2022 FLORIDA FELLOWS INSTITUTE

February 24, 2022

Representing Individual Trustees: Questions and Answers 1.0

Bruce Stone
Goldman Felcoski & Stone P.A.
Coral Gables, Florida

This a general question and answer guide for lawyers who plan to represent individuals as trustees. It is not an exhaustive or comprehensive analysis of the various legal issues and considerations presented in the representation of trustees. It is intended as a beginning point of reference, with references to authoritative sources for a more detailed analysis.

1. *When a trustee asks me for legal advice, who do I represent: the trustee or the trust?*

In Florida at least, a trust is not an entity like a corporation or limited liability company. A trust is a relationship that exists when a person (the trustee) holds legal title to assets (the trust estate or res) for the benefit of persons (beneficiaries) under the terms of the trust. So technically it is not possible to represent "the trust." You are being asked to represent the trustee. The better question is "how am I being asked to represent the trustee: in the trustee's general fiduciary capacity, or in the trustee's individual capacity?"[1]

2. *Can I represent both the trustee and the beneficiaries in a matter?*

Yes, subject to the normal rules of professional conduct governing conflicts of interest in representing multiple clients. The analysis is no different than for any other matter where the lawyer is asked to represent the interests of multiple persons. See Florida Rule of Professional Conduct 4-1.7.[2] Depending on the facts and circumstances, it may be possible to represent both the trustee and the beneficiaries in a particular matter, but should you? As a practical matter you should presume that there is a conflict in the multiple representations unless you can clearly determine there is no conflict, document that in writing, and obtain written consent to the joint representation from the trustee and the beneficiaries.

3. *If I represent the trustee only, do I owe any duties to the beneficiaries?*

Yes – but the nature and the extent of those duties depends on the scope of the engagement and the nature of the representation of the trustee. A number of cases have found that attorneys who represent fiduciaries owe "derivative" or indirect duties to beneficiaries of the fiduciary relationship even though the attorney has been employed to

represent only the fiduciary.[3] For example, if you are being asked to defend the trustee in a suit brought by the beneficiaries for breach of fiduciary duty, or defend a challenge to the trustee's compensation, you would owe only the basic duties that all lawyers owe to persons who are not clients. Those duties primarily are not to knowingly make a false statement of material fact or law to a third person, and a mandate not to fail to disclose a material fact to the third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer's client, unless disclosure is prohibited under the rules governing confidentiality.[4] On the other hand, if you have been employed to provide general advice to the trustee in her or his general administration of the trust, and if you discover the trustee has engaged in acts that constitute a breach of fiduciary duty, duties will arise which can put you in a difficult position because of the duty not to assist a client in conduct that breaches the client's fiduciary duties to the beneficiaries of the trust and for which the lawyer might be found civilly liable. Under the ethics rules governing lawyers in Florida, the lawyer is prohibited from revealing *information* (not just communications) relating to representation of a client unless there is a specific exception to the prohibition, such as to prevent the client from committing a crime.[5]

4. *Are my communications with the trustee protected by attorney-client privilege?*

They should be. Under caselaw whether communications between the trustee and the trustee's lawyer are confidential may depend on the nature of the representation. If the representation of the trustee is deemed to be general in nature, in some jurisdictions there is an exception to the duty of confidentiality known as the fiduciary exception.[6] The focus in those cases is on who is the "real client" of the attorney.[7] But in Florida, communications between the trustee and the trustee's attorney should be privileged. Florida Statutes section 90.5021 overrides the fiduciary exception. The statute had an effective date of June 21, 2011. After first declining to adopt the procedural aspects of the statute as part of the Florida Rules of Evidence, in January 2018 the Florida Supreme Court adopted the content of the statute as a procedural rule, retroactive to June 21, 2011.[8]

5. *Who pays me if I'm hired to represent an individual trustee?*

The short answer is: your client pays you. Because you represent the trustee and not the trust, the trustee pays your bills. The better question is: where does the trustee get the money to pay for your services? While the trustee may pay your fees from the trust assets, any interested person has the right to object to the amount of your compensation. What if the court reduces the amount of your compensation because of a challenge by an affected beneficiary? You will have repay the excess compensation to the trust estate, and if the order is a final order not subject to further appeal, you may have no recourse unless the trustee is separately and personally liable for your fees.[9]

