



Although the law is unsettled, attorneys for trusts may owe a fiduciary duty to trust beneficiaries as well as to trustees. Trust counsel should beware the potential for liability if they fail to act with due care to protect beneficiaries' interests.

By Robert S. Held

A Trust Counsel's Duty to Beneficiaries

When an attorney is retained as counsel for an estate or trust, who is the attorney's client – the trustee, current beneficiaries, remainder beneficiaries, or all of the above? Conflicts between trustees and beneficiaries, and between and among co-trustees, sometimes require the attorney to render advice favoring one and disfavoring another. These conflicts can pose ethical and legal challenges for even the most experienced attorney.

The case law in this area is uneven and unsettled. However, trust counsel may be obligated to produce legal memoranda at a beneficiary's request,¹ refrain from advocating a position that furthers the trustee's position at the expense of the beneficiary's² and act with due care to protect the interest of the beneficiaries.³

Assume, for example, that Attorney A as trust counsel gives a corporate trustee tax advice for fiduciary income tax planning. Later, the beneficiaries of that same trust ask A to sue the corporate trustee for breach of fiduciary duty based on improper trust

Angell, LLP, 2002 WL 1803923 (RI Super) (Court refused to grant summary judgment for defendant law firm against beneficiary-plaintiff).

3. *In re Estate of Halas*, 159 Ill App 3d 818, 512 NE2d 1276 (1st D 1987) (Court found defendant law firm (trust counsel) acted in bad faith as to both its derivative and independent fiduciary duties to beneficiaries); *Charleson v Hardesty*, 108 Nev 878, 839 P2d 1303 (Nev 1992) (Appellate court reversed summary judgment order of trial court that would have disposed of beneficiary's claim against trust attorney); *In re Clarke's Estate*, 12 NY2d 183, 188 NE2d 128 (NY 1962) (attorneys fees denied to counsel for the estate where attorneys placed themselves in a position of conflict with the beneficiaries); *Estate of Larson*, 103 Wash 2d 517, 694 P2d 1051 (Wash 1985); see also: ALL, Restatement (Third) of Law Governing Law §73 (2000). Some courts have characterized the beneficiaries of an estate as derivative or secondary clients of the lawyer for the fiduciary. ACTEC Commentaries, MRPC 1.2 "Duties to Beneficiaries."

1. *Riggs National Bank of Washington, DC v Zimmer*, 355 A2d 709, 713-714 (Del Ch 1976) (trustee compelled to produce for beneficiary, legal memoranda prepared by attorney for the trustee).

2. *The American Kennel Club Museum of the Dog v Edwards &*

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investments, which involves a matter unrelated to the specific legal work A did for the trust years earlier. Can A accept the engagement, or must A politely decline? According to Illinois State Bar Association Advisory Opinion on Professional Conduct 98-01, A can represent the beneficiaries and sue A's former client.⁴

Conflicts of interest and the Rules of Professional Conduct

In the example above, counsel's initial representation of the "trust" created a lawyer-client relationship (more later on who the "client" is). Under Rule 1.9 of the Rules of Professional Conduct, a lawyer who has formerly represented a client cannot, thereafter

(1) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after disclosure; or (2) use information relating to the representation to the disadvantage of the former client, unless:

- (A) such use is permitted by Rule 1.6; or
- (B) the information has become generally known.⁵

In the ISBA Advisory Opinion, while the lawyer may have gained confidential information regarding the trust property, the beneficiary was not contesting the trustees' activities in connection with the legal work previously performed by the attorney (the first prong of Rule 1.9). And under Rule 1.9, the party seeking disqualification of an opposing party's counsel based on counsel's former representation must prove that the former and present representations are substantially related.

The Illinois Supreme Court has adopted a three-part inquiry to determine whether the former and current matters are substantially related. This test requires an attorney to (1) reconstruct the scope of the former representation, (2) determine whether it is reasonable to infer that the confidential information in question would have been given to a lawyer representing a client in those matters, and (3) consider whether the information is relevant to the issues raised in the litigation pending against the former client.⁶

Thus, under the advisory opinion's fact pattern, the confidential information that trust counsel may have obtained was not related to the beneficiaries' claim

against the trustee. Accordingly, the ISBA committee approved the representation.

