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*Peierls* **of Wisdom:**  
**What the *Peierls* Cases Mean**  
**for Trust Fiduciaries and Their Advisors**

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**February 25, 2014 | Telephone Seminar/Audio Webcast**  
*Cosponsored by The American College of Trust and Estate Counsel (ACTEC)*

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**Study Materials**



## **The American Law Institute Continuing Legal Education Group (ALI CLE)**

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### ***About The American Law Institute***

The American Law Institute (ALI), founded in 1923, is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4,000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education. ALI has long been influential internationally and, in recent years, more of its work has become international in scope.

By participating in the Institute's work, its distinguished members have the opportunity to influence the development of the law in both existing and emerging areas, to work with other eminent lawyers, judges, and academics, to give back to a profession to which they are deeply dedicated, and to contribute to the public good.

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In 1947, the American Bar Association (ABA) asked the American Law Institute to undertake the first national program of post-admission legal education. The need to refresh returning WWII lawyer-veterans on the law underscored the importance of continuing education to all lawyers. ALI accepted the challenge, and the two organizations formed a committee denominated as American Law Institute-American Bar Association (ALI-ABA) to begin the work.

The mission of this new, national continuing legal education (CLE) venture was to educate the bar in general, to work with state and local bar groups to meet lawyers' CLE needs, and to assist in establishing organizations that would develop their own CLE programs.

In the early years, ALI-ABA produced hundreds of live programs, and by 1958 brought CLE to communities in 44 states. ALI-ABA's publications also flourished during this time and included the creation of handbooks spanning a range of subject areas. Ultimately, ALI-ABA became renowned for its extensive programming in practice areas including business/corporate, employee benefits, employment, environmental, estate planning, and real estate/land use law, as well as in ethics, skills and law practice.

Over the years, ALI-ABA embraced new technologies and pioneered the delivery of CLE via satellite TV to a network of sites throughout the country hosted by state and local bar associations, law schools, and law firms. More recently, ALI-ABA added MP3 downloads to its delivery media that included live webcasts, online courses, on-demand electronic publications, DVDs, and telephone seminars. In addition to its national curriculum, ALI-ABA offered consulting, training, and accreditation assistance to law firms, corporate law departments, and government agencies for their in-house professional development programs. In 2010, ALI-ABA introduced the Knowledge Portal, a subscription-based, online legal content, research, and education resource designed to help attorneys balance their professional careers and become more efficient in their everyday practice.

### ***ALI CLE: A New Chapter in Continuing Legal Education***

On April 30, 2012, by mutual agreement, the American Bar Association and the American Law Institute chose to move forward separately in their CLE efforts, with the abundant intellectual content and cutting-edge technology of ALI-ABA being absorbed into the CLE group of ALI. Today, the thousands of prominent lawyers, judges, and legal academics in the United States and abroad who taught and wrote for ALI-ABA continue to do so for ALI CLE.

The American Law Institute continuing legal education group remains committed to the work of promoting continuing professional education for lawyers throughout the United States and to creating standards to ensure quality and relevance in CLE programs. As ALI-ABA did for nearly 65 years, ALI CLE continues to evolve to meet the needs of the legal profession, furthering a tradition of unparalleled service to lawyers.



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**PROGRAM SCHEDULE**  
February 25, 2014

Program Schedule	Eastern	Central	Mountain	Pacific	Alaska	Hawaii
National Teleseminar/Webcast	12:30 p.m.	11:30 a.m.	10:30 a.m.	9:30 a.m.	8:30 a.m.	7:30 a.m.
Adjournment	2:00 p.m.	1:00 p.m.	12:00 p.m.	11:00 a.m.	10:00 a.m.	9:00 a.m.

**Scope and Purpose:**

The *Peierls* cases involved 13 trusts settled outside of Delaware from 1953 through 2005. The trustees wished to move the administration of the trusts to Delaware and to modify the trusts under Delaware law. Although the Supreme Court of Delaware affirmed the Court of Chancery with respect to certain jurisdictional matters, it took the opportunity to clearly state the law governing administration of trusts and how the change of trust situs can change the law governing administration.

At this **CLE program on the *Peierls* cases and the migration of trusts to, and the administration of trusts in, Delaware**, learn the significance of the *Peierls* decisions from attorneys who represented the Peierls family in the Delaware Court of Chancery and Supreme Court. Faculty, Fellows of The American College of Trust and Estate Counsel, and counsel who represented the Peierls family, will discuss:

- the prior consent petition practice in Delaware
- key holdings of the Delaware Supreme Court opinions
- impact of the Supreme Court decisions on the methods for modifying trusts under Delaware law
- common reasons why non-Delaware residents utilize Delaware trusts and how a trust may be modified under Delaware law in order to take advantage of Delaware's statutes
- the significance of the *Peierls* decisions with respect to trust situs and governing law

Questions submitted during the program will be answered live by the faculty. In addition, all registrants will receive a set of downloadable course materials and *free* access to the archived online program.

**Program:** (*All Times Eastern Standard*)

**12:30 p.m.** *Peierls* of Wisdom: What the *Peierls* Cases Mean for Trust Fiduciaries and Their Advisors

**2:00 p.m.** Program Ends.

**Suggested Prerequisite:** Two to four years' experience in subject matter

**Educational Objectives:** Acquisition of knowledge and skills to develop proficiency as a practitioner; maintenance of professional competence as a practitioner; provision of information on recent legal developments

**Level of Instruction:** Intermediate

**Total 60-minute hours of instruction:** 1.5. **Total 50-minute hours:** 1.8.

**Nothing in this program, the program materials, or communications stemming from the program (including questions and answers) should be considered as the rendering of legal advice. Non-lawyers should seek the advice of a licensed attorney in all legal matters. Registrants/readers should assure themselves that these presentations/materials/communications are still current and applicable at the time they are delivered or read. Neither ALI CLE nor the speakers/authors can warrant that these presentations/materials/communications will continue to be accurate, nor do they warrant them to be completely free of errors when delivered/published. Registrants/readers should verify statements before relying on them. These presentations/materials/communications reflect the viewpoints of their speakers/authors and do not necessarily express the opinions of ALI CLE or its sponsors. The members of this program's faculty are contributing their services to further the continuing legal education of their fellow members of the Bar.**



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**FACULTY**

**Peter S. Gordon, Esquire**  
Director  
Gordon, Fournaris & Mammarella, P.A.  
1925 Lovering Ave  
Wilmington, DE 19806

**Daniel F. Hayward, Esquire**  
Director  
Gordon, Fournaris & Mammarella, P.A.  
1925 Lovering Ave  
Wilmington, DE 19806

**Karen Ann Fahrner, Esquire**  
PNC Delaware Trust Co.  
300 Delaware Ave., 5<sup>th</sup> Floor  
Wilmington DE 19801-1621



## FACULTY BIOGRAPHIES

### **Peter S. Gordon, Esquire**

Gordon Fournaris & Mannarella, P.A.  
1925 Lovering Ave  
Wilmington, DE 19806-2157



**Peter S. Gordon** is a Director of the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. He is a graduate of Georgetown University and Fordham University Law School. He received his Master of Laws in Taxation from Georgetown University Law School in 1981 and is a member of the Pennsylvania and Delaware Bar Associations.

Mr. Gordon is a former Chair of the Estates and Trusts Section and the Tax Section of the Delaware Bar Association. He has also served as Chairman of the Wilmington Tax Group, presently serves on the Planning Committee of the Delaware Tax Institute and is a regular participant in Bar Association seminars. He is a Fellow of the American College of Trust and Estate Counsel and served that organization as a Regent from 2003 to 2009.

Mr. Gordon is listed in The Best Lawyers in America in both Trusts and Estates and Tax Law and as one of Delaware Today's top lawyers in the field of trusts and estates.

### **Daniel F. Hayward**

Gordon, Fournaris & Mammarella, P.A.  
1925 Lovering Ave  
Wilmington, DE 19806-2157



**Daniel F. Hayward** is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. Daniel graduated with a Bachelor of Science degree in Chemical Engineering from the University of Delaware. He received his law degree from Villanova University School of Law in 2006 and is a member of the Delaware Bar Association. Daniel is currently enrolled in the LL.M. in Taxation program at Villanova University School of Law. He is also a member of the Estates and Trusts Section of the Delaware Bar Association.

Daniel's practice focuses on the unique aspects of Delaware trust law including directed trusts, dynasty trusts, asset protection trusts and all aspects of the validity, construction and

administration of Delaware trusts. Daniel routinely petitions the Delaware Court of Chancery to represent interested parties in the reformation of trusts and to transfer the situs of trusts to the State of Delaware. He also drafts, reviews and comments on Delaware trust agreements for local and out of state clients and provides legal opinions on the validity of trusts under Delaware law, including Delaware dynasty and Delaware self-settled asset protection.

Daniel also represents and advises Delaware corporate and individual trustees regarding trust administration and the legal aspects of their fiduciary roles. His practice also frequently includes representation of Delaware trustees in fiduciary litigation matters, in particular actions in the Delaware Court of Chancery seeking construction of trust provisions or instruction from the Court as to various matters of trust administration.

**Karen Ann Fahrner**

PNC Delaware Trust Co.  
300 Delaware Ave Fl 5  
Wilmington, DE 19801-1699



**Karen Ann Fahrner (“Kim”)** is Senior Counsel for the Asset Management Group with PNC, National Association, in Wilmington, Delaware. Prior to joining PNC, Kim was with a Philadelphia area trust company serving in senior management positions. For most of her career she was a partner in private law practice in Philadelphia.