Section 736.1007(1)(a) specifically states that a fee agreement between the trustee and the trustee's attorney may provide that the trustee is not individually liable for the

attorney's fees and costs. The terms of your engagement letter with the trustee will be critical in determining whether the trustee is separately and personally liable for your fees even if the amount of your fees that can be paid from the trust is reduced by the court. Do you have an ethical duty to disclose to the trustee that she or he can retain counsel without being individually liable for payment of attorney's fees if payment of the fees from the trust assets is reduced or disallowed by the court? The typical individual will not be aware that this is even an option, but you are aware. It is clearly the better and ethical approach to advise the client that she or he does not have to be personally liable for fees, even if you are unwilling to undertake representation on that basis. You can tell the trustee that you aren't willing to take on the representation without the client being individually liable if your fees aren't paid in full from the trust, if that is your position.

It is critically important that you pay close attention to the 2021 amendments to Florida Statutes section 736.1007 if you are representing the trustee of a revocable trust during the period of initial trust administration after the settlor's death.[10] If you intend to charge a fee based on the statutory schedule, you must make five specific disclosures to the trustee. The best and safest practice is to repeat verbatim the five specific disclosures as set forth in the statute. Remember that you must obtain the trustee's signature acknowledging the disclosures.

There is troublesome wording in the 2021 amendment. First, the statute has been amended to say that the attorney for the trustee is entitled to reasonable compensation without court order "except as provided in paragraph (d)" of 736.1007(1). Paragraph (d) says "[i]f the attorney does not make the disclosures required by this section, the attorney may not be paid for legal services without prior court approval of the fees or the written consent of the trustee and all qualified beneficiaries." Presumably this prohibition on payment of attorney's fees only applies to payment based on the statutory schedule, and not payment on some other basis such as time expended – but the amendment does not expressly say that. The only disclosures which the attorney is required to make in section 736.1007 are found in paragraph (b) of subsection (1), which applies only when the attorney intends to charge a fee based on the statutory schedule. The logical conclusion is that if the attorney wants to be paid on the basis of the statutory schedule, the attorney is not going to be paid anything at all unless the court approves payment of fees (and it would seem that the court could award reasonable fees on basis of other statutory factors and not the percentage schedule), or unless the trustee and <u>all qualified beneficiaries</u> agree on fees (which again might be based on other factors without regard to the statutory schedule). And even if the attorney does make the disclosures required in paragraph (b) of subsection (1), under paragraph (a) of subsection (1) the statutory schedule is still not binding on any person who bears the impact of the fees.

If you want to be paid on the basis of the statutory schedule for representation of the trustee during initial administration of a revocable trust, the clear conclusion is that you

should both make the five specific disclosures to the trustee, and get the agreement of every person who bears the impact of your fees. Note specifically that subsection (1)(a) refers to persons who bear the impact of the fee in consenting to a fee agreement. In the ordinary situation this would mean the residuary beneficiaries under the trust agreement. On the other hand, if the attorney fails to make the required disclosures, no fee can be paid unless the trustee and all qualified beneficiaries consent to payment (presumably determined in any manner, not just based on the statutory schedule). Depending on the particular facts and administration of the trust, the consent of persons who do not bear any impact from payment of the fees could be required for payment of fees if the attorney failed to make the required disclosures to the trustee, under the literal wording of the 2011 amendment.

Even if you do intend to be paid based on the statutory schedule, it is highly advisable that you keep accurate and contemporaneous records of time expended and of specific services rendered, in the event that a beneficiary who bears the impact of your fees objects, as you may be required to prove to the court the specific services rendered and the time involved in rendering them.

6. *Is there any advice that I should give someone who is considering serving as a trustee? What about me, if I'm asked if I will serve as a trustee for a client?*

Don't do it! – unless you really know what you are getting into. See Appendix A for some things a prospective trustee should think about before agreeing to serve as a trustee.

7. *Is there a general resource or guide that I can give to my individual client who is a trustee to assist my client in performing his or her duties as a trustee?*

Yes, and it's free! It's titled "What It Means to Be a Trustee: A Guide for Clients," in 31 ACTEC Journal (2005). Copies can be downloaded for free on the ACTEC website.[11] A copy of the guide is included as part of these materials as Appendix B.

