



LOUISIANA STATE LAW INSTITUTE

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December 10, 2013

Senator John A. Alario
President of the Senate
P.O. Box 94183
Baton Rouge, Louisiana 70804

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

RE: SCR NO. 78 of 2009

Dear Mr. President and Mr. Speaker:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2009 Senate Concurrent Resolution No. 78, relative to the duty of attorneys who represent fiduciaries.

Sincerely,

A handwritten signature in black ink that reads "William E. Crawford".

William E. Crawford
Director

WEC/puc

cc: Senator Edwin R. Murray

e-mail cc: David R. Poynter Legislative Research Library
drplib@legis.la.us
Secretary of State, Mr. Tom Schedler
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LOUISIANA STATE LAW INSTITUTE

SUCCESSIONS AND DONATIONS COMMITTEE

**REPORT TO THE LOUISIANA LEGISLATURE
IN REPOSE TO SCR NO. 78 OF THE 2009 REGULAR SESSION
(DUTY OF ATTORNEYS WHO REPRESENT FIDUCIARIES)**

December 10, 2013
Baton Rouge, Louisiana

Max Nathan, Jr., Chairman-Reporter
Claire Popovich, Staff Attorney

LOUISIANA STATE LAW INSTITUTE
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Max Nathan, Jr., Chairman-Reporter
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To: Senator John A. Alario, Jr.
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**REPORT TO THE LOUISIANA LEGISLATURE IN RESPONSE TO SCR NO. 78 OF
THE 2009 REGULAR SESSION RELATIVE TO DUTIES OF ATTORNEYS WHO
REPRESENT FIDUCIARIES**

Introduction

With Senate Concurrent Resolution No. 78 of the 2009 Regular Session, sponsored by Senator Murray, the Legislature requested the Louisiana State Law Institute to “study and recommend guidelines on the professional responsibilities, rights and duties of attorneys who represent fiduciaries, such as succession representatives and trustees.” Given the subject matter of this resolution, the Law Institute assigned this resolution to the Successions and Donations Committee.

There has been, and continues to be, a steady increase in the amount of fiduciary litigation, producing inconsistent decisions in jurisdictions all over the country.¹ The Committee performed considerable research on this topic, and, in an effort to adequately investigate the full impact of this issue, invited a recognized expert in this field, Mr. Rick Stanley, to participate in the Committee's efforts. This report presents the findings and conclusions reached by the Successions and Donations Committee and approved by the Law Institute Council.

Louisiana Law vis-à-vis Attorneys Who Represent Fiduciaries

The resolution requests that the Committee consider an issue that invokes the governing of attorneys. In that regard, the Louisiana Constitution of 1974 reserves solely to the Louisiana Supreme Court the power of governing and disciplining the members of the bar.² This power has been further defined in the rules issued by the Louisiana Supreme Court.³ The Committee

¹ See generally Charles M. Bennett, *A Fiduciary's Lawyer's Duty to the Fiduciary and its Beneficiaries: A Rhyme and a Reason for Every Season*, Seminar D, ACTEC Annual Meeting (Mar. 1996), available at the ACTEC website (<http://www.actec.org/resources/publications/CLEMaterials/NationalMeetings/Annual96/FidDuty-Bennett.pdf>).

² Specifically, the Constitution states that, “The supreme court has exclusive original jurisdiction of disciplinary proceedings against a member of the bar.” La. Const. Art. V, §5(B)(1974).

³ Specifically:

and the Council believe that this delegation of authority to the Louisiana Supreme Court includes the sole authority, if not the duty, for the Court to provide guidelines for attorneys who represent fiduciaries. As this issue falls squarely and exclusively within the purview of the authority of the Louisiana Supreme Court and is an issue that the supreme court alone should consider, the Law Institute is constrained as to what it can recommend to the Legislature on this issue.

The Law in Other Jurisdictions on Attorneys Who Represent Fiduciaries

In other jurisdictions the issue of the duty owed by attorneys who represent fiduciaries is muddled because the questions engendered are manifold and complex. Some of the questions include the most basic of considerations, such as who the attorney actually represents when the attorney is retained by a fiduciary? In answering this query, a number of jurisdictions have found that when a trustee retains an attorney on behalf of the trust, the actual client is the trust beneficiary. Other jurisdictions have held that the fiduciary alone is the client.⁴ In those jurisdictions where this fundamental question has been resolved, other issues have arisen, such as whether the attorney has specific obligations to the beneficiaries, whether a disappointed beneficiary can sue the attorney who represented a fiduciary, whether an attorney representing a fiduciary is liable to a non-client who reasonably believes that he is the attorney's client, and which communications from the attorney are protected by confidentiality. These are challenging with no easy answers. Moreover, no clear rule has emerged in other jurisdictions to lend any guidance as to how these issues should be resolved.

