



FEATURE: ESTATE PLANNING & TAXATION

By **Sandra D. Glazier** & **Thomas M. Dixon**

Collaborative Representation by Counsel in Probate Litigation

Opportunities and considerations for parties who wear multiple hats

Estate litigation appears to be on the rise. With more than \$12 trillion in assets in the process of being transferred from the Greatest Generation to the Baby Boomers, and an additional \$30 trillion in assets anticipated to pass from the Baby Boomers to their heirs,¹ one can anticipate that the number of significant estates coming under challenge or attack might also increase. It's common in trust and estate administration and probate litigation for an individual to be a fiduciary, a beneficiary (and perhaps even a claimant) all at the same time. When a party wears multiple hats, often with conflicting rights, duties and responsibilities, it's important from the outset of an engagement to analyze both the actual and potential conflicts of interest and carefully consider the role that legal counsel should play in properly managing such conflicts. On multiple occasions, we've personally experienced the benefits of collaborative representation when the potential for conflicting interests existed. We both represented the same client, with one representing the client in her fiduciary capacity and the other in her individual capacity. Not only did this approach provide the client with independence of counsel in her respective roles, but also, additional benefits inured to the client as a result of our collaborative efforts in representation.

The Initial Analysis

You've been contacted by a potential client. She's been

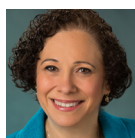
nominated as the personal representative of the decedent's estate and trustee of his inter vivos trust. She's also a beneficiary. Can you represent her in both capacities? Perhaps yes, but because her duties as a fiduciary may conflict with her interests as a beneficiary, often the better course is to represent her in only one capacity. Because the client may not appreciate the importance of having independent counsel for her separate roles, you must be prepared to educate the client about the subtleties of her conflicting roles and the potential risks she faces as a fiduciary should she not properly manage these conflicts of interest.

Determining how best to represent the client requires a careful analysis of other potential interested parties to the administration of the estate and trust. Are there creditors? Are there contesting parties? Is there disharmony in the family? Is there any possibility that there will be a divergence of interests? Are there ambiguities in the document requiring interpretation that could benefit some beneficiaries while adversely affecting others? Even if there's no apparent divergence of interests between your client's fiduciary and beneficiary capacities, there still might be benefits associated with approaching the administration cooperatively with independent counsel, such that your firm represents her in one capacity while another firm represents her in the other. Despite an anticipated increase in the cost of overall representation of the client, when a will or trust challenge is anticipated, working cooperatively with another firm can produce significant benefits to the client that far outweigh any potential for additional costs. In fact, in some instances, quality guidance provided by independent counsel for conflicting roles may actually help avoid a lengthy court battle.

Potential Benefits of Multiple Counsel

The obvious benefit of separate counsel is the availability of truly independent analysis and advice

Sandra D. Glazier is an equity shareholder at Lipson Neilson P.C., practicing in its Bloomfield Hills, Mich.



office, and **Thomas M.**



Dixon is a member of the Detroit office of Clark Hill, PLC and heads its litigation department nationally



FEATURE: ESTATE PLANNING & TAXATION

in managing conflicting roles. Particularly in contentious proceedings, fiduciaries are under hyperscrutiny, even while conducting otherwise routine administration matters. When litigation occurs, administration tends to be ongoing. Under such circumstances, fiduciaries are routinely faced with decisions that might impact beneficiaries differently, which can draw accusations of conflict of interest and breach of fiduciary duty. The circumstances in which conflicts arise are countless. For example, your client in her fiduciary capacity has a duty to maintain and preserve assets for ultimate distribution to herself and other beneficiaries. As such, every dollar

If significant litigation is on the horizon, working collaboratively with another firm, such that the client has representation in both capacities, can provide for a division of responsibilities, enhanced strategies and collaboration of effort during all phases of a proceeding.

spent to maintain assets may mean less for your client as a beneficiary and the other remainder beneficiaries. Independent counsel for the client's fiduciary and beneficiary roles can prove invaluable to a fiduciary in safely navigating these sticky circumstances.

