

ETHICS OPINION 2010-03

Representation of an Estate and Client Identity

QUESTION #1:

When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?

QUESTON #2:

What is a lawyer's ethical responsibility when he discovers that the Personal Representative has misappropriated estate funds or property?

ANSWER #1:

Generally, the lawyer represents the individual that hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the Personal Representative,¹ the lawyer represents the Personal Representative individually, unless the Personal Representative and lawyer agree otherwise. The lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. As a result, if the client is the Personal Representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the Personal Representative in order to avoid violating Rule 4.3.² A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.

¹ This Opinion is limited to questions regarding the representation of a Personal Representative in a probate administration, except as otherwise stated. The Commission expresses no opinion herein on the duties owed by a lawyer representing the trustee of an express trust, a guardian, conservator, or attorney-in-fact.

² Unless otherwise indicated, all references to a "Rule" herein are to the Alabama Rules of Professional Conduct as they exist at the time this Opinion is adopted.

ANSWER #2:

When a lawyer has actual knowledge that the Personal Representative has misappropriated estate funds, the lawyer's first duty is to remonstrate with the Personal Representative in an effort to convince the Personal Representative to either replace the misappropriated funds or to inform the court of the Personal Representative's misappropriation. If the Personal Representative refuses to do so, the lawyer should withdraw from the matter and, upon withdrawal, ask the court to order an accounting of the estate.

DISCUSSION:

The Office of General Counsel frequently receives telephone calls from lawyers requesting ethics opinions concerning the representation of an estate. In explaining the ethical dilemma the lawyer is facing, the lawyer often refers to himself as "representing the estate". The lawyer then goes on to describe a situation in which the interests of the estate or the fiduciary for the estate or a beneficiary may be in conflict. Oftentimes, whether a conflict of interest exists is entirely dependent on who the lawyer actually represents in regard to the estate. Additionally, the Bar sometimes receives complaints filed against the lawyer by the beneficiaries of the estate or the fiduciary of the estate. In those cases, identifying the true client will often determine whether the lawyer has breached any ethical duties. As a result, defining the lawyer's actual client in an estate or probate matter is critical in determining whether a conflict of interest may exist and what duties a lawyer owes to the fiduciary and beneficiaries of the estate.

The Disciplinary Commission has never directly addressed the issue of who the lawyer represents when assisting in the administration or probate of an estate. At best, the Disciplinary Commission indirectly addressed the issue in RO 1989-105, wherein the Disciplinary Commission was asked to provide a formal opinion on a lawyer's ethical duties when an executrix absconded with the assets of the estate. In that situation, the lawyer prepared a will for a client who subsequently passed away. Upon the client's death, the lawyer was asked by the deceased client's widow to probate her husband's will which named her as executrix. The testator was survived by his widow, an adult son, and a minor son. After the lawyer assisted the executrix in collecting the assets of the estate, including cash, the executrix moved to Tennessee, taking with her the cash assets of the estate. Thereafter, the executrix refused to communicate any further with

the lawyer. The lawyer requested an opinion as to whether he could disclose the executrix's actions to the other beneficiaries of the estate or to the court.

Relying on the former Code of Professional Responsibility, the Disciplinary Commission opined that the lawyer should first call upon the client to rectify the fraud and, if the client refused, then the lawyer should withdraw from the matter. The Disciplinary Commission went on to state that under the disciplinary rules, the lawyer had an obligation not to disclose the confidences and secrets of the client. Therefore, the lawyer could not disclose the executrix's apparent fraud to the beneficiaries or the court. While not directly addressing the issue of client identity, it is clear that the Disciplinary Commission considered the executrix to be the lawyer's sole client.