Kim’s professional career has centered on advising financial institutions, individuals and families in connection with wealth management services, including tax, wills, trusts, fiduciary litigation, and related professional practice areas. She is an author, frequent lecturer and course planner for various non-profit and other continuing education programs regarding multiple aspects of the fiduciary field.

Kim is a Fellow of the American College of Trust and Estate Counsel, a nationally recognized group of highly skilled members who are distinguished in their field, where she is a member of the States Laws, Financial Action Task Force, and Business Committees. She also serves on the PA Joint State Government Commission Advisory Committee on Decedents’ Estates Laws, where she is a member of certain legislative drafting committees. She is co-author of a book on PA trust and estate law and Chair of the DE Bar Estates and Trusts Section Committee on Notice to Beneficiaries, and a frequent lecturer. Kim is a member of the Pennsylvania, Florida and Delaware Bars. Recognized for her many accomplishments and high standing in the community, she was named one of The Distinguished Women of 2006 by the *Philadelphia Business Journal*.

Kim is a Past President of the Philadelphia Estate Planning Council, where she originated and served as the moderator and planner of the popular “Roundtable” Luncheons for the Council. As an active member of the Council, Kim was an honored recipient of the President’s Meritorious

Service Award. A past member of the Board of Directors of the Pennsylvania Bar Institute, the teaching arm of the Pennsylvania Bar Association, Kim also served for over 10 years as a faculty member of the Central Atlantic School of Trust for bankers. Kim has received the AEP® designation, which is awarded by the National Association of Estate Planners & Councils to recognized estate planning professionals who meet special requirements of education, experience, knowledge, professional reputation, and character.

Kim received her LLM in tax law from New York University School of Law and obtained her JD from Temple University School of Law and her BA in English with Honors from the University of Miami, Coral Gables, Florida. Her non-profit activities include service on the Board of the Brain Injury Association of Pennsylvania, as a volunteer Area Steward for the Radnor Three Day Event, a Board member of the Buten Museum of Wedgewood and a committee member and co-chair for Contact Careline of Greater Philadelphia.



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***Peierls* of Wisdom—What the *Peierls* Cases Mean  
for Trust Fiduciaries and Their Advisors - *Slides***

**By**

**Karen Ann Fahrner  
PNC Delaware Trust Co.  
Wilmington, Delaware**

**Peter S. Gordon, Esquire  
Gordon Fournaris & Mannarella, P.A.  
Wilmington, Delaware**

**Daniel F. Hayward  
Gordon, Fournaris & Mammarella, P.A.  
Wilmington, Delaware**

*Peierls* of Wisdom:  
What the *Peierls* Cases Mean for  
Trust Fiduciaries and Their Advisors

Peter S. Gordon, Esq.  
Daniel F. Hayward, Esq.  
Karen A. Fahrner

## Introduction

- Delaware Supreme Court issued three separate and related opinions, *en banc*, in the *Peierls* case on October 4, 2013
- The *Peierls* have positively impacted the migration of trusts to Delaware and their subsequent modification under Delaware law
- Delaware is a favored jurisdiction for trusts, and the *Peierls* opinions ensure that it will continue to be a favored destination for trusts.



## The Delaware Advantage

- The trust instrument controls – **12 Del. C. § 3303(a)**.
  - “(a) Notwithstanding any other provision of this Code or other law, **the terms of a governing instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary’s interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary’s powers, duties, standard of care, rights of indemnification and liability** to persons whose interests arise from that instrument; provided however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary’s own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary’s willful misconduct. The rule that statutes in derogation of a common law are to be strictly construed shall have no application to this section. **It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.**”

## The Delaware Advantage

- Limitation on actions against a trustee – **12 Del. C. § 3585(a)**.
  - Beneficiary may not hold a trustee liable for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach unless the beneficiary was so induced by improper conduct of the trustee or the beneficiary did not know at the time the beneficiary’s rights or material facts the trustee knew or should have known. **12 Del. C. § 3588.**

## The Delaware Advantage

- Favorable income tax laws
  - Delaware does not tax that portion of trust income and capital gains accumulated and set aside for future distribution to nonresident beneficiaries. **30 Del. C. § 1636(a).**
  - If all of the beneficiaries of a Delaware trust are nonresidents, the trust pays no Delaware state income tax at all.
- Prudent investor rule – 12 Del. C. § 3302

## The Delaware Advantage

- Self-settled asset protection trusts – The Qualified Dispositions in Trust Act, **12 Del. C. § 3570, et. seq.**
  - The statute allows a transfer by one trustee to a qualified Delaware trustee to be treated as a qualified disposition. **12 Del. C. § 3570(7).**
  - A significant number of out of state trusts have migrated to Delaware in order to take advantage of this statute.
- Total return trusts – 12 Del. C. § 3527

## The Delaware Advantage

- Decanting – 12 Del. C. § 3528.
  - The statute authorizes a trustee, that has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a portion of the principal subject to the power of invasion in favor of a trustee of a trust under a separate trust instrument (a second trust). **12 Del. C. § 3528(a).**
  - Decanting has become an increasingly popular method for migrating trusts to Delaware and modifying such trusts to take advantage of certain aspects of Delaware trust law

## The Delaware Advantage

- Pre-mortem validation of trusts. **12 Del. C. § 3546**
- The “consent petition” process – governed by Delaware Court of Chancery rules 100-104
- Confidentiality / “quiet” trusts
  - A settlor may direct the trustee (for a period of time) not to inform the beneficiary of the beneficiary’s interest in the trust. **12 Del. C. § 3303(a).**

## The Delaware Advantage

- **Directed Trusts – 12 Del. C. § 3313**
  - Delaware recognizes directed trusts and limits the liability of a trustee who acts upon the direction of an adviser appointed in the trust agreement to make an investment decision, a distribution decision or other decisions.
  - When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its “willful misconduct.” **12 Del. C. § 3313(b)**.
  - The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. **12 Del. C. § 3301(g)** and **12 Del. C. § 3301(h)(4)**.
  - In all cases, there may be an adviser who is a “trust protector.” **12 Del. C. § 3313(f)**

## Prior Consent Petition Practice

- Prior to *Peierls*, it was common practice for interested parties to file a Petition in the Delaware Court of Chancery seeking the following relief:
  - Confirmation of the appointment of a Delaware corporate trustee
  - Acceptance of jurisdiction over the trusts so that Delaware will be the situs of the trust and Delaware law will govern the trust’s administration
  - Modification of the trust, usually, in part, to make it a directed trust under Delaware law with respect to investment decisions and/or distribution decisions
- Delaware trustee’s acceptance was contingent upon Court’s confirmation of its appointment

## The Peierls Consent Petitions

- Worked with family for several months to determine best course of action
- Five inter vivos trusts, seven testamentary trusts and one charitable lead trust
- All trusts had broadly similar dispositive and administrative provisions, but located in different jurisdictions
- Most trusts had two individual trustees and one corporate trustee

## The Peierls Consent Petitions

- Petitions filed in Delaware Court of Chancery sought:
  - Approval of the resignation of the individual trustees
  - Confirmation of the appointment of the successor corporate trustee
  - Acceptance of jurisdiction over the trusts so that Delaware would be the situs of the trusts and Delaware law would thereafter govern the administration of the trusts
  - Modification of the trusts to create the position of Investment Direction Adviser
  - Modification of the trusts to create the position of Trust Protector with the authority to remove and replace the other fiduciaries and to further amend the administrative provisions of the trusts without court action
- After a hearing in October of 2012, the Delaware Chancery Court issues its opinions denying each of the Petitions.

## The *Peierls* Opinions – Key Holdings

- Delaware law governing administration
  - Court analyzed relevant Delaware case law
  - Relied heavily on the Restatement (Second) of Conflict of Laws
  - **\*\*\* Even if a trust contains a choice of law provision, and even if that choice of law provision references “administration,” the law governing the administration of a trust will change when the place of administration of the trust changes via the proper appointment of a successor trustee, unless the settlor has specifically stated his or her intent that a state’s law shall *always* govern the administration of that trust**

## The *Peierls* Opinions – Key Holdings

- Trust matters that properly constitute “administration”
  - All items of relief requested in the Petitions were “administrative matters”
  - Opens the door for use of nonjudicial methods available under Delaware law to modify trusts, such as decanting, merger and nonjudicial settlement agreements

## The *Peierls* Opinions – Key Holdings

- Jurisdiction
  - Two questions: (1) *can* the Court exercise jurisdiction? (2) *should* the Court exercise jurisdiction?
  - If all interested parties consent, Court can exercise jurisdiction
  - Whether Court should exercise jurisdiction depends on whether a court currently has “primary supervisions” over the trust
  - Primary supervision can be manifested by the following:
    - » There are existing court orders relating to the trust in which the issuing court specifically retains jurisdiction
    - » “Active control”
  - For typical inter vivos trusts, a court acquires jurisdiction “only when a beneficiary or trustee brings a suit over the trust.”
- No “advisory opinions”
  - Delaware trustee taking part in consent Petition cannot condition the acceptance of its appointment upon an order from the Chancery Court confirming its appointment

## Methods to Modify Trusts Under Delaware Law

- Consent petition process
  - Delaware Supreme Court’s analysis and clarity on governing law and jurisdictional issues eliminates a significant amount of uncertainty
  - If goal is to modify trust to make it a directed trust, there will be a period of time during which the Delaware trustee is not directed. Risk can be minimized or extinguished by:
    - » Nonjudicial settlement agreement under Delaware law, entered into immediately after Delaware trustee accepts its appointment
    - » Release and ratification agreement, entered into immediately after Court enters order modifying trust to make it directed

## Methods to Modify Trusts Under Delaware Law

- Decanting – **12 Del. C. § 3528**
  - When can it be used? – When Delaware law governs the administration of the trust or when the trust is administered in Delaware
  - How can it be used? - Can be used to make significant changes to administrative provisions to the trust as long as requirements of the statute are met. Can be used to give a beneficiary a limited lifetime or testamentary power of appointment.
  - Statute does not require notice to or consent of trust beneficiaries. Most trustees will require a Consent, Release and Indemnity Agreement to be signed by some or all of the trust beneficiaries.