---

[1] "Under the majority view, a lawyer who represents a fiduciary generally with respect to a fiduciary estate stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. In this connection note that a distinction should be drawn between the duties of a lawyer who represents a fiduciary in the fiduciary's representative capacity (a "general" representation) and the duties of a lawyer who represents the fiduciary individually (i.e., not in a representative capacity)." ACTEC Commentaries on the Model Rules of Professional Conduct, 5th ed. 2016 [hereinafter referred to as the "ACTEC Commentaries"], at 2.

[2] Rule 4-1.7 Conflict of Interest; Current Clients

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

[3] "The lawyer who represents a fiduciary generally is not usually considered also to represent the beneficiaries. However, most courts have concluded that the lawyer owes some duties to them. Some courts subject the lawyer to the duties because the beneficiaries are characterized as the lawyer's "joint," "derivative" or "secondary" clients. Other courts do so because the lawyer stands in a fiduciary relationship with respect to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries. The duties, commonly called "fiduciary duties," arise largely because of the nature of the representation and the relative positions of the lawyer, fiduciary, and beneficiaries. However, note that the existence and nature of the duties may be affected by the nature and extent of the representation that a lawyer provides to a fiduciary. Thus, a lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other non-clients." ACTEC Commentaries on the Model Rules of Professional Conduct, 5th ed. 2016, at 2.

[4] Rule 4-4.1 Truthfulness in Statements to Others.

[5] Rule 4-1.6 Confidentiality of Communication.

[6] "The lawyer for the fiduciary ordinarily owes some duties (largely restrictive in nature) to the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer). The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. Moreover, the fiduciary's retention of the lawyer to represent the fiduciary generally in the administration of the fiduciary estate may impliedly authorize the lawyer to make disclosures in order to protect the interests of the beneficiaries. It should be noted that the evidentiary attorney-client privilege is in some jurisdictions subject to the so-called fiduciary exception, which provides generally that a trustee cannot withhold attorney-client communications from the beneficiaries of

the trust if the communications related to exercise of fiduciary duties." ACTEC Commentaries, at 81.

[7] *See, e.g,,* Jacob v. Barton, 877 So.2d 935 (Fla. 2d DCA 2004); *Tripp v. Salkovitz*, 919 So.2d 716 (Fla. 2d DCA 2006).

[8] *See* https://www.floridasupremecourt.org/content/download/243634/2146637/sc17-1005.pdf.

[9] Florida Statutes section 736.1013 Limitation on personal liability of trustee.—

(1) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

[10] 736.1007 Trustee's attorney fees.—
(1)(a) Except as provided in paragraph (d), if the trustee of a revocable trust retains an attorney to render legal services in connection with the initial administration of the trust, the attorney is entitled to reasonable compensation for those legal services, payable from the assets of the trust, subject to s. 736.0802(10), without court order. The trustee and the attorney may agree to compensation that is determined in a manner or amount other than the manner or amount provided in this section. The agreement is not binding on a person who bears the impact of the compensation unless that person is a party to or otherwise consents to be bound by the agreement. The agreement may provide that the trustee is not individually liable for the attorney fees and costs.

(b) An attorney representing a trustee in the initial administration of the trust who intends to charge a fee based upon the schedule set forth in subsection (2) shall make the following disclosures in writing to the trustee:

1. There is not a mandatory statutory attorney fee for trust administration.
2. The attorney fee is not required to be based on the size of the trust, and the presumed reasonable fee provided in subsection (2) may not be appropriate in all trust administrations.
3. The fee is subject to negotiation between the trustee and the attorney.
4. The selection of the attorney is made at the discretion of the trustee, who is not required to select the attorney who prepared the trust.
5. The trustee shall be entitled to a summary of ordinary and extraordinary services rendered for the fees agreed upon at the conclusion of the representation. The summary shall be provided by counsel and shall consist of the total hours devoted to the representation or a detailed summary of the services performed during the representation.

(c) The attorney shall obtain the trustee's timely signature acknowledging the disclosures.

(d) If the attorney does not make the disclosures required by this section, the attorney may not be paid for legal services without prior court approval of the fees or the written consent of the trustee and all qualified beneficiaries.

[11] https://www.actec.org/assets/1/6/ACTEC_What__It_Means_to_be_a_Trustee.pdf.