

Conflict of Interests When Representing a Beneficiary and the Trustee

In the administration of a trust or estate, an attorney may be in the position of representing both the trustee and the beneficiaries for a particular trust.¹ This creates a potential conflict of interests since the beneficiaries may want to enforce the trust provisions against the trustee. Situations can arise where it seems advantageous to represent both parties, such as when the parties are amicable and wish to avoid the added expense of obtaining independent counsel, and when the attorney is familiar with the parties and the property.² Although it is not per se improper to represent both parties, it is not advisable. A lawyer should represent multiple clients only after making full disclosure to all the parties and receiving consent from all the parties.³

Canon 5 of the ABA Code of Professional Responsibility states that a lawyer should exercise independent professional judgment on behalf of each client.⁴ This rule precludes an attorney from accepting or continuing employment that will adversely affect his judgment or dilute his loyalty to a client.⁵ The ABA Code defines the problem as one which arises when a lawyer is asked to represent two or more clients who may have differing interests.⁶

1. Comment, *Trusts; Consequences of Attorney's Good Faith Representation of Adverse Parties in Trust Administration-Potter v. Moran*, 55 CAL. L. REV. 948 (1967).

2. *Id.*

3. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA Code], DISCIPLINARY RULE [hereinafter cited as DR] 5-105(c): "[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

4. See ABA CODE, Canon 5.

5. ABA CODE, ETHICAL CONSIDERATION [hereinafter cited EC] 5-14. Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who have differing interests, whether such interests be conflicting inconsistent, diverse, or otherwise discordant.

6. *Id.*

The consequences for the attorney who represents conflicting interests include malpractice liability, loss of fee, and professional discipline. Malpractice liability could result from a finding of negligence in a suit filed by the client. Loss of a fee could result from a court disallowing a fee from one or both of the parties because of dual representation. Generally, disbarment would occur only in the most serious case, but suspension or reprimand may result.

In *Florida Bar v. Moore*,⁷ the attorney represented the life tenant of a trust. The life tenant agreed to pay the attorney one-third of any amount he might recover over and above the annual income from the trust.⁸ The attorney also represented and advised the trustees in respect to the trust administration. The trustees depleted the trust for the benefit of the life tenant and later contended that they were never advised of their duty to preserve the trust corpus for the remainderman, who eventually brought a suit for an accounting.⁹ The court stated that a serious conflict of interest arose when the trustee began relying on advice of the life tenant's attorney regarding ways the trust could be depleted.¹⁰ The attorney should have withdrawn from representation of the trustee, and his failure to do so violated Canon 6 of the Canons of Professional Ethics.¹¹ Except in exceptional circumstances, an attorney may not represent conflicting interests in the same general transaction.¹² The attorney was suspended from law practice for three months.

When an attorney simultaneously represents two clients whose interests are adverse, the court may disqualify the attorney from appearing in the case. This also has the practical effect of depriving the attorney of his or her fee. In *Ex parte Herrin*,¹³ the attorneys retained as associate counsel by the guardian ad litem of a mentally incompetent ward also represented a daughter of the ward with respect to litigation of property in the trust estate. The guardian ad litem was disqualified for employing counsel representing interest adverse to the ward and allowing the counsel to

7. 194 So. 2d 264 (Fla. 1966).

8. *Id.* at 266.

9. *Id.* at 267.

10. *Id.* at 269.

11. *Id.*

12. *Id.*

13. 257 Ala. 392, 60 So. 2d 56 (1957).

litigate such antagonistic interests through him.¹⁴ The associate counsel was also disqualified.

The attorney may not be the only one affected by dual representation. *Potter v. Moran*¹⁵ indicated that dual representation will preclude proceedings between a trustee and a beneficiary from having a res judicata effect. The attorneys in that case represented both the trustee and the guardian of the trust beneficiaries who were minors. The parties involved knew of the dual representation, but it was not disclosed to the probate court during the hearings on the accounts. Several years later the residuary beneficiary was allowed to reopen the accounts; the appellate court reversed the trial court's holding that the probate court's decree was res judicata.¹⁶

The court in *Potter* based its holding upon a finding of extrinsic fraud in the attorneys' failure to inform the court of their dual representation.¹⁷ The court stated that had the probate court known of the dual representation, it would not have approved the accounts.¹⁸ The beneficiaries were entitled to independent representation and no valid order could be made while their attorneys represented conflicting interests.¹⁹ The court implied that dual representation itself might preclude a binding judgment.

