

PHILADELPHIA BAR ASSOCIATION
PROFESSIONAL GUIDANCE COMMITTEE
Opinion 2007-8
(August 2007)

A recently deceased person granted a power-of-attorney to her sister, who, pursuant to her role as attorney-in-fact, incurred some legitimate expenses, but also used some of decedent's funds for personal uses. The sister was also named as the executrix of the estate of decedent in decedent's will. Following the decedent's death the inquirer was retained by the sister to represent the sister in her capacity as executrix. With inquirer's help the will was probated and the sister was named executrix. The inquirer learned the facts relating to the actions of the sister as attorney-in-fact from the sister following his retention by her.

The main asset of the estate is a house. After taxes and expenses, only \$1700 in cash remains, all of which is now in escrow in the custody of the inquirer. The beneficiaries of the estate are the decedent's grandchildren, at least two of whom have retained counsel. More than one of the grandchildren (and possibly great-grandchildren) are living in the house still owned by the estate. The estate's assets are inadequate to maintain it.

The beneficiaries have demanded an accounting of sister's conduct as attorney-in-fact, prior to the date of decedent's death. A truthful response to the request would reveal the misappropriation of the decedent's funds prior to her death by the sister acting as her attorney-in-fact.

There is some legal work left to do to settle the estate.

The inquirer has posed the following issues:

1. Does inquirer have a conflict with his client?
2. May inquirer withdraw from the representation?
3. Can the inquirer provide an accounting to the beneficiaries? By this the Committee understands the inquirer to ask whether he may reveal the fact that the executrix expended at least some of the funds for personal use.
4. Can the inquirer collect his fee by asserting a lien on the real property of the estate or retaining the remaining \$1700 of the estate, which is its only liquid asset?

These questions require a careful analysis as to the identity of the inquirer's client, and the capacity in which that client is being represented. When representing fiduciaries, the complexity of that issue is not always appreciated. The Committee believes that the inquirer represents the sister in her representative capacity as executrix of the estate of the decedent. Plainly, he was retained by her to advise her in that capacity. He does not represent her individually, nor does he represent the estate, or its beneficiaries.

These distinctions are important in this area of practice, and are explored in detail in commentary on the Model Rules of Professional Conduct (the “MRPC”) by the American College of Trust and Estate Counsel, which we find helpful, as follows:

Representation of Fiduciary in Representative Not Individual Capacity. If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity--the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries--not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. Under some circumstances it is appropriate for the lawyer also to represent one or more of the beneficiaries of the fiduciary estate. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: General Rule) and Example 1.7-2.

General and Individual Representation Distinguished. A lawyer represents the fiduciary generally (i.e., in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate. For example, a lawyer represents a fiduciary individually when the lawyer, who may or may not have previously represented the fiduciary generally with respect to the fiduciary estate, is retained to negotiate with the beneficiaries regarding the compensation of the fiduciary or to defend the fiduciary against charges or threatened charges of mal-administration of the fiduciary estate. A lawyer who represents a fiduciary generally may normally also undertake to represent the fiduciary individually. If the lawyer has previously represented the fiduciary generally and is now representing the fiduciary individually, the lawyer should advise the beneficiaries of this fact.

Lawyer Should Not Attempt to Diminish Duties of Lawyer to Beneficiaries Without Notice to Them. Without having first given written notice to the beneficiaries of the fiduciary estate, a lawyer who represents a fiduciary generally should not enter into an agreement with the fiduciary that attempts to diminish or eliminate the duties that the lawyer otherwise owes to the beneficiaries of the fiduciary estate. For example, without first giving notice to the beneficiaries of the fiduciary estate, a lawyer should not agree with a fiduciary not to disclose to the beneficiaries of the fiduciary estate any acts or omissions on the part of the fiduciary that the lawyer would otherwise be permitted or required to disclose to the beneficiaries. In jurisdictions that permit the lawyer for a fiduciary to make such disclosures, the lawyer generally should not give up the opportunity to make such

disclosures when the lawyer determines the disclosures are needed to protect the interests of the beneficiaries.

Duties to Beneficiaries. The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. Some courts have characterized the beneficiaries of a fiduciary estate as derivative or secondary clients of the lawyer for the fiduciary. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate.

The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate. For example, a lawyer who is retained by a fiduciary individually may owe few, if any, duties to the beneficiaries of the fiduciary estate other than duties the lawyer owes to other third parties generally. Thus, a lawyer who is retained by a fiduciary to advise the fiduciary regarding the fiduciary's defense to an action brought against the fiduciary by a beneficiary may have no duties to the beneficiaries beyond those owed to other adverse parties or nonclients. In resolving conflicts regarding the nature and extent of the lawyer's duties some courts have considered the source from which the lawyer is compensated. The relationship of the lawyer for a fiduciary to a beneficiary of the fiduciary estate and the content of the lawyer's communications regarding the fiduciary estate may be affected if the beneficiary is represented by another lawyer in connection with the fiduciary estate. In particular, in such a case, unless the beneficiary and the beneficiary's lawyer consent to direct communications, the lawyer for the fiduciary should communicate with the lawyer for the beneficiary regarding matters concerning the fiduciary estate rather than communicating directly with the beneficiary. See MRPC 4.2¹ (**Communications with Persons Represented by Counsel**). However, even though a separately represented beneficiary and the fiduciary are adverse with respect to a particular matter, the fiduciary and a lawyer who represents the fiduciary generally continue to be bound by duties to the beneficiary. Additionally, the lawyer's communications with the beneficiaries should not be made in a manner that might lead the beneficiaries to believe that the lawyer represents the beneficiaries in the matter except to the extent the lawyer actually does represent one or more of them. In this connection note the

