

# Ethical and Liability Considerations for Lawyers Acting as Fiduciaries in Estate, Trust and Probate Contexts

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## I. Introduction

A fiduciary duty is an obligation to act in the best interests of another party. These obligations arise from the nature of a relationship between parties. Attorneys have fiduciary obligations to clients. *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964). Attorneys may have differing or competing fiduciary obligations arising out of different or additional relationships. A lawyer who acts as a trustee of a trust has fiduciary duties to the beneficiaries of the trust that do not depend upon an attorney client relationship with that person. When an attorney acts as the representative of an estate, fiduciary duties arise that do not depend upon an attorney client relationship. Lawyers may also serve as guardians, with an obligation to act in the best interest of the ward.

This article will consider the implications of the existence of lawyers’ fiduciary obligations arising outside of the attorney client role. These relationships are labeled non-lawyer fiduciary roles throughout the article. First, the article will consider the application of the Texas Disciplinary Rules of Professional Conduct, the rules of ethics, to situations in which an attorney has fiduciary duties that arise outside of the attorney client relationship. The article will then consider the statutory and common law basis for liability of lawyers acting in non-lawyer

fiduciary roles. Finally, the article will consider insurance coverage issues that may arise for lawyers acting in non-lawyer fiduciary roles.

## II. The Lawyer's Fiduciary Duty Under Ethical Rules

Lawyers must act in the best interest of their clients. The rules of ethics detail the obligations lawyers have to their clients, on the pain of discipline by the State Bar. While we will not attempt to detail each and every obligation of a lawyer here, a number of broad categories of obligations of lawyers to clients should be noted to begin the discussion.

***Duty of diligence and competence*** (TDRPC Rule 1.01): Lawyers are required to act timely and competently for their clients.

***Duty of confidentiality*** (TDRPC Rule 1.05): Lawyers must keep client information confidential. This duty of confidentiality extends beyond just keeping quiet about communications between the attorney and client in the course of representation. It includes a duty not to use confidential information for the advantage of the lawyer, or of third persons, if use of the information is not also to the advantage of the client.

***Duty of loyalty*** (TDRPC Rules 1.06-1.11): Closely related to the duty of confidentiality, the duty of loyalty takes the lawyers fiduciary obligations one step further. The lawyer cannot undertake representation of other clients if the interests of other client conflicts with the obligations of the lawyer or the objectives of the client. The lawyer's own personal interests, whether arising from the practice of law or from duties to third parties outside of attorney client relationships, must not conflict with the client's objectives in the representation.

## III. The Ethical Complications of Serving as Both a Lawyer and in Other Fiduciary Roles

It is not uncommon for a lawyer to be called upon by a client to act as a trustee of a trust by a client, or to serve as the independent executor for the client's estate. Persons seeking to help a family member may be unable to satisfy guardianship requirements, such as bonding, or consider themselves incapable of administering a guardian's estate. These clients may ask the lawyer to serve as guardian for the client.

The reasons for such requests may make very good sense. The lawyer may know about the client's assets and business dealings from providing other legal services, which can save time and money in carrying out the purpose of the grantor of the trust. Lawyers have knowledge of

the court procedures to create and supervise guardianships that is critical to assuring the best result for the ward. Nonetheless, a lawyer faces potential ethical problems when acting in trust, executor or guardianship roles.

As with the attorney-client relationship, a lawyer has a duty of care and competence when acting as a trustee, executor or guardian. Being a lawyer is not necessarily adequate training for conducting inventories, managing assets, or making sound life care and medical decisions. Non-lawyers may be able to provide fiduciary services at a lower cost than lawyers. The lawyer's personal interest may arguably lie in receiving the fees from acting in additional roles.

The drafting of the foundation documents for trusts and estate plans, and in determining compensation in guardianships, creates a danger of conflicts between the lawyer's and the client's interest. In guardianships, compensation from the ward's estate may also affect the quality of the ward's life. Lawyers acting as trustees and executors are usually compensated by the terms of the documents they draft as lawyers. An additional complication in trusts is that the trust may also hold a trustee harmless from certain acts. If a lawyer drafts trust and estate documents and serves as trustee or representative, it is in the lawyer's best interest to maximize the lawyer's compensation and to minimize liability. In guardianships created by the court, lawyers can find themselves in the position of both arguing for creation of a guardianship as the guardian's lawyer and making application for compensation.