## Methods to Modify Trusts Under Delaware Law

- Merger – **12 Del. C. § 3325(29)**
  - When can it be used? – When Delaware law governs the administration of the trust
  - How can it be used? - Pursuant to the statute, a trustee is authorized to “[m]erge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.”
  - Like decanting, merger is an exercise of the trustee’s discretion
  - Since the Delaware Chancery Court’s *Peierls* opinions, merger has become a popular method to obtain desired administrative provisions



## Methods to Modify Trusts Under Delaware Law

- Nonjudicial settlement agreements – **12 Del. C. § 3338**
  - **When can it be used?** – When Delaware law governs the administration of the trust
  - **How can it be used?**
    - » Modeled after Section 111 of the Uniform Trust Code
    - » Interested parties may enter into a binding agreement “with respect to any matter involving a trust.”
    - » Statute contains a nonexclusive list of six matters that be the subject of a nonjudicial settlement agreement
    - » Agreement cannot violate “a material purpose of the trust”
    - » All parties that would be required to sign a Waiver in connection with a consent Petition relating to the trust would be required to sign the nonjudicial settlement agreement for the agreement to be effective



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**The Delaware Supreme Court *Peierls* Opinions – Analysis  
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Wilmington, Delaware



The Delaware Supreme Court *Peierls* Opinions –  
Analysis and Impact on Methods for Modifying Trusts Under Delaware Law

Daniel F. Hayward, Esq.  
 Michael M. Gordon, Esq.  
 Gordon, Fournaris & Mammarella, P.A.  
 1925 Lovering Avenue  
 Wilmington, DE 19806  
 Tel: (302) 652-2900  
 Fax: (302) 652-1142  
[dhayward@gfmlaw.com](mailto:dhayward@gfmlaw.com)  
[mgordon@gfmlaw.com](mailto:mgordon@gfmlaw.com)

**Presented in conjunction with ACTEC/ALI-CLE: What the Peierls Cases Mean for Trust Fiduciaries and Their Advisors – February 25, 2014, by:**

Peter S. Gordon, Esq.  
 Daniel F. Hayward, Esq.  
 Karen A. Fahrner

## **I. Introduction**

The Delaware Supreme Court recently issued three separate and related *en banc* opinions for the *Peierls* matters<sup>1</sup>, authored by Chief Justice Steele, resulting from the appeal of three opinions of the Delaware Court of Chancery. The Delaware Supreme Court opinions in *Peierls* provide significant insight into various legal issues, including how to determine the administrative law, situs and jurisdiction of trusts, that should favorably impact the migration of trusts to Delaware and the subsequent modification of those trusts to take advantage of Delaware trust law. This outline will discuss the various aspects of Delaware law that continue to make Delaware a favorable and desired jurisdiction for trusts, the specific holdings of the *Peierls* opinions, and the extent to which such holdings reduce the barriers to effectively transferring trusts to Delaware and modifying them to modernize administrative provisions.

## **II. The State of Delaware – A Favorable Jurisdiction for Trusts**

Delaware has become a favored jurisdiction for existing trusts for many reasons, perhaps most notably due to the flexibility and administrative advantages afforded by Delaware law. Delaware is a trust friendly state. For more than a century, Delaware has assisted wealthy families in accomplishing objectives such as teaching younger generations about the responsible stewardship of wealth and philanthropy while simultaneously maximizing the investment return

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<sup>1</sup> See *In the Matter of Peierls Family Inter Vivos Trusts*, 2013 WL 5539329 (Del. Oct. 4, 2013); *In the Matter of Peierls Family Testamentary Trusts*, 2013 WL 5526239 (Del. Oct. 4, 2013); *In the Matter of Ethel F. Peierls Charitable Lead Unitrust*, 2013 WL 5526243 (Del. Oct. 4, 2013).

on family assets, protecting family wealth from creditors and saving income taxes. See, R. Nenzo, *Perpetual Dynasty Trusts: Tax Planning and Jurisdiction Selection*, ALI-ABA Planning Techniques for Large Estates, 509-651 (Apr. 2007), available at [www.ali-aba.org](http://www.ali-aba.org). Some of the primary reasons associated with migrating a trust to Delaware and modifying the trust to take advantage of certain aspects of Delaware law, which are also relevant reasons for the creation of new Delaware trusts, are detailed below.

- A. **Trust Instrument Controls.** Delaware law gives maximum effect to the wishes of the settlor as expressed in the governing instrument. 12 Del. C. § 3303(a). This specific statutory provision states that the terms of a governing instrument may expand, restrict, eliminate or otherwise define the rights of beneficiaries, including the right of a beneficiary to be informed of the existence of the trust, the grounds for the removal of a fiduciary, and the fiduciary's powers, duties and standard of care. Id.

### § 3303. Effect of provisions of instrument

(a) Notwithstanding any other provision of this Code or other law, **the terms of a governing instrument may expand, restrict, eliminate or otherwise vary the rights and interests of beneficiaries, including, but not limited to, the right to be informed of the beneficiary's interest for a period of time, the grounds for removal of a fiduciary, the circumstances, if any, in which the fiduciary must diversify investments, and a fiduciary's powers, duties, standard of care, rights of indemnification and liability** to persons whose interests arise from that instrument; provided however, that nothing contained in this section shall be construed to permit the exculpation or indemnification of a fiduciary for the fiduciary's own willful misconduct or preclude a court of competent jurisdiction from removing a fiduciary on account of the fiduciary's willful misconduct. The rule that statutes in derogation of a common law are to be strictly construed shall have no application to this section. **It is the policy of this section to give maximum effect to the principle of freedom of disposition and to the enforceability of governing instruments.** [Emphasis added].

In addition, a trustee has a statutory right to rely on the terms of the trust instrument. In this regard, 12 Del. C. § 3586 states:

### § 3586. Reliance on trust instrument

A trustee who acted in good faith reliance on the terms of a written trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Similarly, 12 Del. C. § 3302(e) states:

### § 3302. Degree of care; authorized investments

(e) Any fiduciary acting under a governing instrument shall not be liable to anyone whose interests arise from that instrument for breach of fiduciary duty for the fiduciary's good faith reliance on the express provisions of such instrument. The standards set forth in this section may be expanded, restricted or eliminated by express provisions in a governing instrument.

- B. Limitation on Actions Against a Trustee. Delaware law provides that a beneficiary may not initiate a proceeding against the trustee for breach of trust after the first to occur of: (i) two years following the date the beneficiary was sent a report that adequately disclosed the facts constituting a claim or (ii) the date the proceeding was otherwise precluded by adjudication, release, consent or other limitation under Delaware law. 12 Del. C. § 3585(a). The two year claims period applies to minor, incapacitated and unborn persons and persons whose identity or location is unknown whose interest is represented under Delaware's virtual representation statute. 12 Del. C. § 3547, which is further discussed below. In 2008, 12 Del. C. § 3585 was amended to add a new five year statute of repose for breach of trust actions. In cases where the two-year limitation period does not apply, the new limitations period absolutely bars breach of trust claims five years following the first to occur of (i) the removal, resignation or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.
1. Beneficiary's Consent. Delaware law provides that a beneficiary may not hold a trustee liable for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach or ratified the transaction constituting the breach unless the beneficiary was so induced by improper conduct of the trustee or the beneficiary did not know at the time the beneficiary's rights or material facts the trustee knew or should have known. 12 Del. C. § 3588.
  2. Virtual Representation. Delaware law provides that the interest of "a minor, incapacitated, or unborn person, or a person... whose identity or location is unknown and not reasonably ascertainable" may be represented and bound by another with substantially identical interests, to the extent that there is no material conflict of interest between the representative and the person being represented with regard to the particular question or dispute. 12 Del. C. § 3547(a). Virtual representation applies for all purposes including judicial proceedings and such non-judicial matters as releasing the trustee, consenting to the conduct of the trustee or ratifying a transaction engaged in by the trustee. 12 Del. C. § 3588. In the case of a minor or incapacitated beneficiary, the surviving and competent parent may represent and bind the beneficiary. 12 Del. C. § 3547(c). A "presumptive remainder beneficiary" (one who would take if the trust terminated at that time without regard to the exercise or non-exercise of a power of appointment) may represent and bind contingent remainder beneficiaries including adults and charities. 12 Del. C. § 3547(b). A surviving parent

or parents or custodial parent (if one parent has sole custody of the beneficiary) may sign on behalf of a minor or incapacitated beneficiary only if “there is no material conflict of interest between the minor or incapacitated beneficiary and either of such beneficiary’s parents with respect to the particular question in dispute”. 12 Del. C. § 3547(c). The foregoing provision often avoids the need to appoint a guardian ad litem for purposes of a judicial proceeding relating to a Delaware trust.