In an attempt to resolve these issues, the Committee studied the implications of the ABA's Model Rules of Professional Conduct and the Restatement Third of the Law Governing Lawyers (e.g. Rules 1.7, 1.13, and 4.3 of the MRPC and §§20, 51, 60 & 61). Unfortunately, in its comment to annotated Rule 1.7, the ABA plainly acknowledges the uncertainty in the jurisprudence⁵ The complexity is compounded for Louisiana, because neither a trust nor an estate is an entity. A trust is a relationship, and a succession is a process.⁶ A more specific example of the ambiguity in this branch of the law is that, "[t]he law remains dangerously unclear as to when a trustee can expect communications with counsel to remain confidential and

Any lawyer admitted to practice law in this state, including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of these Rules or of the Rules of Professional Conduct or any other Rules or Code subsequently adopted by the court in lieu thereof, and any lawyer specially admitted by a court of this state for a particular proceeding, as well as any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state, is subject to the disciplinary jurisdiction of this court and the board. Sup. Ct. Rules, Rule 19, Lawyer Disciplinary Enforcement Rules, Section 6(A).

⁴ Tina N. Babel, *Attorney for the Trust: Does Attorney-Client Privilege Belong to the Trustee of the Beneficiary?*, 98 ILL. B.J., 2 n.10, (2010).

⁵ "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." *ABA Annotated Model Rules of Professional Conduct*, 7th. ed., Rule 1.7, cmt. 27.

⁶ See C.C. Art. 871; R.S. 9:1731.

when he or she may be ordered to reveal those communications to beneficiaries. Unfortunately, there are no signs that clarity will arrive any time soon.”⁷

Conclusion

Conflicting judgments have combined to create an amorphous, unclear status for the jurisprudence on this issue—and its attendant sub-issues—all over the country. Given this lack of clarity, the Institute cannot look to other jurisdictions for guidance. Moreover, the Louisiana Constitution and Supreme Court Rules lead to the inescapable conclusion that in Louisiana the supreme court alone has the authority to create and issue guidelines on the professional responsibilities and duties of an attorney who represents a fiduciary. Accordingly, the Law Institute feels that it is appropriate to leave this issue to the supreme court's consideration.

Nevertheless, the Committee does offer the suggestion that the supreme court can make recourse to the American College of Trust and Estate Counsel (“ACTEC”) for guidance as to the professional responsibilities, rights, and duties for attorneys who represent fiduciaries. This organization has created a set of model rules that could serve as a guideline to the Court. As the supreme court considers and issues rulings on this topic, the Louisiana State Law Institute will follow this legal issue and make appropriate recommendations.

⁷ James Sicilian & Albert L. Barrueco, *The Attorney-Client Privilege in Trust Litigation: Can a Trustee Keep Communications with His Attorney Confidential*, 11-12 (2008).

SENATE CONCURRENT RESOLUTION NO. 78

BY SENATOR MURRAY

A CONCURRENT RESOLUTION

To urge and request the Louisiana State Law Institute to study and recommend guidelines on the professional responsibilities, rights and duties of attorneys who represent fiduciaries, such as succession representatives and trustees.

WHEREAS, trusts are used for a number of different purposes and there is widespread use of the trust instrument in the state of Louisiana; and

WHEREAS, there is little guidance regarding the rights, duties and responsibilities of attorneys who represent trustees in administering trusts and for attorneys who represent succession representatives in handling estates; and

WHEREAS, the unique nature of Louisiana's substantive law on trusts and successions makes the reliance on any rules and regulations of other states of little use in this state, and would probably cause a conflict with the practices in this state; and

WHEREAS, the fiduciary relationships that exist in a trust situation can lead to many legal questions concerning the roles of the parties when there is an alleged breach of fiduciary duty; and

WHEREAS, when problems arise between the parties involved in the trust or succession, there are often legal issues and questions regarding representation between the parties, communications between the parties, and financial issues if either party to the trust has to hire additional counsel to assert rights or defend themselves; and,

WHEREAS, the legal community and the people of this state would benefit from a careful and thoughtful study that would issue guidelines to clarify the professional responsibilities, rights and duties of attorneys who represent fiduciaries.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana urges and requests the Louisiana State Law Institute to study and recommend guidelines on the professional responsibilities, rights and duties of attorneys who represent fiduciaries.

BE IT FURTHER RESOLVED that the Legislature of Louisiana does hereby urge and request the Louisiana Supreme Court , under its authority to regulate the practice of law, to assist the Louisiana State Law Institute in conducting this study.

SCR NO. 78

ENROLLED

BE IT FURTHER RESOLVED that the Louisiana State Law Institute is requested to submit a written report of its findings and study results, together with any recommendations for legislation, by submission to the president of the Senate and the speaker of the House of Representatives at least thirty days prior to the convening of the 2011 Regular Session of the Legislature.

BE IT FURTHER RESOLVED that a copy of this Resolution be transmitted to the director of the Louisiana State Law Institute and to the chief justice of the Louisiana Supreme Court.

PRESIDENT OF THE SENATE

SPEAKER OF THE HOUSE OF REPRESENTATIVES