Robertson and Conflicts of Interest in Trust and Estate Administration

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Introduction

- Legal malpractice claims against trust and estate lawyers have risen 50% over the last 25 years.
- At least one survey identified trusts and estates as the leading practice area for legal malpractice claims in 2014.
- A commonly-alleged error giving rise to malpractice claims is that the lawyer represented a client under a conflict of interest.

* Robert M. Kincaid, Simon v. Zipperstein *and Strict Privity in Trust and Estate Cases in Ohio*, 26 PROB. L.J. OHIO 267 (2016).

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Cincinnati Bar Association v. Robertson

Cincinnati Bar Ass'n v. Robertson, 145 Ohio St.3d 302, 2016-Ohio-654, 49 N.E.3d 284.

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Facts

- Lewallen retained Robertson to represent her as executor of father's estate
- Lewallen later asked Robertson to represent her in her individual capacity when family members objected to estate inventory and attempted to remove her as executor
- Robertson, believing the allegations to be false, agreed to represent Lewallen in both her fiduciary and individual capacity
- Family members eventually withdrew their request to remove Lewallen

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Bad Facts Make Bad Law

- Attorneys' fees must be paid at the time of fiduciary's final account and with prior court approval per Hamilton County Probate Court Local Rule 71.1
- Lewallen's applications for allowance of partial payment and extraordinary attorneys' fees were denied
- Robertson requested Lewallen to advance $23,320 in attorneys' fees, which Lewallen did
- The court awarded only $14,000 in fees
- Robertson endorsed estate check, delivered funds to Lewallen, and reported fees totaling $14,000—not $23,320—on final report
- Lewallen filed grievance against Robertson, and he reimbursed $9,320 to Lewallen

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Outcome

- Violations
  - Rule 1.7(b) (prohibiting a lawyer from accepting or continuing representation of a client if a conflict of interest would be created, unless the affected client gives informed consent in writing)
  - Rule 3.4(c) (prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal)
  - Rule 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice)

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Conflict of Interest Holding

"[T]o the extent the claims of the Lewallen's [sic] other family members implicate[d] potential wrongdoing that would diminish the estate, [Robertson could] not simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer. Accordingly, . . . Robertson's dual representation of Lewallen in her individual capacity and in her role as fiduciary of the estate violated Prof. Cond. R. 1.7(b)."

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Rules of Professional Conduct

Ohio Rules of Professional Conduct (as amended effective September 20, 2016).

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Rule 1.7. Conflict of Interest: Current Clients

Rule 1.7(a). When is there a conflict of interest?

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

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

(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

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Rule 1.7. Conflict of Interest: Current Clients

Rule 1.7(b). If there is a conflict, can you still represent?

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

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

(2) each affected client gives informed consent, confirmed in writing;

(3) the representation is not precluded by division (c) of this rule.

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Rule 1.0(f). "Informed Consent"

What is informed consent?

(f) Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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Rule 1.7. Conflict of Interest: Current Clients

Rule 1.7(c). When is representation absolutely prohibited?

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

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Model Rules of Professional Conduct

Rule 1.7 comment [27]. Conflict questions specific to estate administration

In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

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Ohio Revised Code § 5815.16

Duty of attorney to third parties

(a) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.

(b) As used in this section, "fiduciary" means a trustee under an express trust or an executor or administrator of a decedent's estate.

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Analyzing Conflicts of Interest

1. Identify your client or clients
2. Determine whether a conflict of interest exists under Rule 1.7(a)
3. Decide whether representation is barred by Rule 1.7(c)
4. Evaluate under Rule 1.7(b) whether you can competently and diligently represent all clients affected by the conflict of interest
5. If representation is permissible, consult with the clients affected by the conflict of interest and obtain informed consent of each of them, then make sure that consent is confirmed in writing

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Scenario #1

Decedent's will names Friend to serve as Executor, and Decedent's Trust names Friend to serve as Trustee.

Friend comes to your office to ask for help administering the estate and Trust.

Decedent's surviving spouse is the sole beneficiary under the will, and decedent's children from a prior marriage are the beneficiaries under the Trust.

Can you represent Friend as Executor and Trustee?

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Scenario #2

You represent Husband and Wife.

After their separation, you advise Husband to remove Wife as successor trustee of a revocable trust and transfer some of Husband's assets to keep them from Wife.

Wife now asks you to draft a will while the divorce is pending.

Can you represent Wife?

Disciplinary Counsel v. Jacobs, 109 Ohio St.3d 252, 2006-Ohio-2292, 846 N.E.2d 1260.

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Scenario #3

Decedent's will names Surviving Spouse to serve as Executor.

Under Decedent's will, Decedent leaves his house and $100,000 to Surviving Spouse, and Decedent's rental property and company stock to his three children, equally.

The three children have asked you to represent them with respect to the estate.

Can you represent the three children?

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Scenario #4

You represented Decedent during her lifetime and prepared Decedent's Trust that names Son to serve as successor Trustee to Decedent.

Under the Trust, the share for Son is distributed outright, but the share for Daughter is held in trust for her lifetime.

Under the Trust, you, as Trust Protector, have the power to remove and replace the Trustee.

Son asks you to represent him as Trustee and assist him with his personal estate plan.

Can you represent Son as Trustee? Can you represent Son with respect to his estate plan?

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Scenario #5

You were just retained to represent Executor of Decedent's estate.

In the third week of representing the Executor, Credit Card Company calls you asking for your assistance with preparing and filing a claim against the Decedent's estate for an outstanding balance.

Your firm has represented Credit Card Company for years, and has assisted Credit Card Company with these sort of matters.

What do you tell Credit Card Company? Can you continue to represent Executor?

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Conflicts of Interest Best Practices

1. Engagement letter that:
   A. Clearly defines the client or clients; and
   B. Clearly defines the scope of the engagement.

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Conflicts of Interest Best Practices

2. In all communications (especially with non-clients) make clear who you do (and don't) represent and in what capacity.

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Conflicts of Interest Best Practices

3. Clearly communicate the conflict(s) when seeking informed consent.

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Conflicts of Interest Best Practices

4. Conflict waiver language:
   - identifies current conflicts;
   - addresses potential for future conflicts; and
   - advises of when you may be required to withdraw from representation.

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Questions?

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