- (a) “Material Conflict of Interest” Defined. In 2013, 12 Del. C. § 3547 was amended to provide that a material conflict of interest between a representative and each beneficiary is presumed when, as a result of the judicial proceeding or nonjudicial matter:
- i. the representative will be appointed to a fiduciary or nonfiduciary office or role, unless the representative already serves in a fiduciary or nonfiduciary office or role and will not receive greater authority, broader discretion, or increased protection as a result of the new appointment;
  - ii. the representative currently holds a fiduciary or nonfiduciary office or role and will receive greater authority, broader discretion, or increased protection; or
  - iii. the representative has any other “actual or potential conflict of interest with the represented beneficiaries with respect to the particular question or dispute, including but not limited to a conflict resulting from a differing investment horizon or an interest in present income over capital growth.” 12 Del. C. § 3547(e).
- (b) The 2013 amendment to 12 Del. C. § 3547 aligns the statute with Delaware Court of Chancery Rule 103, which relates to consent Petitions and is further discussed in Section II of this outline.

- C. Favorable Income Tax Laws. Delaware does not tax that portion of trust income and capital gains accumulated and set aside for future distribution to nonresident beneficiaries. 30 Del. C. § 1636(a). If all of the beneficiaries of a Delaware trust are nonresidents, the trust pays no Delaware state income tax at all. Id. Many non-resident trusts (including many from New York) have been moved to Delaware to avoid state income tax that would otherwise apply. See, for example, N.Y. Tax Law § 605(b)(3)(D) exempting resident trusts from New York income tax where all of the trustees are domiciled in a state other than New York, the entire trust corpus is located outside the State of New York and all income and gain of the trust are derived from or connected with sources outside the State of New York. Clients with existing trusts in high income states often move their



trusts to Delaware in anticipation of a transaction that will result in a substantial capital gain (i.e., a sale of a block of low-basis stock) in order to avoid the state income tax that would be imposed as a result of the transaction. Delaware does not have a tax on intangible personal property and there are no other franchise taxes, gross receipts taxes or hidden fees that apply to Delaware trusts.

- D. Prudent Investor Rule. Delaware adopted its version of the uniform Prudent Investor Act in 1986. 12 Del. C. § 3302(b). Delaware permits a trustee to acquire virtually every kind of investment and judges the trustee's investment performance based upon the performance of the entire portfolio of the trust and not on an asset by asset basis. 12 Del. C. § 3302(c). Where the terms of a governing instrument direct the fiduciary to retain specified trust property as a trust investment, the duty of diversification otherwise applicable to the fiduciary with respect to such property shall be deemed to be waived and the fiduciary shall be exonerated from liability for retaining the property except in the case of willful misconduct proved by clear and convincing evidence in the Delaware Court of Chancery. 12 Del. C. § 3304.
- E. Self-Settled Asset Protection Trusts. Delaware enacted a self-settled asset protection trust law "The Qualified Dispositions in Trust Act" in 1997. 12 Del. C. § 3570, et. seq. ("Act"). The Act specifically allows a transfer by one trustee to a qualified Delaware trustee to be treated as a qualified disposition. 12 Del. C. § 3570(7). The Act provides asset protection to certain self-settled trusts permitting a settlor to transfer the settlor's own assets through a qualified disposition to an irrevocable trust, retain certain beneficial interests in the trust and protect those assets from the claims of the settlor's creditors. Id. A creditor's claim against a Delaware asset protection trust is barred unless (i) the claim arose before the qualified disposition and suit is filed not later than four years after the date of the qualified disposition or one year after the creditor discovered or should have discovered the qualified disposition or (ii) the claim arose after the qualified disposition and suit is filed within four years after the qualified disposition. 12 Del. C. § 3572(b). A significant number of out of state trusts have migrated to Delaware to take advantage of the Act.
- F. Total Return Trust. Many trusts have had their place of administration transferred to Delaware has been moved to Delaware specifically for the purpose of allowing the Delaware trustee to convert an income only trust to a total return trust Delaware was the first state to adopt total return legislation when it enacted 12 Del. C. § 3527 on June 21, 2001. The total return statute creates a simplified procedure that allows a "Disinterested Trustee" (such as a corporate fiduciary) to convert an income only trust to a total return trust without court proceedings. 12 Del. C. § 3527(b). The statute allows a trustee to establish a unitrust rate from 3% to 5% in lieu of trust income and to allocate to the unitrust payment tax characteristics such as short-term and long-term capital gain. 12 Del. C. § 3527(h). The power of a trustee to convert an income trust to a total return trust or a total return trust to an income trust is, by statute, a law pertaining to the

administration of a trust and is available to any trust administered in Delaware. 12 Del. C. § 3527(1).

- G. Decanting. Delaware law authorizes a trustee, that has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a portion of the principal subject to the power of invasion in favor of a trustee of a trust under a separate trust instrument (a second trust). 12 Del. C. § 3528(a). Decanting has become an increasingly popular method for migrating trusts to Delaware and modifying such trusts to take advantage of certain aspects of Delaware trust law. The Delaware decanting statute is discussed in more detail later in this outline.
- H. Pre-mortem Validation of Trust. Delaware law allows the trustee of a trust to provide written notice of the trust to the interested parties to the trust (including beneficiaries of the trust), and such notice may provide that such interested party has 120 days from delivery of the notice to initiate a judicial proceeding in the Delaware Court of Chancery to contest the validity of the trust. 12 Del. C. § 3546. If the interested party does not initiate a judicial proceeding within such time period, such party is forever barred from contesting the validity of the trust. In a recent Delaware case, In the Matter of: Restatement of Declaration of Trust Creating the Survivor's Trust Created Under the Ravet Family Trust Dated February 9, 2012, C.A. No. 7743-VCG, the Delaware Court of Chancery enforced the statute by dismissing as time-barred a beneficiary's suit contesting the validity of an irrevocable Delaware trust. The Delaware Court of Chancery also confirmed that the pre-mortem validation statute is a statute of repose and applied the presumption in the statute which provides that delivery of the notice to the last known address of the interested party contesting the trust shall constitute receipt of the notice by such party, which triggers the commencement of the 120 day period in which the party may initiate a judicial proceeding contesting the trust. Delaware's pre-mortem validation statute can therefore be a powerful tool for a Settlor to utilize if the Settlor expects that a trust that he or she creates during life may otherwise be challenged by a beneficiary following the Settlor's death. The pre-mortem validation process would allow the Settlor during his or her lifetime, in the validity of the trust is challenged within the 120 day period, to state his or her intent and confirm that the trust was validly created.
- I. Confidentiality / "Quiet" Trusts. Delaware law places great emphasis on the confidentiality of matters relating to Delaware trusts. A settlor may direct the trustee (for a period of time) not to inform the beneficiary of the beneficiary's interest in the trust. 12 Del. C. § 3303(a).
- J. Directed Trusts. Delaware recognizes directed trusts and limits the liability of a trustee who acts upon the direction of an adviser appointed in the trust agreement to make an investment decision, a distribution decision or other decisions. 12 Del. C. § 3313. The judicial and non-judicial methods described in Section V of this outline to migrate a trust to Delaware and modify or reform the trust are

perhaps most often employed to make the trust a directed trust under Delaware law as to investment decisions (via the creation of the position of an Investment Direction Adviser or Special Holdings Direction Adviser), distribution decisions (via the creation of the position of Distribution Adviser), or both.

1. Definition. A directed trust is a trust that removes one or more powers or discretions traditionally held by the trustee and vests that power or discretion in a person who is either a special trustee or not a trustee at all. The power or discretion can relate to investment decisions, management decisions, distribution decisions and any other decision affecting the administration of the trust. The starting point for the creation of directed trusts is the statutory framework that permits them coupled with the carefully worded language of the trust instrument.
2. Delaware Provisions. The foregoing provisions for directed trusts should be compared with the more protective provisions adopted by Delaware and a few other states.
  - (a) Delaware law recognizes a broad class of advisers including direction advisers, consent advisers and trust protectors. Where one or more persons are given authority by the terms of a governing instrument to direct, consent to or disapprove a fiduciary's actual or proposed investment decisions, distribution decisions or other decisions of the fiduciary, such persons shall be considered to be advisers and fiduciaries when exercising such authority unless the governing instrument otherwise provides. 12 Del. C. § 3313(a).
  - (b) When a trustee acts in accordance with the directions of a trust direction adviser, the trustee will only be liable for its "willful misconduct".

#### Direction Provision

If a governing instrument provides that a fiduciary is to follow the direction of an adviser, and the fiduciary acts in accordance with such a direction, then **except in cases of willful misconduct on the part of the fiduciary so directed, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any such act. 12 Del. C. § 3313(b). [emphasis added] The term willful misconduct means intentional wrongdoing and not mere negligence, gross negligence or recklessness. 12 Del. C. § 3301(g) and 12 Del. C. § 3301(h)(4).

- (c) The statutory standard of care required of a fiduciary acting on the consent of a Consent Adviser is only somewhat broader. When a

trustee acts with the consent of a Consent Adviser, the trustee will only be liable for its “willful misconduct” or “gross negligence”.

#### Consent Provision

If a governing instrument provides that a fiduciary is to make decisions with the consent of an adviser, then **except in cases of willful misconduct or gross negligence on the part of the fiduciary, the fiduciary shall not be liable** for any loss resulting directly or indirectly from any act taken or omitted as a result of such adviser’s failure to provide such consent after having been requested to do so by the fiduciary. 12 Del. C. § 3313(c).  
[emphasis added]

- (d) In all cases, there may be an adviser who is a “trust protector”.