The Disciplinary Commission is also aware that the Office of General Counsel has given recent informal opinions concerning this issue. In their informal opinions, the Office of General Counsel has opined that the client is the estate. The lawyer represents the estate by acting for and through the fiduciary of the estate for the ultimate benefit of the beneficiaries of the estate. Because the lawyer is retained by the Personal Representative to represent the estate and because the Personal Representative is legally required to serve the beneficiaries, the lawyer also has an obligation to the beneficiaries. This relationship has been characterized as one where the fiduciary is not the only client, but merely the "primary client", while the beneficiary is the "derivative client". In some situations where there is a sole beneficiary of the estate, that beneficiary (ostensibly a non-client) may be entitled to the loyalty of the lawyer to much the same extent as the fiduciary.

In light of the lack of clarity as to the identity of the true client and the lawyer's resulting professional responsibilities, the Disciplinary Commission has determined that it is necessary to issue a formal opinion on the matter in order to provide greater guidance to lawyers practicing in the area of estates and trusts.

There are three theories regarding the identity of the client when a lawyer handles an estate. The American Bar Association in Formal Opinion 94-380 recognized that the majority view is that the lawyer represents only the Personal Representative or fiduciary of the estate and not the beneficiaries of the estate, either jointly or individually. In reaching a similar conclusion, a number of other state bar associations have relied, in part, on state law that indicated that an estate is not a separate legal entity. In Ethics Opinion No. 91-2, the Alaska State Bar noted that an estate is "for probate purposes a collection of assets rather than

an organization, and is not an entity involved in the probate proceedings.”³ In Formal Opinion 1989-4, the Delaware State Bar also concluded that under state law, the term “estate” only referred to the actual property of the decedent and did not have an independent legal existence. As such, the Delaware State Bar concluded that the estate could not be a “client” under their rules of professional conduct.

A number of state courts have also held that the lawyer’s sole client is the fiduciary of the estate. However, most of these decisions arise in the context of malpractice litigation and not as a result of an ethical dispute. For example, in Spinner v. Nutt, 631 N.E.2d 542 (Mass. 1994), the Supreme Court of Massachusetts held that the lawyers for two trustees of a testamentary trust owed no duties of care to the beneficiaries of the trust. In Spinner, beneficiaries of a testamentary trust sued the lawyers for the trustees of the trust after the trustees allowed the value of the trust to decline. The Court determined that the lawyers’ only clients were the trustees and therefore, the lawyers were insulated from any liability as a result of the trustees’ actions.⁴ In Goldberg v. Frye, the California Court of Appeals stated as follows:

While the fiduciary, in the performance of this service, may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney, by definition, represents only one party, the fiduciary. It would be very dangerous to conclude that the attorney, through performances of service to the administrator, and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed administration by the fiduciary. They are not owed a duty directly by the fiduciary’s attorney.

217 Cal. App. P.3d 1258, 1268 (1990). Likewise, other state courts have also determined that a lawyer’s only client is the fiduciary of the estate. See, Huie v. DeShazo, 922 S.W. 2d 920 (Tex. 1996); The Estate of Fogelman v. Fegen, 3 P.3d 1172 (Ariz. 2000); In re Estate of Wagner, 386 N.W.2d 448, 450 (Neb. 1986).

³ The Alaska State Bar, however, did note that for purposes of taxation, an estate is treated as an entity.

⁴ The only exception being where the lawyer conspired with, approved, or actively engaged in fraud committed by the trustees.

The second approach to client identity in estate representation holds that the client is the estate itself. This view is identical to the entity theory of representation most commonly employed under Rule 1.13, Ala. R. Prof. C., when representing businesses and corporations. Under this approach, the lawyer represents the “estate” as a freestanding legal entity. The lawyer does not have an lawyer-client relationship with either the fiduciary or beneficiaries of the estate.⁵ One argument in favor of this position is that estates and trusts are treated as separate legal entities for taxation purposes and that therefore, an estate or trust is a recognizable legal entity.⁶ Under this approach, the fiduciary of the estate is merely an agent of the entity.⁷

Other courts have adopted the entity theory of representation for other reasons. In Steinway v. Bolden, the Michigan Court of Appeals, in adopting the entity theory of representation, noted that the lawyer is paid by the estate and not the personal representative:

We conclude that the clear intent of the Revised Probate Code and of the court rules is that, although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative. The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion.

