

Becoming Your Clients' Trustee



By Mark S. Furman & Emily C. Shanahan

As a CPA, you have intimate knowledge of your clients' financial affairs, matters that many of your clients consider to be of a highly sensitive and confidential nature. You may even be privy to the dynamics and politics of their families and businesses. Given the nature of the relationship between you and your client, it would not be unreasonable to consider your client's request that you serve as trustee to be a vote of confidence in your skills and judgment and a testament to the strength of your relationship with the client. Serving as a trustee can be a rewarding experience, but it is not without risks, including lawsuits brought by disgruntled beneficiaries. This article is intended to provide a broad introduction to the responsibilities of a trustee to assist you in weighing the pros and cons of assuming that role.

Fundamental Duties as Trustee

A trustee is a fiduciary. As such, a trustee has several fundamental duties, including the duty of loyalty, the duty to act prudently, the duty of impartiality, the duty to account to and inform beneficiaries and the duty to carry out the terms of the trust.

Duty of Loyalty

It is critical to be aware that the duty of loyalty that a trustee owes runs to the beneficiaries of the trust, not the settlor of the trust. That being said, as trustee, you are not an agent of the beneficiaries. Rather, the trustee is to act solely in the interests of the beneficiaries and must take affirmative action to further the interests of the trust.

Assuming the role of trustee for a valued client poses the inherent risk of divided loyalties. Your natural and understandable desire to please a long-term client who is the settlor of the trust may conflict with your duty to act only in the best interest of the trust and its beneficiaries. For example, if the settlor, who also is your client, approaches you in your role as trustee to request that the trust make a loan to the settlor, you must assess the issue from the perspective of whether the loan is good for the trust, not whether there is any plausible basis to conclude that the loan can be made without harming the trust. The trust that gives the trustee authority to make loans does not insulate the trustee from a breach of fiduciary duty claim if the trustee fails to take affirmative action to further the interests of the trust.

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Duty to Act Prudently

A trustee is under a further duty to act prudently. In particular, a trustee, absent contrary language in the trust, is subject to the prudent investor rule, as codified by the Massachusetts Prudent Investor Act, Mass. Gen. Laws ch. 203C (“MPIA”). The standard of care under the MPIA requires a trustee to “invest and manage trust assets as a prudent investor would, considering the purposes, terms and other circumstances of the trust, including those set forth in subsection (c). In satisfying this standard, the trustee shall exercise reasonable care, skill and caution.” Mass. Gen. Laws ch. 203C, § 3(a). This assessment is made in light of all the facts and circumstances as of the time the investment decision was made.

As your client’s CPA, you are familiar with your client’s financial affairs. That being said, it is unlikely that as a CPA you also are a professional investment manager. To the extent you hold yourself out as having special skills or expertise in this regard, in your role as trustee, you will be held to the standard of one who, in fact, possesses such skills or expertise.

More likely than not, however, if you take on the role of trustee, you will need to engage another professional to manage the assets of the trust. While a trustee may be permitted to delegate the investment of the trust’s assets, a trustee nevertheless retains a variety of duties. Among other things, a trustee must personally define the trust’s investment objectives, exercise reasonable care in selecting an investment manager and adequately supervise the investment manager.

Duty of Impartiality

Conflict arising from the competing interests of the income beneficiary and those beneficiaries who are entitled to the trust property upon the termination of the income beneficiary’s interest in the trust (“the remaindermen”) is a common scenario that often can test another one of a trustee’s fundamental duties – the duty of impartiality. The duty of impartiality requires a trustee not to favor one beneficiary over another unless directed by the terms of the trust. Instead, a trustee must remain neutral and not advocate for any particular beneficiary or class of beneficiaries. The challenge often arises where a trustee must determine the standard of living to which the income beneficiary is entitled. The trustee is in the unenviable position of potentially being viewed as too stingy by the income beneficiary or profligate by the remaindermen.

Duty of Impartiality Continued

In practice, determining the standard of living to which the income beneficiary is entitled may be complicated because the terms of the trust are unclear. Under the terms of the trust, the trustee must take into account the income beneficiary’s other assets? May the trustee do so? Or is the trustee affirmatively precluded from taking the income beneficiary’s other assets into account? If the trust is unclear, the trustee may consider filing a complaint for instructions to protect against a claim by the beneficiary disadvantaged by the trustee’s decision. Seeking a judicial determination of the proper interpretation of the trust is critical because a mistake of law in interpreting a trust is not a defense in any subsequent litigation, and acting contrary to the terms of the trust is a breach of the trustee’s fiduciary duties. An additional advantage to a complaint for instructions is that the trustee generally is able to have his reasonable attorneys’ fees and costs paid from the trust.

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Duty to Account and Inform

A trustee has a duty to account to the beneficiaries. The beneficiaries of an irrevocable trust are entitled to be reasonably informed about the administration of the trust so they are able to protect their interests. Having your accounts judicially allowed on a regular basis benefits you as trustee because allowance of accounts discharges a trustee from any liability for transactions covered by the accounting. Once allowed, accounts generally cannot be questioned in collateral proceeding in law or in equity, absent fraud or manifest error, and only rarely are re-opened. In Massachusetts, for example, Section 7-307 of the Uniform Probate Code establishes both a statute of limitations (six months) and a statute of repose (three years) for claims against a trustee by a beneficiary who has received a final accounting.

Trustees have a further duty to inform and communicate with beneficiaries. A trustee's duty to communicate is two-fold: It includes an affirmative obligation to inform beneficiaries of certain information, as well as an obligation to respond to beneficiaries' reasonable requests for information about the trust. That duty encompasses, among other things, informing a beneficiary of the existence of the trust and of the right to request a copy of the trust.

Duty to Carry Out Terms of Trust

While it may seem an obvious point that a trustee should not act in contravention of the terms of the trust, avoiding such potential liability could at times be difficult in practice. Maintaining an existing relationship with a settlor or beneficiary of a trust who also is a client has the potential to place significant pressure on a CPA who takes on the role of trustee. For example, what do you do if the settlor, who also is your long-term client, approaches you in your role as trustee to make a loan from the trust, but the trust does not authorize the trustee to make such a loan? If you agree to the request, you would breach both your duty of loyalty and your duty to carry out the terms of the trust. Accordingly, it is critical that upon accepting the role of trustee, you read and understand the terms of the trust, and then revisit the terms of the trust before taking any action that is not obviously within the scope of your responsibilities and authority as trustee.

Conclusion

Given the often complex duties of acting as trustee, as well as the potential liability arising from a breach of those duties, it is important that trustee positions not be viewed as another service to offer clients; that is, a way to "add value" to the client relationship. To that point, before taking on the role of trustee, consult with your insurance carrier regarding coverage for claims arising out of your work as a fiduciary. You will want to be certain that you have coverage for your acts as trustee. If your malpractice insurance does not provide coverage, consider obtaining a separate errors and omissions policy that will provide the needed coverage. In the end, the decision to act as trustee should be the product of considered judgment, weighing all facts and circumstances that counsel for and against assuming this role. ■

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