A. DUTIES OWED TO CLIENTS, 1. FIDUCIARY DUTY:

9: THE FIDUCIARY DUTY WHEN A CLIENT EXHIBITS SIGNS OF LACK OF CAPACITY OR UNDUE INFLUENCE

Gillian, a CFP® professional, is an investment adviser representative of MM Advisers, Inc., a small investment advisory firm. Maria, who has a net worth exceeding $10 million, has been Gillian's Financial Planning Client for approximately 25 years. Maria has one daughter, Nina, who is named as a beneficiary for Maria's investment accounts. While Maria historically has been in good health, she recently has experienced difficulty walking and her vision is declining. Maria's husband passed away 10 years ago, and she now lives by herself. MM Advisers has account opening agreements that request the identity of and contact information for a trusted contact person. The agreements authorize the firm and its advisers to contact the trusted contact person to discuss financial matters about the Client's account, as authorized by the Client in those agreements and in a manner consistent with relevant federal laws and regulations, self-regulatory organization rules, and state and local laws and regulations. In her account opening agreements, Maria designated her friend Wilma as her trusted contact person.

Approximately one year ago, Gillian attended a dinner to celebrate Maria's 75th birthday. Maria introduced Gillian to Mick, her new companion, who is 30 years younger than Maria. Mick is a teacher whose financial resources are much more limited than Maria's. Mick attended Gillian's next Financial Planning review meeting. Mick asked many questions, and Maria authorized Gillian to respond to the questions. At the next Financial Planning review meeting held six months later, Maria attended alone, and asked Gillian an unusually large number of questions about her investments. Maria appeared to be having difficulty understanding her portfolio statements, and evidenced signs of memory lapse. At that meeting, Maria directed Gillian to change the beneficiary designation on her investment accounts from her daughter Nina to Mick. When Gillian asked why she wanted to make the change, Maria explained that she and Mick were in a serious relationship and planned to get married soon. She said that Mick had told her that he would "take care of her" in the future. Gillian gives to Maria the form that MM Advisers requires Clients to execute to effectuate a change in beneficiary.

QUESTION:

Under the circumstances, how should Gillian fulfill her Fiduciary Duty?

RESPONSE OPTIONS:

A. **Refuse to change the beneficiary on Maria's investment accounts.**

B. **Explain to Maria the risks involved in changing the beneficiary designation, document the communication, and then promptly contact Wilma, Maria's trusted contact person, to address her concerns.**

C. **Promptly call the police, because the facts suggest that Mick is exerting undue influence.**

D. **Promptly contact Maria's daughter, Nina, to discuss the matter.**

E. **Follow Maria's instructions to change the beneficiary on Maria's investment accounts to Mick.**

Best Response: Response B is the best response. This case involves the Fiduciary Duty (Standard A.1.) and the definitions of Client and Financial Advice (Glossary).

At all times when providing Financial Advice to a Client, a CFP® professional must act as a fiduciary, and, therefore, act in the best interests of the Client. A Client is any person to whom a CFP® professional provides or agrees to provide Professional Services pursuant to an Engagement. Financial Advice includes communications that, based on their content, context, and presentation, would reasonably be viewed as a recommendation to take or refrain from taking a particular course of action with respect to the development or implementation of a financial plan. The Fiduciary Duty includes a Duty of Loyalty, a Duty of Care, and a Duty to Follow Client Instructions. The Duty of Care requires a CFP® professional to act with the care, skill, prudence, and diligence that a prudent professional would exercise in light of the Client's goals, risk tolerance, objectives, and financial and personal circumstances. The Duty to Follow Client Instructions requires a CFP® professional to comply with all objectives, policies, restrictions, and other terms of the Engagement and all reasonable and lawful directions of the Client.

In this case, Gillian has a Financial Planning Engagement with Maria and is implementing Maria's Financial Plan. Therefore, Gillian is providing Financial Advice to a Client and is subject to the Fiduciary Duty.

Here, Maria has exhibited signs of diminished capacity. A Client who lacks capacity no longer is able to provide a Client instruction. A CFP® professional should be aware of and understand the CFP® Professional's Firm's policies and procedures with respect to a potential lack of capacity or undue influence, as well as any applicable laws, rules, or regulations. A CFP® professional should contact a relevant supervisor or manager to discuss such issues as they arise.

To comply with the Fiduciary Duty, Gillian should talk with Maria about the effect of changing the beneficiary on her accounts and assess whether Maria understands that such a change would mean that Mick, and not her daughter Nina, would receive the investments in her accounts after she passes away. Assuming her firm's policies and procedures allow it, Maria also should promptly contact Wilma, Maria's designated trusted contact person, to address her concerns about Maria's capacity to understand the effect of the change in beneficiary and whether Mick is exercising undue influence over Maria. Gillian also should escalate her concerns to an appropriate manager, and otherwise follow her firm's policies and procedures.

Response A is not the best response because Gillian has a duty to comply with the terms of the Engagement and Maria's reasonable and lawful directions. Gillian does not yet have enough information to determine whether Maria has capacity to provide directions in accordance with the Engagement.

Based on the facts provided, Response C is not the best response because Gillian does not have enough information to suggest that there has been undue influence. However, Gillian should consider relevant laws, rules, and regulations in determining when to contact appropriate governmental authorities.

Response D is not the best response because Nina's status as a beneficiary does not grant Gillian with authority to speak with Nina about Maria's confidential information. Gillian's obligation is to her Client, Maria, and not Maria's daughter.

Response E, which provides for Gillian to follow Maria's instructions, may become an appropriate response, depending on the results of Gillian's discussions with Maria and Wilma and within her firm, her analysis of her firm's policies and procedures, and her continued assessment of Maria's capacity.

As a best practice, a CFP® professional should consider including requests for the identity and contact information for a trusted contact person in account opening agreements or other appropriate documents that will provide authorization to contact a trusted person in appropriate circumstances. A CFP® professional also should be aware of and understand the CFP® Professional's Firm's requirements with respect to these matters, and comply with other relevant federal, self-regulatory organization, and state and local laws, rules, and regulations.

Relevant Standards and Definitions: Fiduciary Duty (Standard A.1.); Definitions of Client and Financial Advice (Glossary).