Defining the lawyer's duty: *In Re Estate of Halas*

The Rules of Professional Conduct provide that "[w]hen representation of multiple clients in a single matter is undertaken, the disclosure shall include an explanation of the implications of the common representation and the advantages and risks involved."⁷ While representing a trust involves furthering the interests of the trustee (in its fiduciary role) and enhancing and preserving the interests of the beneficiaries, it is not clear that these roles make these parties the clients.

But determining whether a party is a client does not end the question of what duty, if any, a lawyer may owe. The 1991 Illinois Appellate Court case *In Re Estate of Halas*⁸ is well known for its declaration of the obligations of a fiduciary's duty to the beneficiaries. The *Halas* court made clear that a trustee has a duty to serve the interests of the beneficiaries with complete loyalty, excluding all self-interest, even if a trustee occupies conflicting positions.

But trust counsel also has a fiduciary duty to the trust beneficiaries. In an earlier *Halas*⁹ case decided in 1987, the attorney for the estate sought approximately \$1 million in fees, and the trial judge allowed about half that amount. The law firm and the beneficiaries appealed. The appellate court found that the fiduciary duty of the attorney for an estate to the beneficiaries is derived from the executor's well-established duty to the beneficiaries. The court wrote as follows: "We find...that [counsel for the executor] breached its derivative fiduciary duty as a result of its conduct in the reorganization of the Bears, and also breached its own separate fiduciary duty to the beneficiaries."¹⁰

What if the trustee has an economic incentive to further its own interest in a way that conflicts with its duties as trustee? As a simple example, assume a corporate trustee's fees from a trust, to be generated over time, represent a substantial annuity for the trustee. Assume further that the beneficiaries are seeking a lower fee that they believe to be in line

with what other corporate trustees charge. Is the trust counsel obliged to advise the corporate trustee to lower its fees?

And what about a case of multiple trustees where the corporate trustee is in the minority? Can counsel for the trust advocate a position contrary to one of its "clients"?

Illinois and other jurisdictions recognize that trust counsel may owe an equally strong fiduciary duty to the beneficiaries and the fiduciary.

Courts recognize trust counsel's duty to beneficiaries

The answers can be found in a careful reading of the 1987 *Halas* case and a logical extrapolation of its central theme. As a starting point, under Illinois law, an attorney may owe a duty of care to the third party such as the beneficiary of an estate.¹¹ Interestingly, some states have explicitly adopted a rule that *no duty* exists between a trustee's attorney and the beneficiaries of the trust. Massachusetts is one such state. The Supreme Court of Massachusetts was quite clear in articulating its determination that a trustee's attorney owes no duty to the beneficiaries of a trust. As the court put it,

That the interests of the trustee and the interests of the beneficiaries may at times conflict cannot seriously be disputed... Should we decide that a trustee's attorney owes a duty not only to the trustee but also to the trust beneficiaries, conflicting

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4. See IL Adv Op 98-01, 1998 WL 387646, <<http://www.isba.org/EthicsOpinions/98-01.asp>> (Ill State Bar Association ruling that former attorney for trust can sue the corporate trustee he previously represented without breaching ethical obligations to former client).

5. ILCS S Ct Rules of Prof Conduct, RPC Rule 1.9.

6. *Schwartz v Cortelloni*, 177 Ill 2d 166, 685 NE2d 871 (1997).

7. ILCS S Ct Rules of Prof Conduct, RPC Rule 1.7(c).

8. *In re Estate of Halas*, 209 Ill App 3d 333, 568 NE2d 170 (1st D 1991).

9. *In re Estate of Halas*, 159 Ill App 3d 818, 512 NE2d 1276 (1st D 1987).

10. Id at 825, 512 NE2d at 1280.

11. See *Gagliardo v Caffrey*, 344 Ill App 3d 219, 800 NE2d 489 (1st D 2003) (executor's attorney considered to have represented beneficiary of the estate of deceased).

rights, each series may be treated as a separate LLC for income tax purposes. This would increase accounting costs as separate returns would be required for each series.

