

## Playing Nice in the Sandbox: Tips for Counsel and Co-Trustees in Trust Litigation

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Taylor and Theresa Trustee, together with Taylor's son, Thomas, are co-trustees of a charitable trust established to make gifts to local organizations working to improve the lives of children. Unfortunately, after some complications with a gift, Benevolent Beneficiary, LLC has filed suit, alleging the co-trustees breached their fiduciary duties in connection with the trust administration. One allegation, in particular, alleges that Theresa misappropriated trust assets earmarked for Benevolent. The co-trustees do not believe there is any wrongdoing. But, if there was, Taylor and Thomas may have an obligation to pursue recovery from Theresa. The co-trustees know they need counsel and, to avoid any current or future conflicts, they elect to retain separate counsel for Theresa and for Taylor and Thomas. After giving the appropriate notice, the co-trustees intend to pay their respective attorneys' fees with trust assets. But those assets are their parents' legacy, and they don't want to needlessly waste them on multiple sets of counsel defending what may be frivolous claims. It is now up to counsel to, among other things, ensure they effectively coordinate to protect their clients' interests and obtain the best result possible, to preserve applicable privileges, to ensure the co-trustees adequately fulfill their duties, and to operate efficiently to preserve trust assets.

### **Coordination/Cooperation between Counsel and Co-Trustees**

It is important for co-trustees and their counsel to work together—while zealously representing each party's respective interests. Counsel and the co-trustees should avoid duplications of efforts when possible, and independently stay informed of the proceedings.

Choosing independent, well-qualified counsel that have a history of collaboration is recommended, even if the co-trustees have different views of the case. Through working together, the co-trustees will be able to maintain lower fees, particularly when it involves the sharing of relevant facts, disclosure of relevant documents, and research. Counsel should also coordinate deposition preparation and strategy, hearing strategies, and a final trial strategy.

### **Preserving Privileges**

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In most cases, a voluntary disclosure of privileged information to a third-party will waive attorney-client privilege because it is inconsistent with the requisite confidential relationship. However, Florida courts recognize an exception known as the common interests, joint defense, or pooled information exception. Under this exception, clients and their respective attorneys sharing common litigation interests may exchange information freely without fear that such exchange will forfeit the protection of privilege. It enables litigants who share unified interests to exchange privileged information in order to adequately prepare their cases. This exception is consistent with the underlying policy of privilege—allowing clients to communicate freely and with confidence when seeking legal advice from their attorney.

In deciding whether this exception to the privilege applies, one must first determine whether the communication was made and maintained in confidence under circumstances where it is reasonable to assume that disclosure to third parties was not intended—and whether the information was exchanged for the limited purpose of assisting in their common cause. Moreover, the common interests privilege relates not only to attorney-client materials but also to an attorney's work product. Notably, parties to a joint defense agreement must be involved in threatened or actual litigation, and while a written agreement is not necessarily required to enforce a joint defense, it remains a recommended best practice.

Because the need often arises for Co-Trustees to coordinate their efforts and share information, it is frequently beneficial for the parties to enter into a common interest agreement. Additionally, it is more economical for the parties to share information or research that one party could validate or further review instead of repeatedly attempting to reinvent the wheel.

A word of caution: the privilege may be waived when a member of the common interest group discloses this information to a non-member. Moreover, should the co-trustees ultimately become adverse in the same or related litigation, keep in mind that the privilege may be vitiated and documents that were previously protected could potentially be disclosed.

### **The Duty to Stay Involved and Make Informed, Independent Decisions**

Trustees all owe fiduciary duties of good faith and loyalty. The duty of good faith requires, among other things, that a trustee remain actively involved in trust administration and exercise independent judgment. Trustees cannot delegate to other trustees duties the settlor would expect them to perform jointly. Trustees may, however, delegate certain issues to a professional, so long as they use reasonable care in selecting the professional, establishing the scope of the engagement, and in performing periodic reviews of the professional's work.

Counsel and clients must keep these duties in mind when separate counsel represent co-trustees. For example, when multiple parties are separately represented, it is common for one counsel to take the "lead" and/or the "laboring" role on certain issues. However, in the context of trust litigation or

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administration, each trustee (and, preferably, their counsel) must stay sufficiently informed and independent to satisfy the trustee's fiduciary duty of good faith. This likely means a co-trustee cannot simply delegate litigation strategy or contested trust administration issues to a co-trustee or the co-trustee's counsel. Rather, each trustee (with their counsel) must stay informed of the matter, participate in the decision-making process, and exercise their own independent judgment.

### Paying Attorneys' Fees from Trust Assets

The default rule in Florida is that a trustee may pay attorneys' fees from trust assets. Trustees may generally make such payments without court supervision or approval. However, if a trustee incurs attorney fees in connection with a claim or defense of breach of trust made in a filed pleading, the trustee must first serve a written notice of intent upon each beneficiary whose share may be affected by the payment. Counsel should be careful to make sure each separately represented co-trustee properly provides such notice.

To fulfill their fiduciary duties, co-trustees must also make sure the trust is only paying valid and reasonable expenses, including with respect to invoices for legal fees. Of course, each trustee likely has an interest in having its own counsel's fees approved and paid from the trust. As a result, to remove any potential concern of conflicting interests, co-trustees should submit their counsel's invoices to the non-interested trustees for review and approval. Counsel should therefore be sure their invoices are sufficiently detailed to identify the services provided, but not so detailed as to reveal any sensitive attorney-client communications and/or work product (not otherwise covered by a common interest or joint defense agreement).

Trust litigations can be filled with complicated issues and strategic decision-making. Co-trustees and their counsel must therefore coordinate their efforts to ensure an effective and efficient representation, while always keeping in mind the many fiduciary duties at play. The authors of this article have years of experience representing co-trustees in such matters.

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