Legal Malpractice and Breach of Fiduciary Duty Update

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Introduction

Because fiduciary law addresses a problem that has been described as "one of equity," "the circumstances out of which a fiduciary relationship will be said to arise are not subject to hard and fast lines." *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509 (Tex. 1942).

The common characteristic of all fiduciary relationships is said to be the existence of a high degree of trust and confidence. *See Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176–77 (Tex. 1997). But the reported cases go much further in describing fiduciary obligations:

- Fiduciaries have a duty to act with the utmost good faith and the most scrupulous honesty. *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 265 (Tex. 1951).

- A fiduciary is required to place the interests of the other party before his own. *Crim Truck & Tractor*, 823 S.W.2d at 594.

- A fiduciary must deal openly and make full disclosure to a party with whom he stands in such a relationship. *Kinzbach Tool Co. v. Corbett-Wallace Corp*., 160 S.W.2d 509, 512–14 (Tex. 1942).

- A fiduciary must make reasonable use of the trust and confidence placed in him or her. *Stephens Cnty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 261 (Tex. 1974);

- The fiduciary relationship between attorney and client requires absolute and perfect candor, openness, and honesty and the absence of any concealment or deception. *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.—Corpus Christi 1991, writ denied).

- Transactions involving a fiduciary must be both fair and equitable to the beneficiary. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co*., 20 S.W.3d 692, 699 (Tex. 2000).

Do these descriptions apply to *every* fiduciary relationship, irrespective of the context? Consider the following recognized fiduciary relationships.

Agent/Principal. An agent owes a duty of loyalty to his principal. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002) ("Under the common law of most jurisdictions, including Texas, agency is also a special relationship that gives rise to a fiduciary duty"). The Restatement (Second) of Agency sets forth in general terms the concept that "[u]nless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." *Id*. at § 387. "Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment, the duty not to act as, or on account of, an adverse party without the principal's consent, the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency, and the duty to deal fairly with the principal in all transactions between them." *Johnson*, 73 S.W.3d at 200 (quoting Restatement (Second of Agency § 13, cmt. a (1958)).

Trustee/Beneficiary. A trustee is a fiduciary. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996). So, too, are personal representatives and executors. *Id*. Trustees and executors owe their beneficiaries "a fiduciary duty of full disclosure of all material facts known to them that might affect [the beneficiaries'] rights." *Montgomery v.*

Kennedy, 669 S.W.2d 309, 313 (Tex. 1984). In dealing with the estate funds, the trustee must "act in scrupulous good faith, casting aside completely its personal interest and opportunities for gain resulting from the fiduciary relationship." *Humane Society v. Austin Nat'l Bank*, 531 S.W.2d 574, 577 (Tex. 1975). Like agents and attorneys, personal representatives owe a common-law duty of loyalty. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) ("A trustee owes a trust beneficiary an unwavering duty of good faith, fair dealing, loyalty and fidelity over the trust's affairs and its corpus").

In Texas, the source of the trustee's fiduciary duty, unlike that for agents and attorneys, is partly statutory. *See* Tex. Estates Code § 351.101 ("The rights, powers, and duties of executors and administrators are governed by common law principles to the extent that those principles do not conflict with the statutes of this state."). And, somewhat unique to personal representatives, is the requirement that in discharging their fiduciary duty, personal representative must act with "utmost good faith," a term PJC 232.2 defines as "an action that is prompted by honesty of intention and reasonable belief that the action was probably correct."

Whether a personal representative failed to comply with his duties as a fiduciary often, if not always, involves the question of whether the fiduciary engaged in self-dealing. *See* Comment following PJC 232.2. Indeed, PJC 232.2 instructs the court to "describe self-dealing transaction" in the question to the jury. This is one of several differences between PJC 104.2 and 232.2.

Attorney/Client. The essence of an attorney's fiduciary duty to his client also involves the "integrity and fidelity" of the attorney. *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.). In general an attorney's breach of his or her fiduciary duty is consistently reported to involve failure to disclose conflicts of interest; failure to deliver funds belonging to the client; failure to place the client's interests ahead of personal interests; misuse of client confidences; abuse client's trust; self-dealing; and material misrepresentations. *See Duerr v. Brown*, 262 S.W.3d 63, 71 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

But the attorney/client relationship, rightly or wrongly, is more complicated. What might appear to be allegations of a breach of trust and confidence may be nothing more than allegations of professional negligence. *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506–07 (Tex. App.—Houston [1st Dist.] 1995, no writ). Merely alleging that certain actions fall within these broad descriptive terms will not convert what is otherwise a professional negligence claim into a claim for breach of fiduciary duty theory. *Murphy v. Gruber*, 241 S.W.3d 689 (Tex. App.—Dallas 2007, pet. denied). Distinguishing when a given set of facts in the attorney-client context gives rise to either a negligence or breach of fiduciary duty cause of action, or both, is the subject of an entire body of law referred to as improper "fracturing." The distinguishing characteristic of a failure to comply with a fiduciary duty is often the presence of what is referred to as an improper benefit. *See Goffney v. Rabson*, 56 S.W.3d 186, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Even considering the unique statutory duties that apply to trustees in certain situations, the attorney/client relationship remains the most complex and regulated fiduciary relationship. With very few exceptions, only those holding a law license may practice law. Rules of Professional Responsibility and Ethics provide guidance on the lawyer's relationship with the client, courts, and third-parties. One need

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