185 Mich. App. 234, 238 (Mich. Ct. App. 1990).⁸ The Illinois Court of Appeals has also adopted the entity theory of representation. Grimes v. Saikley, 904 N.E.2d 184 (Ill. Ct. App. 2009).

The third view holds that the lawyer represents the fiduciary and beneficiaries of the estate jointly. This view of estate representation has been most prominently advocated by Geoffrey C. Hazard Jr. and W. William Hodes in

⁵ Virginia L. Blackwell, Conflicts of Interest When An Attorney Represents An Estate, 27 J. Legal Prof. 141 (2002-2003).

⁶ However, a number of state courts have specifically held that an estate is not a separate legal entity.

⁷ Jeffery N. Pennell, Representations Involving Fiduciary Entities: Who is the Client?, 62 Fordham L. Rev. 1319 (1994).

⁸ The Michigan Court of Appeal recently affirmed the entity theory of representation in In re Estate of Graves, 102709 MICA (Mich. Ct. App. 2009).

The Law of Lawyering, § 57.3, 4. 3rd Edition (2005), in which the authors argue the following:

Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees, partners, vis-à-vis other partners, spouses, corporate directors and officers vis-à-vis their corporations, and many others, including parents. Because, in the situations posited, the lawyer is hired to represent the fiduciary, and because the fiduciary is legally required to serve the beneficiary, the lawyer must be deemed employed to further that service as well.

It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the "primary" client. [Footnote omitted] In this view, the beneficiary is the "derivative" client. The beneficiary, strictly speaking a non-client, may be entitled to the loyalty of the lawyer almost as if he were a client. [Footnote omitted]

A number of consequences follow from adopting the derivative client approach to representation of a fiduciary. First, the lawyer's obligation to avoid participating in a client's fraud . . . is engaged by a more sensitive trigger. The fiduciary is subject to a high standard of fair dealing as regards the beneficiary, but may face temptation to engage in improper overreaching. The lawyer therefore faces a correspondingly greater risk of being implicated in the fiduciary's misconduct, and also has a greater duty to ensure that the purpose of the representation is not subverted.

Hazard & Hodes, The Law of Lawyering, § 2.7, 2-11 3rd Edition (2005). The derivative client approach as described above is most closely akin to that of where an insurance company hires a lawyer to represent one of its insureds. In Mitchum v. Hudgens, 533 So.2d 194 (Ala. 1988), the Alabama Supreme Court described that relationship as follows: "When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." Id. at 198. However, where a conflict arises between the interests of the insured and

insurer, “the primary obligation is to the insured.” Lifestar Response of Alabama, Inc. v. Admiral Ins. Co., 17 So.3d 200, 217 (Ala. 2009).

The Alabama Rules of Professional Conduct do not determine whether an attorney-client relationship has been formed. Likewise, they do not identify a lawyer’s client in an estate administration. Unlike the Comment to Florida Rule of Professional Conduct 4-1.7 which specifies that the personal representative is the client, the Comment to Rules 1.2 and 1.7, Ala. R. Prof. C., does not provide a clear answer as to the identity of the client in estate representation. Rather, the Comment to Rules 1.2 and 1.7, Ala. R. Prof. C., state as follows:

Rule 1.2. Scope of Representation

Comment

* * *

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Rule 1.7. Conflicts Of Interest

Comment

* * *

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. 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. The lawyer should make clear the relationship to the parties involved.

Many other state bars that have addressed this issue have often relied on case law or statutes to reach a definitive resolution. Unfortunately, the appellate courts in Alabama appear to have never directly addressed the issue. However,

the courts in Alabama have issued a “few instructive cases.”⁹ In Wilkinson v. McCall, 23 So.2d 577, 580 (Ala. 1945), the Supreme Court of Alabama noted that “[i]t is true usually that the executor employs counsel in his personal, not his representative capacity . . .” In Smelser v. Trent, 698 So.2d 873 (Ala. 1976), the Court stated “[a] personal representative . . . has the power to hire attorneys to assist him in the administration of the estate.” Id. at 1096.