A situation analogous to the one in which an attorney represents both a trustee and a beneficiary arises when an attorney represents different interests in the same property or estate. The conflict of interests that can result often has disastrous consequences for the attorney. For example, in *Richardson v. State Bar of California*,²⁰ the attorney was disbarred for representing differing interests in the same estate. He solicited employment from several heirs of an estate he was administering without disclosing to them that he was the administrator of the estate. At the time he solicited such employment he had already obtained a fifty percent contingency fee contract with another heir of the same estate.²¹ The court held that the attorney's misrepresentation of facts to the

14. *Id.* at 400, 60 So. 2d at 63.

15. 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 (1966).

16. *Id.* at 879, 49 Cal. Rptr. at 234.

17. *Id.* at 876, 49 Cal. Rptr. at 232.

18. *Id.* at 879, 49 Cal. Rptr. at 233.

19. *Id.*

20. 19 Cal. 2d 707, 122 P.2d 889 (1942).

21. *Id.* at ___, 122 P.2d at 891.

court, his failure to disclose facts to the heirs, his misuse of information contrary to the heirs' interest and his representation of conflicting and adverse interests warranted disbarment.²²

In the case of *Cleveland Bar Association v. Pleasant*,²³ the attorney, who was appointed administrator of the estate, acted as attorney for the estate and for one of the claimants who was later determined to be the sole heir. The claimant agreed to pay the attorney forty percent of what he (the claimant) received from the estate. The court found the attorney committed fraud upon the court by not disclosing the fee arrangement.²⁴ The Supreme Court of Ohio went on to state that where parties having different interests are involved, no lawyer can represent or receive compensation without full disclosure to all the parties of the dual representation and compensation arrangements.²⁵ The attorney's misconduct resulted in his disbarment.

The court in *Morales v. Field*²⁶ determined that the attorneys acting for the trustee-executor owed a duty to the beneficiary to disclose their representation of the trustee as well as other co-guarantors at the time the trustee sought authorization to execute a loan guarantee. The court concluded that the attorneys' failure to disclose the dual representation to the court amounted to extrinsic fraud.²⁷ As a result, the court order settling the first account could be set aside and did not preclude the beneficiary from alleging the attorneys' breach of duty.²⁸ The court declared that at a minimum the trustee's attorney is to inform the beneficiaries of his dual representation.²⁹

Absence of corrupt motive or intent in a dual representation situation may prevent disciplinary action. An example of such a result is *In re Collins*.³⁰ That case held that the allegations in a complaint against an attorney in a disbarment proceeding were not

22. *Id.* at —, 122 P.2d at 892.

23. 167 Ohio St. 325, 148 N.E.2d 492 (1958).

24. *Id.* at 333, 148 N.E.2d at 498.

25. *Id.* at 331, 148 N.E.2d at 497.

26. 99 Cal. App. 3d 307, 160 Cal. Rptr. 239 (1979). The result for the estate was a loss of a right of subrogation and instead became entitled to only a prorata contribution from the co-guarantors.

27. *Id.* at 313, 160 Cal. Rptr. at 242 (citing *Potter v. Moran*, 239 Cal. App. 2d 873, 49 Cal. Rptr. 229 (1966)).

28. *Id.* at 313, 160 Cal. Rptr. at 249.

29. *Id.* at 316, 160 Cal. Rptr. at 244.

30. 147 Cal. 8, 81 P. 220 (1905).

sufficient to withstand demurrer when they alleged only that the attorney represented both the administrator and a claimant to the estate.³¹ It should appear by appropriate allegations that the interests represented were in fact antagonistic and that the attorney assumed to represent both sides.³² In addition, it should appear that in representing both sides the lawyer was acting from a corrupt motive or evil intent, and because of such conduct some injury was sustained by the parties.

Conclusion

An attorney is not prohibited from representing both the trustee and the beneficiary of a trust. However, he is required to make a full disclosure to the parties of the dual representation and obtain the consent of all the parties. The attorney's failure to disclose dual representation to his client can result in malpractice liability, loss of fee, or disciplinary action. It is also advisable for a disclosure of the dual representation to be made to the court at the outset of any proceeding where such representation will occur. Lack of disclosure to the court can result in a court later finding extrinsic fraud and possibly setting aside the earlier court order, as well as disciplinary action against the attorney.

Even with full disclosure and consent, an attorney should not represent multiple clients unless he determines that he can adequately represent each party. Adequate representation would be possible only when the interests of the trustee and the beneficiary were in fact neither adverse nor conflicting.

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31. *Id.* at ___, 81 P. at 223.

32. *Id.*