

## **DRAFT Opinion, EO-25-0002: Lawyer Serving as Trust Protector**

### **Introduction**

The Arizona Trust Code permits appointment of a trust protector of a trust. The trust protector exercises powers authorized by the trust instrument, which may include removing and appointing a trustee, modifying or amending the trust instrument for any valid reason, and modifying the interests of trust beneficiaries.

An inquiring attorney asks whether a lawyer who drafts a trust instrument may also serve as trust protector. This opinion concludes that this practice is not strictly prohibited, but lawyers must abide by the Arizona Rules of Professional Conduct with regard to conflicts of interest and informed consent.

### **Relevant Ethical Rules**

ER 1.0(e). Terminology: Informed Consent.

ER 1.4. Communication.

ER 1.7. Conflict of Interest: Current clients.

ER 1.8. Conflict of Interest: Current Clients: Specific Rules.

### **Relevant Ethics Opinions**

State Bar of Arizona Ethics Opinion 96-07: Conflict of Interest; Lawyer as Trustee; Wills; Estates: An attorney may draft a revocable living trust with a pour-over will for a client and be named as trustee and/or personal representative. Such an arrangement does not constitute a gift under ER 1.8, but the lawyer may not recover trustee fees in addition to legal fees for the same work. The lawyer must be able to exercise independent professional judgment when acting as both trustee and counsel to the estate. [ERs 1.8, 2.1]

## Background

In an estate planning practice, clients may ask lawyers who draft their estate documents to serve in ancillary roles such as trustee or personal representative. State Bar of Arizona Ethics Opinion 96-07 concluded that a lawyer may draft a revocable living trust with a pour-over will for a client and be named as trustee or personal representative. Opinion 96-07 further opined that such arrangements are subject to the Arizona Rules of Professional Conduct regarding conflicts of interest, reasonable legal fees, and independent professional judgment. The opinion's analysis is consistent with the current language of ER 1.8, Comment 6, which states:

This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in ER 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.<sup>1</sup>

Subsequent to the publication of Ethics Opinion 96-07, Arizona enacted a trust protector statute, A.R.S. § 14-10818, as part the Arizona Trust Code (ATC), which took effect in 2009. Generally speaking, a trust protector's role is to provide third-party oversight to the administration of a trust.<sup>2</sup> A.R.S. § 14-10818 states that a trust instrument

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<sup>1</sup> ARIZ. SUP. CT. R. 42, ER 1.8 cmt. 6.

<sup>2</sup> See generally Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, A.B.A. PROB. & PROP. MAG., Jan./Feb. 2017, at 15.

grants “powers, delegations, and functions” to the trust protector, which may include the power to:

1. Remove and appoint a trustee.
2. Modify or amend the trust instrument for any valid purpose or reason, including, without limitation, to achieve favorable tax status or to respond to changes in the internal revenue code or state law, or the rulings and regulations under that code or law.
3. Increase, decrease, modify or restrict the interests of any beneficiary of the trust.
4. Modify the terms of a power of appointment granted by the trust.
5. Change the applicable law governing the trust.<sup>3</sup>

## **Discussion**

This opinion concludes that the Arizona Rules of Professional Conduct do not strictly prohibit a lawyer from drafting a trust that names the lawyer as trust protector. First, the applicable statute does not prohibit or limit a lawyer’s appointment as a trust protector. Second, a lawyer’s appointment as trust protector is analogous, although not identical, to a lawyer’s appointment as a trustee or personal representative. As reflected in ER 1.8 and Ethics Opinion 96-07, the Rules of Professional Conduct permit this practice subject to compliance with conflict of interest rules.<sup>4</sup>

However, when a client asks the drafting lawyer to serve as trust protector, or when the drafting lawyer seeks appointment as trust protector,<sup>5</sup> the lawyer must assess the

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<sup>3</sup> A.R.S. § 14-10818(B)(1)-(5).