A further potential incentive for a lawyer to seek to serve as a non-lawyer fiduciary is the legal services that may be needed to represent the trust, estate, or ward. In the guardianship situation, the lawyer could both be reporting to the court as guardian and acting as lawyer for the ward in recovering assets. In complex matters, this could be a sizeable bonus for the lawyer and his or her firm. Clearly, the potential for overreaching and undue influence of lawyers in suggesting that they serve as trustees, executors or guardians is significant.

As a result, a number of courts and ethics opinions have ruled that lawyers should not suggest, directly or indirectly, to clients that they serve as trustees or executors. The seminal case in this area is *State v. Gulbankian*, 196 N.W.2d 733, 54 Wis. 2d 605 (Wis. 1972), in which a lawyer was disciplined for routine appointment as the executor in client wills. Reviewing the applicable rules of ethics at the time, the court noted the following:

We emphasize that while an attorney is discussing the identity and the duties of an executor, he must especially be careful that his conversation does not intimate or suggest or solicit, directly or indirectly, his employment as the possible attorney to assist the executor in the probate of the estate or his appointment as executor. We realize this is an area in which it is difficult to police professional standards, but circumstantial

evidence as well as direct testimony may be relied upon to prove that solicitation has occurred.

Similarly, Texas Ethics Opinion 182, June 1958, reported in 18 Baylor L. Rev. 278 (1966), decided under the Canons of Ethics, found that serving in the role of executor and lawyer is acceptable if “the attorney did not solicit in any way the insertion of his name in the will as independent executor...”

Such reasoning may also apply to a lawyer who initially counsels a ward’s family or other concerned persons in seeking appointment as guardian. Lawyers would be wise to document that using the lawyer as a non-lawyer fiduciary did not originate with the lawyer.

The Gulbankian case and Texas Opinion were decided quite some time ago, before the enactment of ABA Model Rules based professional standards of conduct. The Model Rules and the Texas Disciplinary Rules of Professional Conduct can be read to reach a similar result. When a lawyer acts as a trustee or executor for a client, it can be argued that a lawyer enters into a different business transaction with the client under ABA Model Rules based ethical rules. See Edward D. Spurgeon and Mary Jane Ciccarello, *The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations*, *Fordham Law Review*, Vol. 62, Issue 5, pg. 1378 (1994). The roles of trustee or executor are not lawyer roles; they can be and often are performed by other parties.

The commentary to TDRPC Rule 1.06 is important with regard to taking on additional roles beyond that of lawyer:

5. The lawyer’s own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer’s need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee.

When a lawyer actively solicits additional roles as a fiduciary, the fee charged for the additional service may or may not be seen as “reasonable.” If the lawyer lacks adequate training for the non-lawyer fiduciary role, this may violate Rule 1.06.

TDRPC 1.08 also may apply when a lawyer serves in these roles for a client:

**Rule 1.08 Conflict of Interest: Prohibited Transactions**

(a) A lawyer shall not enter into a business transaction with a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Interestingly, ABA Ethics 2000 added the following comment to Rule 1.8, the equivalent to TDRPC 1.8. This amendment has not been adopted in Texas:

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 (in TDRPC 1.6) when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Based on the state of the Texas rules, the safest course for Texas lawyers is probably to avoid “seeking (a) potentially lucrative fiduciary position.” Drafting lawyers who will serve as trustee or executor should charge for their non-lawyer services in a way that is demonstrably fair and reasonable, particularly when the question of the lawyer’s role as fiduciary arises after the commencement of representation. Consideration of typical charges made by non-lawyers performing in the same roles may be appropriate. If there is any question as to whether the client is capable of understanding either the need for or the terms of the service as a non-lawyer fiduciary, lawyers should be careful about accepting such roles.

Before drafting the foundation documents for the trust or estate plan, or seeking appointment as guardian after a request from another party who has sought the lawyer’s services, the lawyer should notify the client in writing that they can seek the advice of another independent lawyer before agreeing to have the lawyer serve in a non-lawyer fiduciary role. While it is more difficult to characterize a lawyer who serves as guardian as engaging in a business transaction with a client as the client is not typically the ward but rather a concerned party, such a procedure is still a good idea as the client will have the opportunity to obtain an objective evaluation as to whether having the lawyer serve a guardian is best for the ward. Additional documentation should acknowledge either that the client has consulted with other counsel or that the client does not desire to do so, despite having been given reasonable time to do so.