#### Trust Protector

... the term “adviser” shall include a “protector” who shall have all of the power and authority granted to the protector by the terms of the governing instrument, which may include but shall not be limited to:

- (i) The power to remove and appoint trustees, advisers, trust committee members, and other protectors;
  - (ii) The power to modify or amend the governing instrument to achieve favorable tax status or to facilitate the efficient administration of the trust; and
  - (iii) The power to modify, expand, or restrict the terms of a power of appointment granted to a beneficiary by the governing instrument. 12 Del. C. § 3313(f).
- (e) The statutory protection afforded trustees of directed trusts would be diminished if advisers or beneficiaries could sue the trustee on the theory that the trustee had a duty to keep them informed and to impart to them knowledge affecting their interests in the trust so they could perform their duties as advisers or otherwise protect their beneficial interests in the trust.

#### Duty to Monitor, Communicate and Inform

Whenever a governing instrument provides that a fiduciary is to follow the direction of an adviser with respect to investment decisions, distribution decisions, or other decisions of the

fiduciary, then, except to the extent that the governing instrument provides otherwise, **the fiduciary shall have no duty to:**

- (i) **monitor the conduct of the adviser;**
- (ii) **provide advice to the adviser or consult with the adviser; or**
- (iii) **communicate with or warn or apprise any beneficiary or third party concerning instances in which the fiduciary would or might have exercised the fiduciary's own discretion in a manner different from the manner directed by the adviser.** 12 Del. C. § 3313(e). [emphasis added].

Absent clear and convincing evidence to the contrary, the actions of the fiduciary pertaining to matters within the scope of the adviser's authority (such as confirming that the adviser's directions have been carried out and recording and reporting actions taken at the adviser's direction), shall be presumed to be administrative actions taken by the fiduciary solely to allow the fiduciary to perform those duties assigned to the fiduciary under the governing instrument and such administrative actions shall not be deemed to constitute an undertaking by the fiduciary to monitor the adviser or otherwise participate in actions within the scope of the adviser's authority. Id.

### III. Prior Consent Petition Practice in the Delaware Court of Chancery

#### A. Prior Practice

1. Before the Delaware Chancery Court's rulings in *Peierls*, it was common practice for interested parties to file a Petition with the Court seeking confirmation of the appointment of a Delaware corporate trustee, acceptance of jurisdiction over the trust, and the modification/reformation of the trust at issue.
2. The Delaware trustee's acceptance of its appointment as successor trustee was contingent upon an order from the Court confirming the appointment.
3. The most commonly sought modification is the addition of an Investment Direction Adviser to direct the Delaware trustee on the investment and

management of some or all of the trust assets in accordance with Delaware's directed trust statute, 12 Del. C. § 3313.

4. Because the Orders were entered simultaneously, the Delaware trustee's appointment would occur at the same time the trust was modified to convert it into a directed trust meaning there would not be any point in time where the Delaware trustee was responsible for the investment of the trust assets.

#### B. The Peierls Consent Petitions

1. Our office worked with members of the Peierls family for several months in order to construct a plan by which several trusts created for their benefit could be moved to the same jurisdiction with the same corporate trustee and subsequently be streamlined in order for more efficient administration of the trusts.
2. The various Peierls trusts had broadly similar dispositive and administrative provisions, but not all were situated in the same jurisdiction and they did not all have the same corporate trustee serving. Most of the trusts had two individual trustees and a corporate trustee. Additionally, all of the trusts contained special assets that would not be typically be found in an institutional trustee's portfolio.
3. In 2012, several Petitions were filed relating to five inter vivos trusts, seven testamentary trusts, and one charitable lead unitrust. The Petitions each sought the following relief from the Chancery Court for each trust:
  - Approve the resignation of individual trustees
  - Confirm the appointment of the Delaware corporate trustee
  - Accept jurisdiction over the trust so that Delaware would be the situs of the trusts and Delaware would govern the administration of the trust.
  - Reform/modify certain administrative provisions of the trust, including the addition of the positions of Investment Direction Adviser and Trust Protector, as well as the modernization of the provisions relating to the resignation, removal and appointment of corporate trustees.

4. The individuals proposed as the initial Investment Direction Adviser and the initial Trust Protector had already been serving as individual trustees of the trusts for a significant period of time.
5. The Chancery Court denied the Petitions on several grounds, including lack of jurisdiction over the trusts since no administration was yet taking place in Delaware.
  - The Petitions relating to the five inter vivos trusts were denied primarily because the Delaware Chancery Court held that it could not consider the proposed modification because Delaware law did not govern the inter vivos trusts and, further, would not govern the trusts even if the Delaware corporate trustee accepted its appointment as successor corporate trustee.
  - The Petitions relating to the seven testamentary were denied because the Delaware Chancery Court held that the courts of other states had retained jurisdiction over the trusts, and to consider such Petitions would be a violation of interstate comity principles.
  - The Petition for the charitable lead unitrust was denied because the Court held that the change in situs and administrative law could be accomplished without Court action, and strictly construed the requested “reformation” of the trust to mean that the changes were to be effective as of the date of the trust’s creation, as opposed to a “modification” of the trust terms moving forward.
6. Additionally, the Court held that it could not rule upon certain items of requested relief, including approval of the resignation of the individual trustees and confirmation of the appointment of the successor corporate trustee, because such actions could be accomplished without Court involvement pursuant to the terms of the trusts, and to rule upon such matters would cause the Court to render impermissible advisory opinions.
7. The three opinions of the Delaware Chancery Court were appealed in November, 2012, and oral argument was heard before the Delaware Supreme Court, *en banc*, on July 10, 2013. Three opinions were issued by the Delaware Supreme Court on October 4, 2013.

#### IV. Delaware Supreme Court Opinions – Key Holdings



### A. Delaware Law Governing Administration

1. The most critical holding relates to the effect of changing the place of administration of a trust on the law that governs the administration of the trust. The Supreme Court concludes, contrary to the Chancery Court's analysis, that even if a trust contains a choice of law provision, and even if that choice of law provision references "administration", under the principles set forth in the *Restatement (Second) of Conflict of Laws* (the "*Restatement*") the law governing the administration of a trust will change when the place of administration of the trust changes via a proper appointment of a successor trustee, unless the settlor has specifically stated his or her intent that a state's law shall *always* govern the administration of that trust.
2. "When a settlor does not intend his choice of governing law to be permanent and the trust instrument includes a power to appoint a successor trustee, the law governing the administration of the trust may be changed."
3. The Supreme Court carefully reviewed relevant Delaware case law and concluded that the holdings of those cases did not support the Chancery Court's conclusions concerning the effect of the change of the place of administration of a trust and the law governing the administration of a trust.
4. The Court analyzed the provisions of each of the inter vivos trusts at issue and determined that the settlor did not intend that the initial law governing the administration of the trusts must always remain the law of the original jurisdiction, and concluded that for each trust the "law of administration would change with a change in the place of administration."
5. In analyzing what trust matters properly constitute "administration" such that they would be governed by the administrative law that applies to a trust, the Delaware Supreme Court ruled that all of the items of relief requested in the Petitions, which include the change of existing trustees, the acceptance of jurisdiction over the trusts, the change of trust situs and administrative law, and the modifications of the trusts, were "administrative matters" as contemplated by the Restatement.



6. The Court suggests that the analysis of the effect of a change in the place of administration of a trust on the law governing the administration of a trust may be different when “the trustee has become subject to the continuing jurisdiction of a particular court to which the trustee is thereafter accountable.”
7. This holding opens the door for the use of nonjudicial methods to modify trusts under Delaware law, such as decanting, merger and nonjudicial settlement agreements.

## B. Jurisdiction

1. The Delaware Supreme Court, again relying heavily on the Restatement, also analyzed when a Court acquires and can properly exercise jurisdiction over a trust. The analysis is helpful primarily for two reasons: (i) it enables the interested parties to a trust to determine whether the Delaware consent Petition process will be a viable tool for modifying the trust; and (ii) it is important for the corporate trustee and the trust beneficiaries to have some level of certainty concerning which jurisdiction’s courts will hear an action relating to the trust in the event there is a future issue requiring judicial involvement
2. As an initial matter, in the opinion for the Peierls inter vivos trusts, the Court noted that for a typical inter vivos trust that has never been the subject of court action, a court acquires jurisdiction “[o]nly when a beneficiary or trustee brings a suit over the trust,” and that this situation is distinguishable from the situation where the trustee has become subject to the continuing jurisdiction of a court to which the trustee is thereafter accountable.
3. The Supreme Court analyzed when a court can exercise jurisdiction over a matter involving a trust and, if it does have jurisdiction, whether it should exercise such jurisdiction to consider a matter.
4. The Supreme Court determined that the Chancery Court did have jurisdiction to adjudicate issues of administration of the testamentary trusts because all parties, including the trustee, had consented to the jurisdiction of the Chancery Court, which satisfied the Due Process Clause.