Most importantly, the Act provides that *debts, liabilities and obligations incurred, contracted for or otherwise existing with respect to a particular series are enforceable against that series only, and not against the assets of the LLC generally or any other series* of the LLC. Delaware LLC Act, § 18-215(m).

To create a series LLC, special language must be included in the certificate of formation, which is filed with the

Delaware Secretary of State and is the equivalent of the Illinois Articles of Organization.

To obtain and preserve separate liability status, each series must be operated as a separate entity, with separate books and records. Assets must not be commingled among the separate series.

The most obvious use for the series LLC is to hold multiple parcels of real property in liability-segregated cells. As this new business and planning tool becomes better known, creative advisors will find a multiplicity of uses for them.

Illinois Secretary of State Jesse White's Business Laws Advisory Committee has

been studying the series concept for more than two years. A draft bill amending the Illinois LLC act to permit formation of series LLCs in Illinois will be submitted to the 2005 session of the Illinois General Assembly.

Until Illinois has its own Series LLC act, however, practitioners may form Series LLCs in Delaware and qualify them to do business in Illinois. Illinois courts should apply Delaware law to these entities, according to the Illinois Limited Liability Company Act, 805 ILCS 180/45-1(a). ■

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loyalties could impermissibly interfere with the attorney's task of advising the trustee. This we refuse to do.¹²

However, many jurisdictions – in addition to Illinois – recognize a duty between a lawyer for a trust and third parties. Ohio, Nevada, California, and Rhode Island are four such examples. And a California appellate court crystallized this view:

An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to ful-

In a Delaware case involving a beneficiary's motion to compel production of legal memos prepared by the trustee's attorney, the court held the beneficiaries were entitled to inspect the documents. Further, the court opined that the beneficiaries were at least as much clients as were the trustees, such that the attorney-client privilege did not prohibit disclosure. The Delaware Court stated as follows:

As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client in the sense that [h]e is personally being served. And, the beneficiaries are not simply incidental beneficiaries who [c]hance to gain from the professional services rendered...The trustees here cannot subordinate the fiduciary obligations owed to the beneficiaries to their own private interests under the guise of attorney-client privilege....The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees. In effect, the beneficiaries were the clients...as much as the trustees were, and perhaps more so.¹⁴

Likewise, a Rhode Island court concluded as follows:

The notion that a trust beneficiary, not merely the trustee, is the client of the trustee's attorney supports the acknowledgement of a duty of care from the

trustee's attorney to the beneficiary. Given this court's determination that a trustee's attorney owes a duty of care to the trust beneficiaries...[the trust beneficiary] has standing to bring suit against [the attorney for the trust] for legal malpractice and breach of fiduciary duty.¹⁵

A serious obligation

While there is still uncertainty and likely the law in this area will continue to develop, it seems at this point that an attorney's obligations flow to the beneficiaries rather than the individual self-interest of the trust fiduciaries.¹⁶ Practitioners should continue to keep the ethical rules in mind.

For the trustee/executor, the case law is clear that the fiduciary responsibility to the beneficiaries is an obligation that should not be taken lightly. For trust counsel, Illinois and other jurisdictions recognize that an attorney may owe an equally strong fiduciary duty to the beneficiaries and the fiduciary. ■

12. *Spinner v Nutt*, 417 Mass 549, 553, 631 NE2d 542, 544-45 (1994).

13. *Morales v Field*, 99 Cal App 3d 307 (1st D 1980).

14. *Riggs* at 713-714.

15. *The American Kennel Club Museum of the Dog* at *9.

16. See *Halas*, 159 Ill App 3d 818, 512 NE2d 1276 (1st D 1987).

An attorney's obligations flow to the beneficiaries rather than the individual self-interest of the trust fiduciary.

fill his obligations to all beneficiaries. It follows that when an attorney undertakes the relationship as advisor to a trustee, he in reality also assumes a relationship with the beneficiaries akin to that between trustee and beneficiaries.¹³

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