Independent counsel can also provide the client with a broader skillset. For example, if your area of expertise is probate administration and tax planning, the client may benefit if you partner up with another attorney who specializes in probate litigation. This could be important even when the client's fiduciary and beneficial interests are aligned, but the prospects of litigation are present.

The ability to litigate versus the ability to navigate the Internal Revenue Code are very different specialties. The Rules of Professional Conduct prohibit attorneys from handling legal matters that they aren't competent to handle, unless they're associated with a lawyer who's competent to handle the matter.²

Because the client in her fiduciary capacity will have an undivided obligation of loyalty to the best interests of all of the beneficiaries, her individual interests may conflict with her fiduciary obligations. In such instances, separate representation will be required, or the client may have to go unrepresented in one of those capacities (most likely that as beneficiary). If the firm elects to represent the client in both her individual and fiduciary capacities, challenges may arise as to fees and costs relating to the client's beneficial interest, if care isn't taken to segregate and separately bill such time and expenses. Typically, only those services rendered for her benefit in her fiduciary role may be chargeable as reasonable expenses of administration to the estate or trust. When a beneficiary seeks an award of attorney's fees, many jurisdictions limit payment from the trust only for those services that the beneficiary can prove benefited the trust as a whole.³

When beneficiaries are aligned (and there's no anticipated divergence of interests), the firm representing the client in her individual/beneficiary capacity might represent multiple beneficiaries. Should this occur, it's beneficial to analyze the potential for conflicts to later arise, address them in the engagement agreement and disclose to the clients what will happen with regard to representation should such conflicts arise, so that each beneficiary can execute a knowing and voluntary waiver, at least as it relates to the current potential for future conflicts.

If significant litigation is on the horizon, working collaboratively with another firm, such that the client has representation in both capacities, can provide for a division of responsibilities, enhanced strategies and collaboration of effort during all phases of a proceeding, including depositions and trial examination of witnesses. With many jurisdictions fast-tracking litigation of disputes, litigation can be a time-consuming endeavor. When discovery is compressed and multiple witnesses need to be examined and/or prepped, a collaborative approach to representation can enhance the overall

FEATURE: ESTATE PLANNING & TAXATION

quality of the representation of the client.

For example, in one substantial undue influence case, we had more than 70 depositions, many of which ran multiple days. The types of witnesses varied significantly; some were doctors, others were forensic psychiatrists and psychologists, while still others were therapists, record keepers, business associates, attorneys and, of course, a collection of lay witnesses, including family beneficiaries. By having one firm represent the client in her fiduciary capacity, while the other represented her individual/beneficiary interests, primary responsibility for the preparation and taking of depositions could be thoughtfully allocated between the firms. On occasion, primary responsibility for significant witnesses was divided topically. Also, having multiple firms representing aligned interests provided the opportunity for an attorney from each firm to ask questions of the witness at the deposition

(as well as at trial). This also permits one attorney to take the bulk of responsibility for a particular witness while the other engages in tying up loose ends and addressing questions specifically pointed to the client's individual or divergent interests.

When interests are aligned, the responsibility for preparation of pleadings, motions, responses and other papers can also be allocated among counsel, while each has input into the final product. This approach generally results in an end product enhanced by consideration of varying perspectives and, when necessary, conflicting interests. However, when different firms are representing the same party in varying capacities, it's important that the firms (and lawyers involved) be able to work as a "team"; this requires the attorneys to check their egos at the door, not be turf or fee driven and focus on the ultimate needs, directives and potential outcomes available to the client.



FAIR SPLIT

DIVIDE THINGS, NOT FAMILIES

NEW - Estate Settlement & Division of Personal Property Online



"No, sorry we really don't have anything to help with items not named in the will or trust... good luck!"