5. In determining whether a Court should exercise jurisdiction to evaluate a trust matter brought before it, the Supreme Court concluded that it was a matter of which court has “primary supervision” over the trusts.
6. Determining whether a court is currently exercising primary supervision of a trust is critical because:
  - The Delaware Supreme Court adopted the principle that a court having primary supervision over a trust “will exercise jurisdiction as to all questions which may arise in the administration of a trust.”
  - If the court in which the trustee has qualified does not exercise ongoing control over the administration of a trust, then the court of the place of administration of the trust “may exercise primary supervision.”
7. How do we determine whether a court is exercising primary supervision over a trust? Thankfully, the Delaware Supreme Court provided some general guidelines on this issue and then applied those guidelines to the Peierls testamentary trusts at issue.
  - If a trust has previously been the subject of a court order in any jurisdiction, the order may specifically note whether such court is retaining jurisdiction over the trust.
  - If a court is exercising “active control” over a trust, then it is clearly has primary supervision over that trust. The Court noted that for a testamentary trust, “active control” by a Court is most commonly evidenced by the requirement that the trustee render periodic accountings in the court in which the trustee had qualified.
8. Importantly, when considering a Texas court order that resulted from a “pitch and catch” procedure between New York and Texas for two of the testamentary trusts at issue, the Supreme Court concluded that although the Texas order accepted jurisdiction over the trust, there was no evidence that the Texas court exercised active control over the trusts, therefore it did not have exclusive jurisdiction or primary supervision over the trusts. Therefore, the fact that a court at some point exercised jurisdiction over a trust does not mean a subsequent court order is needed for the court to relinquish jurisdiction; the key issue is whether the court specifically retained jurisdiction or is exercising ongoing control over the trust.

9. One of the key takeaways of the Supreme Court's analysis of jurisdictional issues is that when considering the migration to Delaware of a testamentary trust (for which historical court involvement is more typical than for inter vivos trusts due to the potential accounting requirements of the jurisdiction in which the decedent's will was probated), the history of any court orders or accountings must be carefully considered to determine whether any action needs to be taken in the home state to facilitate the move to Delaware.

C. Advisory Opinions

1. The Supreme Court upheld the Chancery Court's holding that it could not approve the resignation of the individual trustee or confirm the appointment of the successor trustee because the trust instruments expressly authorized such actions without judicial involvement.
2. Because no case or controversy existed with respect to the resignation or appointment of trustees, to rule upon such matters would constitute an impermissible advisory opinion.
3. Therefore, in the future the Delaware trustee taking part in a consent Petition cannot condition the acceptance of its appointment as trustee upon an Order from the Court confirming its appointment.

V. **Impact of Decisions on Methods to Modify Trusts Under Delaware Law**

A. Consent Petition Process – Governed by Delaware Chancery Court Rules 100-104

1. When can it be used?
  - i. The Delaware Supreme Court's clarity on jurisdictional and especially administrative law issues will make it easier to utilize the consent Petition process to modify trusts.
  - ii. For inter vivos trusts that are not subject to the exclusive or continuing jurisdiction of another state, the key to utilizing the consent Petition process is to appoint the Delaware trustee prior to filing the Petition which will now, in most cases, cause Delaware law to govern the administration of the trusts.

- iii. For testamentary trusts, if there is ongoing accountability to a non-Delaware court this would likely establish that such court has “primary supervision” over the trusts, necessitating an order from such court terminating such primary supervision before the Delaware Chancery Court will exercise jurisdiction and consider a Petition to modify the trusts.
- iv. In most circumstances there will be a brief period of time between the Delaware trustee accepting its appointment and the proposed modification being approved by the Court, during that period of time the Delaware trustee may be undirected regarding the investment of some or all of the trust assets. This issue can be resolved either of the following methods:
  - (a) Immediately following the appointment of the Delaware trustee, the interested parties enter into a nonjudicial settlement agreement pursuant to 12 Del. C. § 3338, by which the trustee is directed to hold certain trust assets (or to refrain from diversifying out of certain assets) until the proposed court modification is approved. The direction to a trustee to refrain from performing a particular act or the grant to a trustee of any necessary or desirable power is one of the specific, authorized uses of a Delaware nonjudicial settlement agreement. 12 Del. C. § 3338(d)(3).
  - (b) The interested parties entering into a consent, release and indemnity agreement pursuant to 12 Del. C. § 3588 absolving the Delaware trustee from any liability relating to the investment of such assets effective upon an order modifying the trust to make it directed under Delaware law.

2. How can it be used?

- i. All interested parties, as defined in Chancery Court Rule 101(a)(7), must consent to the petition or state that they take no position with respect to the relief requested pursuant to the petition. Under certain circumstances a guardian ad litem may need to be appointed by the Court to represent the interests of minor or unborn beneficiaries in the event Delaware’s virtual representation statute, 12 Del. C. § 3547, cannot be used.

- ii. In general, modifying any of the administrative provisions of a trust is permitted. In some cases, modification of beneficial provisions is also possible, especially if a tax benefit is sought.
- iii. Reformation (as opposed to modification) of a trust - The Delaware Supreme Court has expressly supported the general principle that unilateral mistake on the part of a settlor of a trust is sufficient to warrant the reformation of such trust. *Roos v. Roos*, 203 A.2d 140, 142 (Del. Ch. 1964) (citing *Scott on Trusts* § 333.4; *Restatement of Trusts*, § 333; *In re Trust Estate of LaRocca*, 411 Pa. 633, 192 A.2d 409; *Kiser v. Lucas*, 170 Md. 486, 185 A.441; *Wright v. Goff*, 22 Beav. 207, 52 Reprint 1087).
- iv. The Chancery Court is likely to be more comfortable with the proposed relief if, following the proposed modification, the Delaware trustee has some authority over either distribution decisions or investment decisions.

B. Decanting – Governed by 12 Del. C. § 3528

- 1. When can it be used?
  - i. When Delaware law governs the administration of the trust or when the trust is administered in Delaware. 12 Del. C. § 3528(f).
  - ii. Under most circumstances following the *Peierls* decisions, it will be unnecessary to rely on this provision, although it will continue to be helpful in the event a trust contains language indicating the law of other state shall always govern the administration of the trust even if the place of administration changes.
- 2. How can it be used?
  - i. A trustee that has authority under the terms of the trust instrument (the first trust) to invade principal for the benefit of one or more beneficiaries, to exercise such authority by appointing all or a

portion of the principal subject to the power of invasion in favor of a trustee under a separate instrument (a second trust). 12 Del. C. § 3528(a).

- ii. Decanting can be utilized to make significant changes to a trust by decanting it into a new trust with the desired administrative provisions.
- iii. Some of the key requirements of the decanting statute include:
  - The beneficiaries of the second trust must also be beneficiaries of the first trust. 12 Del. C. § 3528(a)(1).
  - The second trust may not alter the beneficial interests of beneficiaries of the first trust that are not proper objects of the exercise of the power of invasion. 12 Del. C. § 3528(a)(1).
  - The second trust must comply with any standard that limits the trustee's authority to make distributions from the first trust. 12 Del. C. § 3528(a).
  - A written "decanting instrument" must be signed and acknowledged by the trustee and filed with the records of the trust. 12 Del. C. § 3528(b).
- iv. While the second trust may not have beneficiaries who are not also beneficiaries of the first trust, the decanting statute specifically permits the second trust to grant a beneficiary of the first trust a limited or general power of appointment thereby allowing the beneficiary to appoint trust property to a person who is not a beneficiary of the first trust. 12 Del. C. § 3528(a).
- v. Unlike consent Petitions, the trustee does not need the consent of the beneficiaries or any other interested party to exercise its decanting power. However, because decanting is an exercise of the trustee's discretion it is common practice in Delaware to have the beneficiaries consent to the decanting and release and indemnify the trustee from any liability in connection with the decanting.
- vi. Potential GST or gift tax consequences of a proposed decanting should be analyzed.

C. Merger – Governed by 12 Del. C. § 3325(29)

1. When can it be used?
  - i. When Delaware law governs the administration of the trust.
  - ii. There are 35 states (including Delaware) plus the District of Columbia that allow for trust mergers without judicial involvement, and other states may permit merger via the state's common law. Even if a non-Delaware trust contains a provision stating that law governing administration shall not be changed when the place of administration changes, the trust could be merged under the law of that state into an identical trust that contains a Delaware governing law provision.
  
2. How can it be used?
  - i. The trustee is authorized to “[m]erge any 2 or more trusts, whether or not created by the same trustor, to be held and administered as a single trust if such a merger would not result in a material change in the beneficial interests of the trust beneficiaries, or any of them, in the trust.”
  - ii. In addition to the new trust into which the existing trust will be merged a simple merger instrument signed by the trustee(s) is sufficient to legally accomplish a merger.
  - iii. Any changes to administrative provisions available through the consent Petition process or decanting could also be accomplished by merger, including the addition of Investment Direction Adviser, Distribution Advisers and Trust Protectors.
  - iv. Like decanting, merger is an exercise of the trustee's discretion. While not required under the statute, the trustee may seek a release from the trust beneficiaries and other interested parties before effectuating a merger.
  - v. As with decanting, potential tax consequences must be considered.

D. Nonjudicial Settlement Agreements – Governed by 12 Del. C. § 3338, signed into law August 6, 2013 as part of Delaware's Trust Act 2013.

1. When can it be used?
  - i. When Delaware law governs the administration of the trust.
2. How can it be used?
  - i. The statute is modeled after Section 111 of the UTC.
  - ii. Requires the agreement of all “interested persons” whose consent would be needed to achieve a binding settlement in the Delaware Court of Chancery. 12 Del. C. § 3338(a).
  - iii. The language of the statute suggests that its application can be quite broad. The interested persons may enter into a binding agreement “with respect to *any matter involving a trust...*” (except with respect to charitable trusts and purpose trusts described in 12 Del. C. § 3541). 12 Del. C. § 3338(b) (emphasis added). The phrase “any matter” is inclusive rather than restrictive, suggesting that the presumption should be that any matter does fall within the proper subject matter of a nonjudicial settlement agreement rather than not.
  - iv. Delaware’s NJSA Statute provides a list of six matters that may be resolved by a nonjudicial settlement agreement. 12 Del. C. §3338(d). Comments to the UTC version of the nonjudicial settlement agreement (which contains a list identical to 12 Del. C. § 3338(d)) make clear that the list is nonexclusive. As such, Delaware’s NJSA Statute could be a powerful tool to resolve trust matters, including the bifurcation of trustee responsibilities among a trustee and direction or consent advisers.
  - v. A nonjudicial settlement agreement is “only valid to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the Court of Chancery under this title or other applicable law.” 12 Del. C. § 3338(c). The phrase “material purpose” is not defined under Delaware’s trust code, and there is no direct guidance in the model UTC provisions or the UTC’s commentary. However, reference to the intent of the settlor in creating the trust, express or implied, would seem to be appropriate.