The Supreme Court’s holding is supported by various statutes in the Alabama Code of 1975. For instance, § 43-2-682, Ala. Code 1975, which allows a fiduciary or lawyer to be compensated from the assets of the estate, states, in pertinent part, as follows:

Upon any annual, partial or final settlement made by any administrator or executor, the court having jurisdiction thereof may fix, determine and allow an attorney’s fee or compensation . . . to be paid from such estate to attorneys representing such administrator or executor . . .

(emphasis added) Additionally, § 43-2-843(17), Ala. Code 1975, allows a personal representative to “[e]mploy necessary persons, including . . . attorneys . . . to advise or assist the personal representative in the performance of administrative duties . . .” Along with McCall, these statutes indicate that a lawyer is hired by the fiduciary to represent the fiduciary in his individual capacity. More recently, the Supreme Court of Alabama has stated that “a personal representative . . . has the power to hire attorneys to assist him in the administration of the estate.” Smelser v. Trent, 698 So.2d 1094, 1096 (Ala. 1997).

In Mills v. Neville, 443 So.2d 935, 938 (Ala. 1983), the Supreme Court of Alabama indicated that the estate was the client. In Mills, the lawyer that drafted the testator’s will later served as executor of the decedent’s estate. While acting as executor, the lawyer hired himself to represent the estate and to pursue a wrongful-death action. In upholding the lawyer’s actions, the Court stated the following:

However much the beneficiaries are interested parties in the outcome of the administration of the estate, and therefore in the ensuing litigation, it is the estate which is the client here, and it is

⁹ Peter M. Wright, Ethics Issues Facing the Fiduciary Attorney; Sirote & Permutt, P.C., Birmingham, Alabama.

the court which supervises and approves the allowances to the attorney for the estate. . . For these reasons, we are convinced that the respondent's failure to consult with the minor beneficiaries here, if he failed to do so, did not result in a violation of [the applicable rule of professional conduct].

While recognizing that the estate was the client in a wrongful death lawsuit, the Court also indicated that the lawyer had no ethical duty to consult with the beneficiaries of the estate.

Finally, in Robinson v. Benton, 842 So.2d 631 (Ala. 2002), the beneficiaries of an estate sued a lawyer for failing to destroy the will of the testator. In Benton, the lawyer drafted a will for a client. Sometime later, the client delivered the will to the lawyer and asked him to destroy the will for the purpose of revoking it. The lawyer failed to follow the client's wishes and the client subsequently passed away. As a result, the will was later submitted for probate. The heirs and beneficiaries of the client sued the lawyer claiming that had he followed the client's instructions, the beneficiaries would have received a larger portion of the estate. In rejecting the beneficiaries' claims, the Supreme Court of Alabama declined to change the law in Alabama "that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty, either by contract or gratuitously." The Disciplinary Commission finds the holding in Robinson instructive irrespective of the fact that it concerns a malpractice action regarding a lawyer's liability to beneficiaries in estate planning and the preparation of wills.

Conclusion Regarding Client Identity

After considering the above-discussed cases, state bar opinions, and other state cases, it is the opinion of the Disciplinary Commission that ordinarily, when a lawyer is hired by a Personal Representative to assist in the administration of an estate, the lawyer's sole client is the Personal Representative of the estate.¹⁰ As a result, the lawyer would owe the Personal Representative a duty of loyalty and confidentiality just as he would any other client pursuant to Rule 1.6, Ala. R. Prof. C. The fact that the Personal Representative has obligations to the beneficiaries of the estate does not in itself either expand or limit the lawyer's obligations to the Personal Representative under the Rules, nor would it impose

¹⁰ Obviously, if the lawyer is hired by a beneficiary or other interested party, the beneficiary or interested party would be the lawyer's client.

on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

Upon commencement of representation, the lawyer should clarify with the Personal Representative the role of the lawyer, the scope of representation, and the Personal Representative's responsibilities towards the lawyer, the court, beneficiaries, and other interested third parties.