Guardianships may present a slightly different consideration under the ethics rules. TDRPC 1.08 does not apply, as the lawyer can only be appointed by a court. The business transaction for the

guardianship role is thus with the court, for the benefit of the ward. Nonetheless, the possibility of conflict arises in two ways. First, the very existence of the guardianship and its continuation creates a potential conflict with the ward's interest. Second, the lawyer may find themselves in the position of arguing to the court about the amounts the lawyer should be paid out of the ward's estate, to the detriment of the ward.

Given these potential conflicts, one must analyze whether the conflicts reach a point where the lawyer and client interest are so adverse that the lawyer cannot reasonably believe the representation will not be affected by the differing interests. Under TDRPC Rule 1.06(c), consent to representation in the face of a conflict cures the conflict only if "1) the lawyer reasonably believes the representation of each client will not be materially affected."

No blanket rule absolutely assures lawyers that servings as both a lawyer and non-lawyer fiduciary is ethical. The facts of each individual case will be critical to determining the acceptability of representation under Rule 1.06 and Rule 1.08.

#### IV. Liability for Violation of Disciplinary Rules and Breach of Fiduciary Duty

As should be clear, lawyers may violate the rules of ethics and face disciplinary action when serving simultaneously in lawyer and non-lawyer fiduciary roles. At first reading, it seems as if a violation of the ethics rules would not give rise to a cause of action. Paragraph 15 of the Preamble to the Texas Rules states in part:

15. These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a Rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.

While the rules purport not to set standards for liability, in practice they are used as evidence of the standard of care. The standard of care in Texas is determined by the finder of fact, often a jury, based on expert testimony. See *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119-20 (Tex. 2004). Experts frequently incorporate a discussion of the rules of ethics in their testimony regarding the standard of care since all lawyers are required to follow the rules.

As noted previously, a lawyer's fiduciary duty as a lawyer includes duties of competence and diligence, confidentiality, and loyalty. These duties continue while acting in a non-lawyer fiduciary role. A cause of action may exist for violating the lawyer's fiduciary duty based on the lawyer's actions in a non-lawyer fiduciary role.

In Texas, competence and diligence fiduciary duties are matters of tort law, the tort of legal malpractice. No contract cause of action lies for breach of these duties. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). The confidentiality and loyalty duties, however, are addressed by a cause of action for breach of fiduciary duty. *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.-- Dallas 2004, no pet.). Tort causes of action for legal malpractice are subject to a two year discovery rule, while breach of fiduciary duty legal malpractice actions are governed by a four year discovery rule.

Common law liability for breach of fiduciary duty exists requires the following elements:

- (1) Existence of a fiduciary relationship;
- (2) Breach of the duty; and
- (3) Proximate cause of injury to the plaintiff or inappropriate benefit to the defendant.

*Jones v. Blume*, 196 S.W.3d 440, 447 (Tex.App.- Dallas 2006, pet. denied).

Breach of fiduciary duty claims could be asserted against a lawyer serving in a fiduciary role based on either their duties as a lawyer or as another fiduciary. When breach of fiduciary duty is asserted against a lawyer as a lawyer, damages can include a return of some or all legal fees as a penalty in addition to actual damages. *Burrow v. Arce*, 997 S.W.2d 229, 246 (Tex. 1999).

## V. Liability of Lawyers When Serving in Non-Lawyer Fiduciary Roles: Trustees and Executors

As with lawyers, non-lawyer fiduciaries have common law duties of competence, confidentiality and loyalty. Note, however, that the law may modify the scope of this duty.

The liability of trustees, whether lawyers or not, is quite extensively addressed by the Property Code:

Tex. Prop. Code Sec. 114.001. LIABILITY OF TRUSTEE TO BENEFICIARY. (a) The trustee is accountable to a beneficiary for the trust property and for any profit made by the trustee through or arising out of the administration of the trust, even though the profit does not result from a breach of trust; provided, however, that the trustee is not required to return to a beneficiary the trustee's compensation as provided by this subtitle, by the terms of the trust instrument, or by a writing delivered to the trustee and signed by all beneficiaries of the trust who have full legal capacity.

(b) The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property or for a failure to make a profit that does not result from a failure to perform the duties set forth in this subtitle or from any other breach of trust.

