



TO BE OR NOT TO BE: Your Client's Trustee

BY KIRA LOCKE AND CASEY MARSHALL

No one likes job hunting. Looking for a job can be like trying to find a parking spot at a mall during the holiday season. You circle endlessly, your patience wears thin, and just when you think you've found a spot, someone swoops in and snatches it away, leaving you to contemplate the meaning of life in a crowded lot.

As an attorney, it can often feel like the job hunt never stops as you seek to showcase your skillset and expertise, all in an effort to continuously attract new clients. Those efforts often involve taking on additional roles, including positions with bar associations, nonprofit organizations, and other community service organizations. Some attorneys, whether they like it or not, even end up acting as informal therapists for their clients.

Occasionally, a client will ask their attorney to take on the role of serving

as trustee of the client's trust. Before saying yes, an attorney should understand how their duties and obligations as an attorney interact with the duties and obligations of being a trustee. This article, while not a substitute for legal advice, will discuss what an attorney should consider before acting as a trustee of their client's trust.

TRUSTEE 101

A trust is a legal arrangement in which an owner of assets (the settlor) transfers ownership of the assets to another person or entity (the trustee), to hold in trust for a particular person or persons (the beneficiary or beneficiaries). When a trust is created, one of the most important decisions to make is determining who to name as trustee. Trustees manage the trust assets for the benefit of the beneficiaries. This could include investing assets, hand-

ling financial affairs, maintaining proper records of assets and transactions, and distributing assets in accordance with the terms of the trust.

Like attorneys, trustees have many fiduciary duties. A trustee owes a duty of loyalty to the trust beneficiaries. When there are multiple beneficiaries, a trustee also has a duty to treat the beneficiaries impartially. Finally, a trustee has a duty to administer the trust in a prudent manner. These are just some of the many fiduciary duties a trustee has.

WHY AN ATTORNEY MAY BE A DESIRABLE TRUSTEE

Clients often look to their attorneys to take on the role of trustee. A client might nominate their attorney as the trustee of their trust because the client trusts the attorney's legal expertise, discretion, and commitment to carrying out their wishes faithfully and responsibly. Moreover, attorneys



are known for their ability to analyze situations critically and provide strategic solutions to problems.

WHY AN ATTORNEY MAY DECLINE AN APPOINTMENT AS TRUSTEE

A settlor can nominate whoever they want to serve as trustee of their trust. However, for that nomination to take effect, the trustee must voluntarily agree to accept that role. There are many reasons why an attorney might decline to serve as trustee of a trust created by a client.

Dueling Fiduciary Duties. When an attorney acts as a trustee, the attorney must abide by their fiduciary duties as a trustee *and* their fiduciary duties as an attorney. In other words, the Rules of Professional Conduct still apply to attorneys acting as trustees. An attorney must be confident in their ability to abide by the additional fiduciary duties that come along with being a trustee.

Conflicts. Conflicts can arise from an attorney's role as trustee. Under Rule 1.7 of the Minnesota Rules of Professional Conduct, a conflict arises when there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to a third person. An attorney-trustee's duties to trust beneficiaries can materially limit their duties to existing clients. This could occur when the interests of a beneficiary are adverse to the interests of an attorney-trustee's client. Attorney-trustees must remain cognizant of how their relationship with trust beneficiaries might impact their relationship with their clients.

Cost. Trustees are typically paid a fee for their services, but this fee is often much lower than what an attorney charges for their legal services. Attorneys should not expect to receive their same attorney-compen-

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sation when acting as a trustee. In fact, attorneys in Minnesota have faced professional discipline for charging excessive fees when acting as a trustee.

Personal Liability. When a trustee acts improperly, the trustee can be held *personally liable* for their errors. Many attorneys are risk-averse and may want to avoid the potential of being personally liable for any mis-

takes that may arise in their role as trustee.

Time. Being an attorney is time consuming – as is being a trustee. While an attorney might want to help their client by acting as trustee, the attorney should ensure they have enough time to act as trustee while still being able to fulfill their obligations as a lawyer and still allowing for a life outside of the law.

CONCLUSION

Attorneys are permitted to act as the trustee of their client's trust. However, before doing so, an attorney must ensure that they are able to abide by all relevant duties and obligations imposed on them. Without considering the ethical ramifications of this dual role, an attorney is likely to find themselves in an ethically compromising position. *Trust us.*

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