Steps after listing and inviting heirs to private account:

- * Asset Review - Interested or not? Yes/No
- * Emotional Value Bidding with points
- * Alternating Selection rounds awarded by who listed highest

View demo online -

Contact us:

855-58-ESTATE (855-583-7828) - Camarillo, CA
sales@fairsplit.com - www.FairSplit.com



FEATURE: ESTATE PLANNING & TAXATION

Joint Defense Agreements

Because the firms are representing two different parties (embodied in the same individual), to preserve work product and the attorney-client privilege, consider using joint defense agreements (sometimes called “common interest” agreements) and confidentiality agreements. Use of such agreements can help effectuate and provide a mechanism for coordinating the efforts of counsel with respect to common defense or prosecution issues and to avoid duplicative costs when practicable. But, this isn’t the end of the protections required. When interests are divergent, certain communications between the client and counsel will need to be protected. Not all efforts can be pursued by the team. Therefore, while electronic file sharing can assist in the cooperative efforts in team representation, protections must remain in place with regard to confidences and advice provided to the client with regard to divergent interests. So, while discovery materials, trial books, optical character recognition copies of documents loaded into search engine programs and related material might be shared across firms, and chronologies, deposition summaries and certain other work product materials might be shared under a common file share or other format, some information must be separately maintained and protected to preserve its confidential and privileged nature. Navigating what may be shared and what must be protected requires ongoing vigilance and analysis of the potential for conflicting interests and attention to which firm is responsible for pursuing or defending a divergent (as opposed to aligned) interest.


Commencing with retention and throughout representation, it remains important to evaluate (and re-evaluate) the extent to which information, work product and strategies may be communicated among firms. Ongoing analysis of actual and potential conflicts of interest is required. Care in the drafting and amendment of joint defense or representation and confidentiality agreements remains critical. So too, the observance of a “Chinese Wall”⁴ can help protect information that must remain segregated and confidential to preserve the privileges otherwise afforded to such information, particularly when the information relates solely to the interest or defense of a claim of the client in her individual capacity.

The team approach also tends to work best if each

firm specifically designates its own internal lead counsel. This facilitates coordination of efforts both within the firm and among firms. Open communication of assignments and responsibilities among lead counsel is also important when it comes to areas falling within the parameters of the joint defense and confidentiality agreement.

Other Benefits

The benefits of team representation outlined in this article, including the opportunity for examination of witnesses by both counsel, often result in more thorough and effective discovery efforts and trial presentation. However, this may not be available in every jurisdiction; therefore, a careful analysis of whether the right of examination is afforded to “a side” as opposed to “a party” can be a consideration in determining a tactical strategy for approaching the division of responsibility among members of the team.

Working collaboratively and cooperatively with other attorneys on behalf of clients with conflicting roles not only can lead to a collegial approach to issues, but also can provide an important sounding board for strategies that might be employed in the case. Consideration of different perspectives generally results in better client outcomes—but the access to independent advice of counsel and the associated expression of differing positions and perspectives remain important for the client in effectively managing conflicts. 

Endnotes

1. Accenture, “The ‘Greater’ Wealth Transfer: Capitalizing on the Intergenerational Shift in Wealth” (2015), www.Accenture.com/us-en/insight-capitalizing-intergenerational-shift-wealth-capital-markets-summary.aspx.
2. See Michigan Rules of Professional Conduct Rule 1.1. See also ABA Model Rules of Professional Conduct Rule 1.1.
3. The “American rule” provides that attorney’s fees aren’t recoverable unless expressly authorized by statute or court rule. MCL 700.7904(1) provides Michigan courts with the authority to award attorney’s fees and costs to a party who enhances, preserves or protects trust property. Therefore, unless the beneficiary’s actions can be shown to enhance, preserve or protect trust property, as opposed to being for the sole purpose of enhancing the beneficiary’s personal interest in the trust, an award of attorney’s fees may not always be a viable remedy. See Bogert, *Trusts & Trustees*, Second Edition, Section 871, at pp. 187-191.
4. https://en.wikipedia.org/wiki/Chinese_wall.