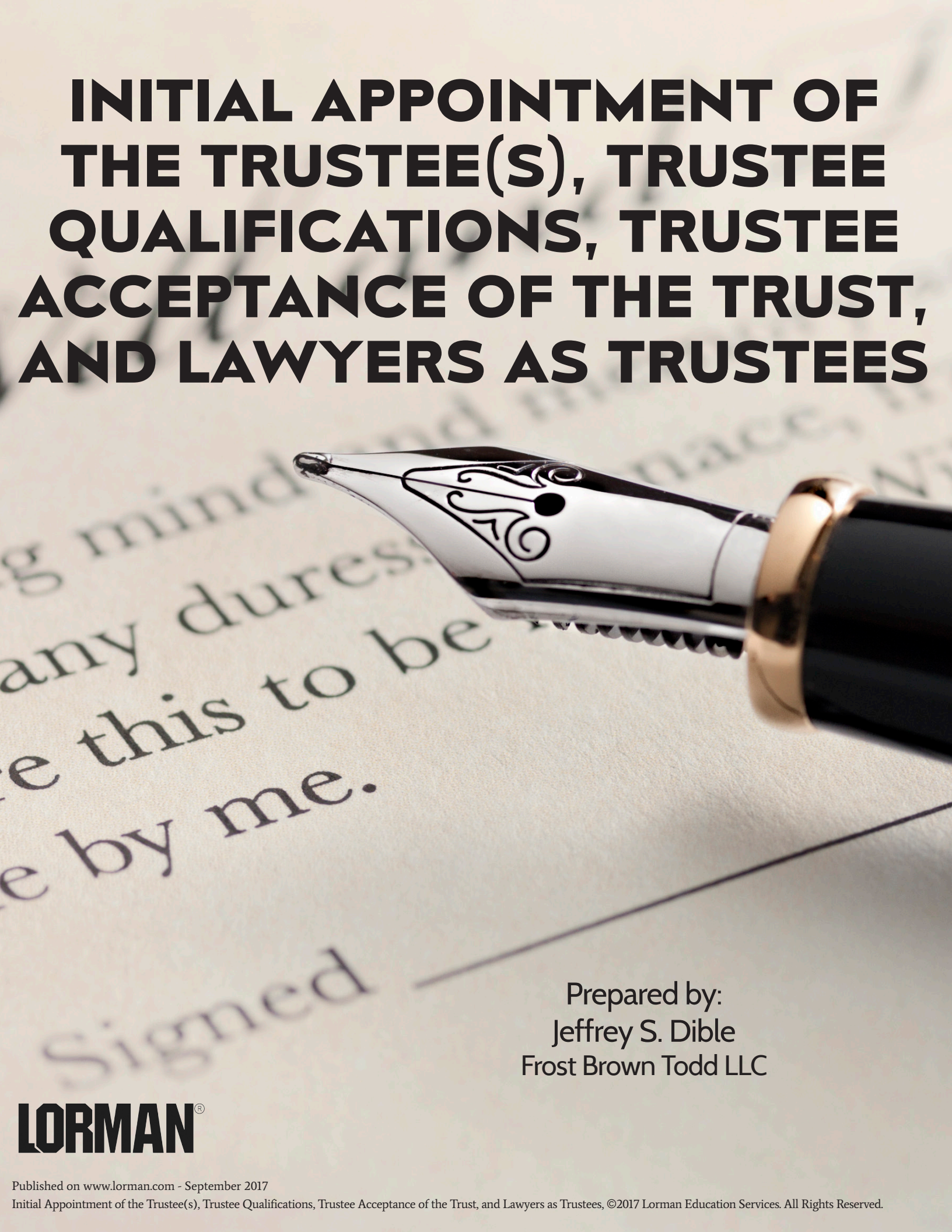
INITIAL APPOINTMENT OF THE TRUSTEE(S), TRUSTEE QUALIFICATIONS, TRUSTEE ACCEPTANCE OF THE TRUST, AND LAWYERS AS TRUSTEES



Prepared by:
Jeffrey S. Dible
Frost Brown Todd LLC

LORMAN®

Published on www.lorman.com - September 2017

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you UNLIMITED access to Lorman's ever-growing library of training resources:

- ☑ **Unlimited Live Webinars** - 120 live webinars added every month
- ☑ **Unlimited OnDemand and MP3 Downloads** - Over 1,500 courses available
- ☑ **Videos -** More than 700 available
- ☑ **Slide Decks -** More than 1700 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.

Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

VI. Initial Appointment of the Trustee(s), Trustee Qualifications, Trustee Acceptance of the Trust, and Lawyers as Trustees.

At a minimum, the creation of a valid trust requires the identification of one or more beneficiaries, the settlor's express declaration of an intention to create a trust,[13] the acceptance of the trust by a trustee, and the identification of actual or potential trust property. In most states, a trust can be valid before it is funded with any property, and the trustee can accept appointment and the trust's terms by an overt action (*e.g.* acceptance of delivery of trust assets) or by the trustee's signature.

The UTC contains no explicit rules about the required minimum qualifications for trustees. Some non-UTC states require that an individual trustee be an adult capable of owning property, and that a corporate fiduciary must be authorized under applicable state law to exercise trust powers.

Obviously, nothing prevents the settlor of a trust from specifying additional qualifications for a successor or alternate trustee, or from disqualifying certain individuals (a beneficiary, the spouse or former spouse of a beneficiary, etc.) from ever serving as the trustee. It is a good drafting practice to name multiple candidates for successor trustee in order of priority, *or* to specify a procedure by which beneficiaries or other persons may act without court intervention to fill a vacant trustee position. *See* the further discussion in Section XV starting on Page 88 below.

Generally, it is not *per se* unethical for a lawyer to draft a trust instrument in which the lawyer or a colleague in the lawyer's firm is appointed as a trustee. *See* ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th Ed. 2006) 95; Rules of Prof. Conduct 1.8, comment 8. However, because of every lawyer's obligation to exercise independent professional judgment on behalf of the client, a lawyer who is not a close relative of the settlor/client should not name himself or herself as a fiduciary in a client's document drafted by the lawyer without first truthfully confirming, in the trust instrument or Will itself or in a separate writing, that (1) the client and the lawyer have discussed the availability of alternative candidates for the fiduciary position; (2) the lawyer has advised the client of the ability of the lawyer to collect fees for legal services *and* for fiduciary services after the client's death; (3) *the client asked the lawyer* to name the lawyer as a fiduciary; and (4) the lawyer did not suggest or volunteer himself or herself as a fiduciary.

Some clients have good reasons for creating trusts and do not know any individuals who are not prospective beneficiaries and who are both trustworthy enough *and* willing and capable to serve as a trustee. And some of these clients cannot be persuaded to name a bank or trust company as the trustee, because the trust corpus is likely to be too small to warrant having a corporate fiduciary or because the clients just "don't trust

---

[13] Under the UTC, an express *oral* declaration can be sufficient to create a trust; in many non-UTC states, the settlor's expression of intent to create a trust must be written.

banks." In such circumstances, the lawyer may feel impelled to name himself or herself as a second- or third-priority successor trustee, or perhaps even as a primary trustee.

But the more knowledgeable a lawyer is about the risks and burdens of trust administration, the less likely the lawyer may be to reflexively encourage or accept the lawyer's own appointment as a trustee. Even when the lawyer thoroughly documents the decision process by which the client/settlor drove the decision to appoint the lawyer as the trustee, actually serving as a trustee exposes the lawyer-trustee to additional malpractice risk, and to later accusations by beneficiaries that the lawyer "engineered" or connived his or her appointment as a trustee.