- vi. An interested person may seek judicial determination to interpret, apply, enforce or determine the validity of a nonjudicial settlement agreement. 12 Del. C. § 3338(e).



# STATE MCLE CONTACTS

## **Alabama**

Ms. Angela Parks  
Director Regulatory Programs  
Alabama State Bar  
415 Dexter Avenue  
PO Box 671  
Montgomery, AL 36101  
334/269-1515  
334/261-6310 FAX  
[cle@alabar.org/](mailto:cle@alabar.org)  
[www.alabar.org](http://www.alabar.org)

## **Alaska**

Ms. Mary Ellen Ashton  
MCLE Administrator  
Alaska Bar Association  
550 W. 7<sup>th</sup> Avenue, Ste 1900  
Anchorage, AK 99501  
907/263-1841  
907/272-2932 FAX  
[ashtonm@alaskabar.org](mailto:ashtonm@alaskabar.org)  
[www.alaskabar.org](http://www.alaskabar.org)

## **Arizona**

Ms. Carolyn de Looper  
Membership Administration &  
Services Manager  
State Bar of Arizona  
4201 N. 24<sup>th</sup> Street, Ste 100  
Phoenix, AZ 85016-6266  
602/340-7327  
602/271-4930 FAX  
[carolyn.deloooper@staff.azbar.org](mailto:carolyn.deloooper@staff.azbar.org)  
[www.azbar.org](http://www.azbar.org)

## **Arkansas**

Ms. Dana L. Rowlett  
Arkansas CLE Board of the  
Supreme Court of Arkansas  
625 Marshall Street  
120 Justice Building  
Little Rock, AR 72201  
501/374-1855  
501/374-1853 FAX  
[www.courts.arkansas.gov](http://www.courts.arkansas.gov)

## **California**

Ms. Dina DiLoreto  
The State Bar of California  
Office of Certification  
180 Howard Street  
San Francisco, CA 94105  
415/538-2126  
415/538-2180 FAX  
[providers@calbar.ca.gov](mailto:providers@calbar.ca.gov)  
<http://mcle.calbar.ca.gov/>

## **Colorado**

Ms. Karen Bradley  
Assistant Executive Director  
Ralph L. Carr Judicial Center  
Colorado Supreme Court Board  
of Continuing Legal & Judicial  
Education  
1300 Broadway, Ste 1500  
Denver, CO 80202  
303/928-7771  
[cleinfo@csc.state.co.us](mailto:cleinfo@csc.state.co.us)

## **Delaware**

Ms. Margot Millar  
Executive Director  
Commission on CLE of the  
Supreme Court of Delaware  
Carvel State Office Building  
820 N. French Street, 11<sup>th</sup> Fl  
Wilmington, DE 19801-3545  
302/577-7040  
302/577-7037 FAX  
[margot.millar@state.de.us](mailto:margot.millar@state.de.us)  
[www.courts.delaware.gov](http://www.courts.delaware.gov)

## **Florida**

Ms. Michelle Francis  
Education Compliance &  
Accreditation Manager  
The Florida Bar  
651 E. Jefferson Street  
Tallahassee, FL 32399-2300  
850/561-3180  
850/561-5660 FAX  
[mfrancis@flabar.org](mailto:mfrancis@flabar.org)  
[www.floridabar.org](http://www.floridabar.org)

## **Georgia**

Mr. Cliff Brashier  
Executive Director  
Georgia Commission on  
Continuing Lawyer Competency  
104 Marietta St NW, Ste 100  
Atlanta, GA 30303  
404/527-8700  
404/527-8717 FAX  
<http://www.gabar.org/membership/cle/>

## **Hawaii**

Ms. Debbie Blanton  
MCLE Administrator  
Hawaii State Bar Association  
1100 Alakea St, Ste 1000  
Honolulu, HI 96813  
808/792-7348  
808/521-7936 FAX  
[dblanton@hsba.org](mailto:dblanton@hsba.org)  
[www.hsba.org](http://www.hsba.org)

## **Idaho**

Ms. Annette Strauser  
MCLE Administrator  
Idaho State Bar  
PO Box 895  
Boise, ID 83701-0895  
208/334-4500 x1886  
208/334-4515 FAX  
[astrouser@isb.idaho.gov](mailto:astrouser@isb.idaho.gov)  
[www.isb.idaho.gov](http://www.isb.idaho.gov)

## **Illinois**

Ms. Karen Litscher Johnson  
Director, MCLE Board of the  
Supreme Court of Illinois  
200 W Madison St, Ste 3420  
Chicago, IL 60606  
312/924-2420  
315/924-2421 FAX  
[mcle@mcleboard.org](mailto:mcle@mcleboard.org)  
[www.mcleboard.org](http://www.mcleboard.org)

## **Indiana**

Ms. Julie L. Orzeske  
Executive Director  
Indiana Supreme Court  
Indiana Commission for CLE  
30 S Meridian St, Ste 950  
Indianapolis, IN 46204  
317/232-1943  
317/233-1442 FAX  
[jorzeske@courts.state.in.us](mailto:jorzeske@courts.state.in.us)  
[www.state.in.us](http://www.state.in.us)

## **Iowa**

Ms. Trinity M. Braun-Arana  
Asst. Director for Boards and  
Commissions  
Office of Professional Regulation  
1111 E. Court Avenue  
Des Moines, IA 50319  
515/725-8100  
515/246-8032 FAX  
[trinity.braun-arana@iowacourts.gov](mailto:trinity.braun-arana@iowacourts.gov)  
[www.iacourtcommissions.org](http://www.iacourtcommissions.org)

## **Kansas**

Ms. Shelly Sutton  
Executive Director  
Kansas CLE Commission  
400 S Kansas Ave, Ste 202  
Topeka, KS 66603  
785/357-6510  
[shelly.sutton@kscler.org](mailto:shelly.sutton@kscler.org)  
[www.kscler.org](http://www.kscler.org)

## **Kentucky**

Mr. Clifford Timberlake  
Accreditation Coordinator  
Kentucky Bar Association  
514 W Main St  
Frankfort, KY 40601-1883  
502/564-3795 x228  
502/564-3225  
[ctimberlake@kybar.org](mailto:ctimberlake@kybar.org)  
[www.kybar.org](http://www.kybar.org)

## **Louisiana**

Ms. Kitty Hymel  
MCLE Administrator  
Louisiana Supreme Court  
Committee on MCLE  
2800 Veterans Memorial Blvd  
Suite 355  
Metairie, LA 70002-6130  
800/518-1518 Toll Free  
504/828-1416 FAX  
[kittyh@lasmcle.org](mailto:kittyh@lasmcle.org)  
[www.lasmcle.org](http://www.lasmcle.org)

## **Maine**

Ms. Susan Adams  
CLE Coordinator  
Maine Board of Overseers  
of the Bar  
PO Box 527  
August, ME 04332-0527  
207/623-1121  
207/623-4175 FAX  
[sadams@mebaroverseers.org](mailto:sadams@mebaroverseers.org)  
[www.mecle.com](http://www.mecle.com)

## **Minnesota**

Ms. Liz Vanderbeek  
CLE/BLC Administrator  
Minnesota State Board of CLE  
180 E 5<sup>th</sup> St, Ste 950  
St. Paul, MN 55101  
651/297-1857  
651/296-5866 FAX  
[lvanderbeek@mbcle.state.mn.us](mailto:lvanderbeek@mbcle.state.mn.us)  
[www.mbcle.state.mn.us](http://www.mbcle.state.mn.us)

## **Mississippi**

Ms. Tracy Graves  
CLE Administrator  
Mississippi Commission on CLE  
PO Box 369  
Jackson, MS 39205-0369  
601/576-4622  
601/576-4733  
[tgraves@mssc.state.ms.us](mailto:tgraves@mssc.state.ms.us)  
<http://courts.ms.gov>

## **Missouri**

Mr. Christopher C. Janku  
Director of Programs  
The Missouri Bar  
326 Monroe Street  
PO Box 2355  
Jefferson City, MO 65102-2355  
573/638-2233  
573/635-2811 FAX  
[mcle@mobar.org](mailto:mcle@mobar.org)  
[www.mobar.org](http://www.mobar.org)

## **Montana**

Ms. Kathy Powers  
MCLE Administrator  
State Bar of Montana  
7 W 6<sup>th</sup> Ave, Ste 2B  
PO Box 577  
Helena, MT 59624  
406/442-7660  
406/442-7763 FAX  
[kpowers@montanabar.org](mailto:kpowers@montanabar.org)  
[www.montanabar.org](http://www.montanabar.org)