Lawyers Duties to Third Parties

While the client would ordinarily be the Personal Representative, the lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. If the lawyer were to do so, it could be found that he has undertaken to represent both the Personal Representative and the beneficiaries of the estate which could result in conflicting loyalties and conflicts of interests. As a result, a lawyer must comply with certain duties upon undertaking representation of a Personal Representative or risk violating certain rules of professional conduct.

First and foremost, upon being hired by a Personal Representative to assist in the administration of an estate or trust, the lawyer should explain to the beneficiaries or other interested parties that the lawyer's sole client in the matter is the Personal Representative, individually. A lawyer that fails to do so could be in violation of Rule 4.3, Ala. R. Prof. C., which states as follows:

Rule 4.3. Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In doing so, the lawyer should explain that he does not represent the beneficiaries' individual interests in the matter. One suggestion has been that the lawyer consider drafting an engagement letter that clearly defines the client and the scope of the lawyer's representation. This letter should then be sent to all interested persons.

Likewise, if a lawyer was to undertake to represent both a Personal Representative and a beneficiary or two Co-Personal Representatives in an estate matter, and the parties' interests later diverged, the lawyer would be required to withdraw from the representation of each. Rule 1.7, Ala. R. Prof. C. By clearly identifying the client and advising the parties of the lawyer's role in the matter, the lawyer will be in a better position to identify and avoid possible conflicts of interests that may arise during the course of the representation.

Duties When the Personal Representative Misappropriates Estate Assets

First, this opinion does not impose an affirmative duty upon the lawyer to monitor or double-check all of the Personal Representative's actions in administering the estate or to investigate whether the Personal Representative has wasted or misappropriated estate assets. Rather, this opinion only imposes duties upon the lawyer once the lawyer has actual knowledge that the Personal Representative has engaged in misconduct with estate assets.

Determining the lawyer's ethical responsibilities when he discovers that the Personal Representative of the estate has misappropriated estate funds is a difficult question as it calls for a balance between the lawyer's obligations to his client, the Personal Representative, and the lawyer's obligations as an officer of the court. Rule 1.6, provides as follows:

1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a

defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Pursuant to Rule 1.6, a lawyer would not be allowed to disclose the misconduct of the Personal Representative to the court, the beneficiaries, or any other interested third-party without the permission of the Personal Representative. However, Rule 3.3, places certain obligations on the lawyer to affirmatively disclose misconduct by a client:

RULE 3.3. Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Pursuant to Rule 3.3(a)(2), Ala. R. Prof. C., the lawyer has a duty to disclose to the court any facts necessary to avoid assisting a client who is committing an ongoing, continuing criminal or fraudulent act. As the Comment to Rule 3.3,

Ala. R. Prof. C., states, “[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.” As such, the dilemma the lawyer faces is whether the Personal Representative’s misappropriation of estate assets is ongoing. If so, the lawyer would have an obligation to disclose such conduct to the court.

However, more often than not, the lawyer only learns of the misappropriation of estate assets after the fact. In such situations where the misconduct is not ongoing, the lawyer may not disclose the prior misconduct to the court pursuant to Rule 1.6. As a result, the lawyer’s only recourse is to seek to persuade the Personal Representative to either replace any misappropriated funds or to voluntarily disclose to the court the Personal Representative’s misconduct. If the Personal Representative refuses to do either, then the lawyer should withdraw from the representation and, upon withdrawal, request that the court order an accounting of the estate. By doing so, the lawyer avoids assisting the Personal Representative in any criminal or fraudulent acts. Further, by requesting that the court order an accounting upon the lawyer’s withdrawal, the lawyer helps to shield himself from any accusations or allegations that he assisted or allowed the Personal Representative to engage in the misconduct.