Guidance for Professional Advisors When Considering Serving as a Client's Trustee

Why should you serve as your client's trustee?

Attorneys, accountants, and financial advisors typically have a special and trusted relationship with their clients. If creating a revocable or irrevocable trust is part of your client's succession planning, your client may look no further than you to serve as a trustee since you may currently understand their business and financial goals better than anyone else. Before you agree to accept this responsibility, it is important to fully appreciate the scope of fiduciary duty and inherent risks and responsibilities of being a trustee. Although you may have the ability and know-how to accept this role, should you? And what should you consider before you agree to serve alone or as a co-trustee of your client's trust? This article posits several questions for you to consider in deciding whether you should serve your client in this way.

What does it mean to be a fiduciary?

The Louisiana Trust code, for example, defines a trustee as a person to whom title to the trust property is transferred to be administrated by him as a fiduciary. Although this definition may seem simple, the substance lies in the meaning of fiduciary. The Louisiana Supreme Court recognizes a "fiduciary" as "one who holds a thing in trust for another, a trustee; a person holding the character of a trustee, or a character analogous to that of a trustee, with respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking."[1] Louisiana, Texas, Tennessee, and most other states strictly follow the commonly understood belief that a fiduciary relationship demands the highest duty of care.

Can your personal interests and the interests of the trust beneficiaries overlap?

The Louisiana Trust Code, as well as the Uniform Trust Code which forms the basis for trust law in many other states, expressly recognizes certain fiduciary duties, including a duty of impartiality, prohibition on self-dealing, proper accounting, and prudent administration. Being a trustee requires that you set aside your personal interests in favor of a loyalty to the interests of the trust's current and future trust beneficiaries. Attorneys and accountants may be found liable when they have an interest in, or provide services for, companies which also contract with the trust. In a 1993 Texas case, Janice Jochec, an accountant, was serving as trustee of trusts created for her client's children. She also served as president of a closely held company created to facilitate the client's investment in a real estate development and a partner of an entity that financed certain promissory notes to "buy out" her client's co-investor following the financial collapse of the development. The trust declined in value as a result of this real estate investment, while at the same time Jochec collected fees as trustee, paid invoices for her work as an accountant, and also had a personal interest in the "buy-out." The trial court returned a verdict in excess of $1.5 million in favor of the beneficiaries based, in large part, on her conflict of interest.[2]

This case illustrates the conflict that can easily develop when a trustee with certain professional skills is employed to provide services to the trust. A trustee should seek the most qualified expert considering, among other things, the complexity of the matter and size of the trust. However, an accountant, attorney, or financial advisor may want to do work for the trust and get paid for his or her professional services. Before taking on dual roles, ask yourself if the proposed matter is most efficiently and economically handled by you in your professional capacity or if there is another professional better suited for the task.

What effect can a potential breach of fiduciary duty have for you personally and professionally?

The goodwill that you have with your client may not extend to a spouse and/or his or her children, particularly when your client's estate plan does not comport with his or her family's financial expectations. This may have been the case in the Jochec case and also with the William R. Knichel Trust.[3] Mr. Knichel's attorney prepared a trust where Mr. Knichel's long-time companion was named trustee and the attorney was named "special co-trustee," giving him the power to manage trust assets and arbitrate disputes between the beneficiaries. Later Mr. Knichel's children were dissatisfied with the performance of the trustees. They filed a lawsuit resulting in the attorney's removal as special co-trustee. The circuit court found a conflict of interest since he was giving legal advice to Mr. Knichel's companion while she was both a beneficiary and co-trustee. The court found that he had a duty to administer the trust for the equal benefit of all of the beneficiaries. Mr. Knichel's attorney was required to report any removal for breach of trust to the state bar and his malpractice insurance carrier, potentially impacting his future earnings and professional reputation. His appeal was dismissed, with the court reasoning that his professional grievances were unrelated to the pecuniary interests of the beneficiaries, and he had no standing to appeal his removal.

Are your actions as trustee covered by your malpractice insurance?

Before accepting a fiduciary appointment, you should consider asking this question directly to your insurance carrier. Your malpractice carrier can determine if you are covered under your existing insurance contract or if additional coverage (and premiums) is required.

Insurance is a contractual agreement between an insurance company and the insured. It is well settled in most jurisdictions that determining whether the insurer has a duty to defend the insured turns on whether the allegations are within the scope of the risk contemplated by the terms of the insurance policy. Sometimes the lines separating professional and fiduciary roles may blur. For example, Paul Endicott acquiesced to a request by his friend to become trustee of the Barrett E. Smith Trust and to prepare trust tax returns.[4] After serving for many years, an action for an accounting by the trustee was brought against Mr. Endicott by a third party. The insurance carrier sought a declaratory judgment to determine if it was required to defend and indemnify Mr. Endicott. In finding for the insurance company, the court determined that "while defendant's position as an accountant may have been relevant to his selection as a trustee, it is irrelevant to his duty to provide an accounting which is the basis of the underlying action." In short, it is important to read your policy carefully. If you intend to rely on your professional liability coverage to defend your actions as trustee, it may be necessary to prove that the facts of any allegations are within the scope of your insurance coverage.

About Argent

Argent is the largest independent, trust-based wealth management firm domiciled in the South. We are an experienced fiduciary with responsibility for more than $15 billion of our clients' assets, and we are always willing to assist you in answering questions or providing resources to you or your clients. This article is intended to be a resource to assist you in managing your risk if you choose to accept a fiduciary role for a client. This article is not intended to give legal advice and you should always consult with an attorney regarding legal matters.

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[1] Plaquemines Parish Commission Council v. Delta Development Company, Inc., 502 So.2d 1034, 1040. (La. 1987).
[2] Jochec v. Clayburn, 863 S.W. 2d 516. (Tex. App-Austin, 1993).
[3] In the Matter of William R. Knichel. 347 SW 3d 127 (E.D. Missouri 2011)
[4] The North River Insurance Co. v. Paul T. Endicott 391 N.W. 2d 454 (Mich. 1986)