(c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:

(1) any loss or depreciation in value of the trust estate as a result of the breach of trust;

(2) any profit made by the trustee through the breach of trust; or

(3) any profit that would have accrued to the trust estate if there had been no breach of trust.

(d) The trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property or for acting or failing to act under Section 113.025 or under any other provision of this subtitle if the action or failure to act relates to compliance with an environmental law and if there is no gross negligence or bad faith on the part of the trustee. The provision of any instrument governing trustee liability does not increase the liability of the trustee as provided by this section unless the settlor expressly makes reference to this subsection.

(e) The trustee has the same protection from liability provided for a fiduciary under 42 U.S.C. Section 9607(n). ***This is a reference to environmental liability under federal law.***

Lawyers serving as trustees may have the protection of exculpatory clauses granted by the settlor of the trust in trust documents. Such clauses are limited by the Property Code as follows:

Tex. Prop. Code Sec. 114.007. EXCULPATION OF TRUSTEE. (a) A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that the term relieves a trustee of liability for

(1) a breach of trust committed:

(A) in bad faith;

(B) intentionally; or

(C) with reckless indifference to the interest of a beneficiary; or

(2) any profit derived by the trustee from a breach of trust.

(b) A term in a trust instrument relieving the trustee of liability for a breach of trust is ineffective to the extent that the term is inserted in the trust instrument as a result of an abuse by the trustee of a fiduciary duty to or confidential relationship with the settlor.

(c) This section applies only to a term of a trust that may otherwise relieve a trustee from liability for a breach of trust. Except as provided in Section 111.0035, this section does not prohibit the settlor, by the terms of the trust, from expressly:

(1) relieving the trustee from a duty or restriction imposed by this subtitle or by common law; or

(2) directing or permitting the trustee to do or not to do an action that would otherwise violate a duty or restriction imposed by this subtitle or by common law.

Also, beneficiaries of trusts may agree to exculpation under the Property Code.

Tex. Prop. Code Sec. 114.005. RELEASE OF LIABILITY BY BENEFICIARY. (a) A beneficiary who has full legal capacity and is acting on full information may relieve a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations.

(b) The release must be in writing and delivered to the trustee.

Similarly, a lawyer serving as an executor may also function under the protection of exculpatory clauses. Unlike with trusts, no Texas statute specifically permits exculpatory clauses in wills. The Supreme Court has held, however, that “the executor of an estate is held to the same fiduciary standards in his administration of the estate as a trustee.” *Humane Society of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W.2d 574, 577(Tex. 1975), cert. denied, 425 U.S. 976 (1976). This is, of course, a drawing of a parallel to common law duties, not the statutory duties of trustees.

Including an exculpatory clause in a trust under which the drafting lawyer may ultimately serve as trustee may be seen as self-serving breach of fiduciary duty consistent with TDRPC Rules 1.06 and 1.08. Keep in mind that lawyers functioning in the lawyer role ordinarily may not disclaim liability to clients in advance under TDRPC 1.08(g). Whether this extends to their role as a fiduciary is unclear, since the legal representation and fiduciary roles are so closely related. Tex. Prop. Code Sec. 114.007(b) regarding trustees invalidates an exculpatory clause that is inserted because of “an abuse by the trustee of a fiduciary duty to or confidential relationship

with the settlor.” A similar result could be expected for executors appointed by will by the application of common law. Because of the dual role of the lawyer when they serve as trustee or executor, he or she may not be able to enforce exculpatory.

## VI. Liability of Lawyers When Serving in Non-Lawyer Fiduciary Roles: Guardians

Lawyers serving as guardians may have judicial immunity for their actions. Typically, lawyers serve as guardians in two distinct contexts in Texas. The first is when appointed as a guardian ad litem in the course of litigation in which the ward may potentially receive a monetary recovery. The role of such a guardian ad litem is to evaluate whether proposed settlements are appropriate. The extent of such immunity is governed by the Texas Family Code.

Tex. Fam. Code Sec. 107.009. IMMUNITY. (a) A guardian ad litem, an attorney ad litem, or an amicus attorney appointed under this chapter is not liable for civil damages arising from an action taken, a recommendation made, or an opinion given in the capacity of guardian ad litem, attorney ad litem, or amicus attorney.

