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Maryland's Version of the Prudent Investor Rule

A prospective client walks into an attorney's office with a newly acquired sense of authority. She has accepted her appointment as a Trustee and is looking for guidance. She advises the attorney that she has spoken with a Financial Advisor who asked what standard of investing applies to the trust. Without sufficient information, she was directed to the attorney's office for direction. This poses a real dilemma for the attorney who, upon reflection, realizes she may be asking either (or both) of two questions, one relating to the application of principles that deal with risk, returns and diversification; and one relating to specific investment decisions. As a general rule, the attorney can handle the former, but not the latter.

Rule 1.1 of the Maryland Rules of Professional Conduct requires that a lawyer provide competent representation to a client. Since attorneys are not trained or otherwise qualified to provide investing advice – at least insofar as specific investments are concerned – attorneys have traditionally avoided giving financial advice. Providing financial advice would likely be misleading to a client of ordinary sensitivities concerning the scope of the attorney's competency.

While the attorney in the earlier scenario should not give investment advice, the attorney must, as part of her representation, explain Maryland's version of the prudent investor rule. The attorney must be competent to facilitate this discussion, and in fact, the failure to advise the prospective client of any standard for investing trust assets required or permitted upon election may be a costly mistake with serious consequences.

In 1994, Maryland's version of the Prudent Investor Rule (the "Rule") was codified. The predominant theory of investment underpinning the Rule was Modern Portfolio Theory (MPT). MPT has been said to free trustees from the confines of rigid and outdated investment practices, instead liberating advisors to use the full panoply of modern investment tools in selecting and managing investment portfolios. The Rule, however, only applies to a fiduciary who is a trust company, an investment advisor, or a person who makes a valid Maryland Code, Estates and Trusts § 15-114 (g) election to be governed by the § 15-114 standards for investing.

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