wealth manager trustee, and the law firm trust director.

This Article argues that law firms should explore that option of serving as a trust director. Because the firm is often the repository of a client's personal information, intents, fiduciary reliance, and proven partner in other legal endeavors, the law firm is a logical choice for serving as trust director. Together with a separate entity, a wealth management firm as trustee, the law firm trust director can provide many services, many of which are recited in the powers listed this Article. If properly drafted, an agreement among the transferor, the trustee, and the trust protector may not only result in increased revenues for the law firm, but also greater personal involvement for the transferor, and a more manageable administration for the trustee.