(b) Subsection (a) does not apply to an action taken, a recommendation made, or an opinion given:

- (1) with conscious indifference or reckless disregard to the safety of another;
- (2) in bad faith or with malice; or
- (3) that is grossly negligent or willfully wrongful.

In general, the judicial immunity is thus for simple negligence in this context. The same is true, but under different statutory authority, in other situations.

The second context in which lawyers are often appointed as guardians of the person or of the estate is when a person is incompetent under the law, either by reason of minority or of diminished mental capacity. In these roles, the Estates Code serves as the source for immunity.

Texas Estates Code Sec. 1164.001. LIABILITY OF GUARDIAN. A person is not liable to a third person solely because the person has been appointed guardian of a ward under this title.

Sec. 1164.002. IMMUNITY OF GUARDIANSHIP PROGRAM. A guardianship program is not liable for civil damages arising from an action taken or omission made by a person while

providing guardianship services to a ward on behalf of the guardianship program, unless the action or omission was:

(1) wilfully (sic) wrongful;

(2) taken or made:

(A) with conscious indifference to or reckless disregard for the safety of the ward or another;

(B) in bad faith; or

(C) with malice; or

(3) grossly negligent.

It is not unusual in Texas for guardians in this second context to serve as both guardians and lawyers. The lawyer might be approached by a concerned family member or other party with the intent of seeking guardianship. The lawyer may be asked to take on the actual guardianship role because the original party cannot qualify or does not want to serve in the guardianship role after counseling on the responsibilities in that role. Lawyers are also often asked to take on a guardianship role for wards of the state.

The potential for breach of fiduciary duty liability as a guardian is in part one of self-dealing. Additionally, the lawyer may be in a position to argue without opposition regarding appropriate fees for the lawyer's service both as lawyer and as guardian, in conflict with the ward's interest. In an interesting case in Virginia, a law firm was ordered to return \$229,000 in fees. Among the alleged billing abuses were \$6,300 to prepare \$1,800 worth of household items for auction, \$2,300 to sell a \$4,000 car, and \$4,200 to recover \$5,300 worth of investments. Justin Jouvenal, Guardianship case in McLean illustrates lack of regulation for those caring for the elderly Washington Post, Nov. 29, 2012, online at [http://www.washingtonpost.com/local/guardianship-case-in-mclean-illustrates-lack-of-regulation-for-those-caring-for-the-elderly/2012/11/29/40a49bc2-ec65-11e1-a80b-9f898562d010\\_story.html](http://www.washingtonpost.com/local/guardianship-case-in-mclean-illustrates-lack-of-regulation-for-those-caring-for-the-elderly/2012/11/29/40a49bc2-ec65-11e1-a80b-9f898562d010_story.html).

## VII. Liability of All Fiduciaries for Taxes

Even when exculpatory clauses or immunities apply, fiduciaries may incur liability for failure to file or failure to pay federal taxes in certain situations. Diane L. Mutolo , Fiduciary Liability for Penalties Under IRC Section 6651 and Knappe v. U.S, <http://www.lexisnexis.com/legalnewsroom/tax->

[law/b/federaltaxation/archive/2013/10/01/fiduciary-liability-for-penalties-under-irc-section-6651-and-knappe-v-u-s.aspx](http://www.irs.gov/pub/irs-soi/20131001/fiduciary-liability-for-penalties-under-irc-section-6651-and-knappe-v-u-s.aspx).

## VIII. Legal Malpractice Insurance Issues

Legal malpractice insurance usually does not cover all potential claims against fiduciaries. In typical lawyers' professional liability insurance policies, the main coverage agreement is for professional legal services. The coverage may extend specifically to coverage for professional legal services while acting as a fiduciary. The definition of professional legal services often excludes the provision of investment or management advice.

As noted earlier, breach of fiduciary duty may result in the return of fees under *Arce*. It is thus important to note that return of fees generally is not covered under legal malpractice insurance.

Lawyers should investigate the availability of separate fiduciary service professional liability insurance when they serve in non-lawyer fiduciary roles.

It should be noted that the bonds fiduciaries obtain when serving as fiduciaries protect the beneficiaries, not the fiduciaries. In most cases, bonds are protection against intentional nefarious acts by fiduciaries. The insurance company writing the bond may pursue recover of amounts paid out under a bond from the fiduciary. In most cases, bonds do not come into play when the claim made by a beneficiary is one of negligence.