¹ The ABA's Model Rule of Professional Conduct 4.2 (MRPC) is substantially equivalent to Pennsylvania's Rule of Professional Conduct 4.2

Comment to MRPC 4.3² (Dealing with Unrepresented Person) stating that a lawyer should "not give advice to an unrepresented person other than the advice to obtain counsel."

The questions posed by the inquirer implicate the principles explored in these comments. At the outset of the representation, the inquirer should have explained the limited nature of his representation; the duties owed to the beneficiaries; and that a conflict between one's duties as a fiduciary and as an individual might arise. While we do not know precisely what was explained to the client, from the questions posed by the inquirer, it appears it was not done with enough specificity to convey the limitation of the inquirer's role to the client. That is important because one of the factors that may determine the answers to the questions posed is the understanding of the client on those issues when she divulged the information she did about her conduct as the attorney-in-fact.

The first question posed by the inquirer is whether he has a conflict with his client. We would not pose the question that way since, we think he has one client, the executrix in her representative capacity, and in his role as counsel he has no conflict with her. More precisely, however, if he means to ask if a conflict exists between his client's duties as executrix and her self-interest in not disclosing her wrongdoing as the former attorney-in-fact, we agree that such a conflict exists, and that this results in tension between his role as counsel to her in her representative capacity and his duty to the beneficiaries. Recognition of that does not in itself answer any question as to what the inquirer may or should do, but it does supply the necessary framework in which to address his questions as to whether he may disclose what he has learned from his client about her conduct as the decedent's attorney-in-fact to the beneficiaries, and whether he may withdraw.

As to the disclosure issue, Pennsylvania Rule of Professional Conduct (the "Rules") 1.6 **Confidentiality of Information** provides in section (a) that,

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Comment 18 to Rule 1.6 provides that,

[18] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4.

² The ABA's Model Rule of Professional Conduct 4.3 (MRPC) is substantially equivalent to Pennsylvania's Rule of Professional Conduct 4.3.

The Committee believes that this rule does not permit the inquirer to reveal the information he learned from the client to the beneficiaries, and that the exceptions to the rule do not apply to the present inquiry. The inquirer's **only** client is the sister, and while the lawyer may owe duties to the beneficiaries, we do not believe that duty supersedes Rule 1.6.

As presented by the inquirer, the client advised the inquirer of her conduct while attorney in fact, and obviously concern exists about the client's liability to the beneficiaries as a consequence of the revealed information. While the client revealed the information to the inquirer as part of the representation in which he was representing and advising her in connection with her duties as the executrix, it appears to the Committee that the information was communicated with the almost certain understanding by the client that it was done so in the context of an attorney/client communication and was entitled to confidential treatment. The fact that the inquirer is asking us the question indicates that he did not advise the client otherwise. Without there having been any advance disclosure by the inquirer of the possible and actual conflicts between the client's role as executrix and her past conduct as attorney in fact, any other result would be unfair to the client.

This result is also consistent with our prior opinion in No. 93-5 (June 1993).

Pennsylvania Rule 1.7 **Conflict of Interest: Current Clients** provides that,

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent.

Regarding the inquirer's question of whether he may withdraw from his present representation, the Committee finds that in fact the inquirer **must withdraw** because of the conflict inherent in his representation of his client in two capacities. While he was originally hired to provide representation to her in her capacity as executrix, when the inquirer started handling the issues associated with his client's past

conduct as attorney in fact, there became an irreconcilable conflict in his client continuing to serve as executrix, (since the executrix should be taking action against the attorney in fact to recover those inappropriately expended assets of the estate). The client having conflicting roles, where the inquirer has provided representation in both roles, means that the inquirer has a non-waivable concurrent conflict of interest as provided by Rule 1.7a. As such the inquirer is required to withdraw by the provisions of Rule 1.16 **Declining or Terminating Representation**, section (a)(1) which provides that,

(a) Except as stated in paragraph (c) a lawyer shall not represent a client, or where representation has commenced, **shall withdraw from the representation of a client** if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law; [emphasis added]

The Committee cautions that the inquirer must comply with Rule 1.16(c)'s directive that he comply with any applicable law requiring notice to or permission of a tribunal when terminating a representation.

The Committee declines to address the inquirer's final question as to the steps he may take to be paid for his services. Those are issues of substantive contract law as to the terms of his retention and the fee arrangement.

CAVEAT: The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.