## **Nebraska**

Ms. Carole McMahon-Boies  
Director, Judicial Branch  
Education  
521 S 14<sup>th</sup> St, Ste 200  
Lincoln, NE 68508  
402/471-3072  
402/471-3071 FAX  
[carol.mcmahon-boies@nebraska.gov](mailto:carol.mcmahon-boies@nebraska.gov)  
[www.mcle.ne.gov](http://www.mcle.ne.gov)

## **Nevada**

Ms. Toni Sarocka  
Executive Director  
Nevada CLE Board  
457 Court St, 2<sup>nd</sup> FL  
Reno, NV 89501  
775/329-4443  
775/329-4291 FAX  
[nevadacleboard@sbcglobal.net](mailto:nevadacleboard@sbcglobal.net)  
[www.nvcleboard.org](http://www.nvcleboard.org)

# STATE MCLE CONTACTS

## **New Hampshire**

Ms. Dana Hochgraf  
NHMCLE/NH Bar Association  
2 Pillsbury St, Ste 300  
Concord, NH 03301-3502  
603/224-6942  
603/224-2910 FAX  
[dhochgraf@nhbar.org](mailto:dhochgraf@nhbar.org)  
[www.nhbar.org](http://www.nhbar.org)

## **New Jersey**

Supreme Court of New Jersey  
Board on Continuing Legal  
Education  
Richard J. Hughes Justice  
Complex  
25 Market Street  
8<sup>th</sup> Floor, North Wing  
Trenton, NJ 08625-0979  
609/633-9733  
[webmaster.mailbox@judiciary.state.nj.us](mailto:webmaster.mailbox@judiciary.state.nj.us)  
[ate.nj.us](http://ate.nj.us)  
[www.judiciary.state.nj.us](http://www.judiciary.state.nj.us)

## **New Mexico**

Ms. Anita Otero  
Court Regulated Programs  
Administration  
New Mexico MCLE  
PO Box 93070  
Albuquerque, NM 87199  
505/821-1980  
505/821-0220 FAX  
[mcle@nmmcle.org](mailto:mcle@nmmcle.org)  
[www.nmmcle.org](http://www.nmmcle.org)

## **New York**

Ms. Elise Anne Geltzer  
New York State Unified Court  
System  
25 Beaver St., Room 888  
New York, NY 10004  
877/NYS-4CLE (697-4253)  
212/428-2974 FAX  
[cle@courts.state.ny.us](mailto:cle@courts.state.ny.us)  
[www.courts.state.ny.us](http://www.courts.state.ny.us)

## **North Carolina**

Ms. Debra Holland  
Associate Director  
North Carolina Continuing Legal  
Education  
PO Box 26148  
Raleigh, NC 27611  
919/733-0123  
919/821-9168 FAX  
[dholland@ncbar.gov](mailto:dholland@ncbar.gov)  
[www.nccle.org](http://www.nccle.org)

## **North Dakota**

Ms. Debbie Bowen  
Director  
State Bar of North Dakota CLE  
504 N Washington St.  
Bismarck, ND 58501  
701/255-1404  
701/224-1621 FAX  
[debbie@sband.org](mailto:debbie@sband.org)  
[www.sband.org](http://www.sband.org)

Revised: 5/2/2013

## **Ohio**

Ms. Susan Christoff  
Executive Director  
The Supreme Court of Ohio  
Commission on CLE  
65 S. Front St.  
Columbus, OH 43215-3431  
614/387-9325  
[Christos@sconet.state.oh.us](mailto:Christos@sconet.state.oh.us)  
[www.sconet.state.oh.us](http://www.sconet.state.oh.us)

## **Oklahoma**

Ms. Beverly S. Petry  
MCLE Administrator  
Oklahoma Bar Association  
PO Box 53036  
Oklahoma City, OK 73152  
405/416-7009  
405/416-7089 FAX  
[beverlyp@okbar.org](mailto:beverlyp@okbar.org)  
[www.okbar.org](http://www.okbar.org)

## **Oregon**

Ms. Denis Cline  
MCLE Coordinator  
Oregon State Bar  
16037 SW Upper Boones Ferry Rd  
Tigard, OR 97281-1935  
503/620-0222  
503/684-1366 FAX  
[dcline@osbar.org](mailto:dcline@osbar.org)  
[www.osbar.org](http://www.osbar.org)

## **Pennsylvania**

Ms. Sue Miller  
Provider Coordinator  
Pennsylvania CLE Board  
PA Judicial Center  
601 Commonwealth Ave,  
Ste 3400  
Harrisburg, PA 17106-2495  
717/231-3230  
717/231-3231 FAX  
800/497-2253 x3230  
[pacleb@pacle.org](mailto:pacleb@pacle.org)  
[www.pacle.org](http://www.pacle.org)

## **Puerto Rico**

Ms. Yanis Blanco Santiago  
Continuing Legal Education  
Program  
Supreme Court of Puerto Rico  
PO Box 190917  
San Juan, PR 00919-0917  
787/641-6604  
787/641-6602 FAX

## **Rhode Island**

Ms. Holly Hitchcock, M. Ed.  
Executive Director  
Judiciary of Rhode Island  
John E. Fogarty Judicial Annex  
24 Weybosset St., 3<sup>rd</sup> Floor  
Providence, RI 02903  
401/222-4942  
401/222-4302 FAX  
[www.courts.state.ri.gov](http://www.courts.state.ri.gov)

## **South Carolina**

Ms. Mary A. Germack  
Executive Director  
The Supreme Court of South  
Carolina Commission on CLE &  
Specialization  
PO Box 2138  
Columbia, SC 29202  
803/799-5671  
803/799-4118 FAX  
[commcle@bellsouth.net](mailto:commcle@bellsouth.net)  
[www.commcle.org](http://www.commcle.org)

## **Tennessee**

Ms. Judy Bond-McKissack  
Executive Director  
Tennessee Commission on CLE &  
Specialization  
221 Fourth Ave. North, Ste. 300  
Nashville, TN 37219  
615/741-3096  
615/532-2477 FAX  
[info@cletn.com](mailto:info@cletn.com)  
[www.cletn.com](http://www.cletn.com)

## **Texas**

Ms. Nancy R. Smith  
Director of MCLE  
State Bar of Texas  
PO Box 13007  
Austin, TX 78711-3007  
515/427-1806 or 800/204-2222  
515/427-4123 FAX  
[nsmith@texasbar.com](mailto:nsmith@texasbar.com)  
[www.texasbar.com/mcle](http://www.texasbar.com/mcle)

## **Utah**

Ms. Sydnie W. Kuhre  
MCLE Board Administrator  
Supreme Court Board of CLE  
Utah Law & Justice Center  
645 South 200 East, Ste. 312  
Salt Lake City, UT 84111-3834  
801/531-9077  
801/531-0660 FAX  
[skuhre@utahbar.org](mailto:skuhre@utahbar.org)  
[www.utahbar.org](http://www.utahbar.org)

## **Vermont**

Ms. Martha I. Hicks-Robinson  
Director  
MCLE Board  
111 State Street, Ste 9B  
Montpelier, VT 05609-0701  
802/828-3281  
802/828-6550 FAX  
[martha.hicks-robinson@state.vt.us](mailto:martha.hicks-robinson@state.vt.us)  
[www.vermontjudiciary.org](http://www.vermontjudiciary.org)

## **Virginia**

Ms. Gale M. Cartwright  
Director of MCLE  
Virginia State Bar  
707 E. Main St., Ste. 1500  
Richmond, VA 23219-2803  
804/775-0577  
804/775-0544 FAX  
[mcle@vsb.org](mailto:mcle@vsb.org)  
[www.vsb.org](http://www.vsb.org)

## **Virgin Islands**

Ms. Hinda Carbon  
Executive Director  
Virgin Islands Bar Association  
PO Box 4108  
Christiansted, VI 00822  
340/778-7497  
340/773-5060 FAX  
[executivedirector@vibar.org](mailto:executivedirector@vibar.org)

## **Washington**

Ms. Kathy Todd  
MCLE Manager  
Washington State Bar  
Association  
1325 4<sup>th</sup> Ave., Ste 600  
Seattle, WA 98101-2539  
206/733-5912  
206/727-8313 FAX  
[kathyt@wsba.org](mailto:kathyt@wsba.org)  
[www.wsba.org](http://www.wsba.org)

## **West Virginia**

Ms. Hope L. Gresham  
MCLE Coordinator  
The West Virginia State Bar  
2006 Kanawha Blvd., East  
Charleston, WV 25311-2204  
304/558-7992  
304/558-2467 FAX  
[greshamh@wvbar.org](mailto:greshamh@wvbar.org)  
[www.wvbar.org](http://www.wvbar.org)

## **Wisconsin**

Ms. Jacquelyn B. Rothstein  
Director  
Board of Bar Examiners  
Mail: PO Box 2748  
Madison, WI 53701-2748  
Shipping: 110 E. Main St.,  
Ste. 715, Tenney Building  
Madison, WI 53703-3328  
608/266-9760  
608/266-1196 FAX  
[jacquelyn.rothstein@wicourts.gov](mailto:jacquelyn.rothstein@wicourts.gov)  
[tammy.mcmillen@wicourts.gov](mailto:tammy.mcmillen@wicourts.gov)  
[www.wicourts.gov](http://www.wicourts.gov)

## **Wyoming**

Ms. Marie Ellis  
Wyoming State Bar  
500 Randall Ave.  
PO Box 109  
Cheyenne, WY 82003-0109  
307/632-9061  
307/632-3737 FAX  
[mellis@wyomingbar.org](mailto:mellis@wyomingbar.org)  
[www.wyomingbar.org](http://www.wyomingbar.org)