<sup>4</sup> See also *In re ABB Trust*, 251 Ariz. 313, 491 P.3d 1120 (Ct. App. 2021) (analyzing an undue influence claim involving a trust for which the trust protector was also the drafting lawyer without noting any impropriety about the lawyer’s appointment as trust protector).

<sup>5</sup> Comment 6 to ER 1.8 states that a lawyer may “seek” to have the client appoint the lawyer to a fiduciary position. Whether such conduct crosses the line into impermissible solicitation will depend on the circumstances; ordinarily, Arizona’s Rules of Professional Conduct do not prohibit solicitation with a contact who has a “prior business or professional relationship with the lawyer or firm.” ARIZ. SUP. CT. R. 42, ER 7.3(b)(2).

arrangement to determine whether there is a significant risk that the lawyer's obligations to the client will be materially limited by the lawyer's duties as trust protector.<sup>6</sup> If so, the lawyer has a conflict of interest and cannot serve in this dual role unless the client gives informed consent. Per ER 1.0(e), a client's informed consent requires the lawyer to "communicate[] adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Even when a lawyer concludes that appointment as trust protector does not create a conflict of interest, the lawyer should still "discuss[] with the client information reasonably necessary to enable the client to make an informed decision" when appointing a trust protector.<sup>7</sup> Moreover, a lawyer's role as trust protector may not interfere with the lawyer's ability to exercise independent professional judgment in advising a client, as required by ER 2.1.

A lawyer who drafts a trust instrument that names the lawyer as trust protector should also consider the following:

- *Does the trust instrument provide for the trust protector to be paid for their services?* If so, as discussed in Ethics Opinion 96-07, a lawyer cannot recover both trust protector fees and legal fees for the same work.
- *Does the trust instrument make the trust protector a fiduciary?* A.R.S. § 14-10818(D) states that a trust protector is not a fiduciary unless provided by the trust instrument. If a lawyer serves as a fiduciary trust protector, then a conflict may arise if the lawyer's duties as a fiduciary clash with the lawyer's ethical duties to a client or former client.<sup>8</sup>

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<sup>6</sup> ARIZ. SUP. CT. R. 42, ER 1.7(a)(2).

<sup>7</sup> ARIZ. SUP. CT. R. 42, ER 1.4(b); e.g., A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 02-426 (2002) (discussing the need for lawyers to communicate enough information for clients to make informed decisions about appointing a lawyer as a trustee or executor, even when the lawyer does not have a conflict of interest).

<sup>8</sup> See, e.g., A.R.S. § 14-5652(B) (stating that a conflict between a lawyer's fiduciary duties and ethical duties may be grounds for removal as personal representative or trustee).

- *Does the lawyer’s malpractice insurance exclude coverage for service as a trust protector?* Although a discussion of malpractice insurance is outside the scope of this ethics opinion, prudent lawyers will consult with their malpractice insurance carriers before undertaking any role that may not be covered by their policy.<sup>9</sup>

## **Conclusion**

Although an estate planning lawyer is not prohibited from drafting a trust instrument that names the lawyer as trust protector, the lawyer must conduct a careful ethics analysis before undertaking this appointment. The lawyer should consider the potential conflicts of interest and, when necessary, must seek a conflict waiver, i.e., the client’s informed consent. Even when no conflict presently exists, a lawyer’s duty of communication requires the lawyer to provide enough information about the consequences and alternatives to the lawyer’s appointment as trust protector to permit the client to make an informed decision.

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<sup>9</sup> See, e.g., Terry Campbell, *Attorney as Trust Protector: Do Your Due Diligence and Avoid Ethical Pitfalls*, INSIDE TRACK, Feb. 18, 2015, <https://www.wisbar.org/NewsPublications/InsideTrack/pages/article.aspx?Volume=7&Issue=4&ArticleID=23886> [<https://perma.cc/2D9C-WXV2>] (cautioning Wisconsin lawyers that “[m]alpractice carriers may exclude services rendered as a Trust Protector”).