

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-401
Issued: September 1997

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Comment 12 to Rule 1.7, which is now contained in Comment 27. In addition, Rule 1.7 was amended to require informed consent, confirmed in writing (rather than consultation) in certain conflicts situations. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

The Committee has been asked to address the applicability of the Kentucky Rules of Professional Conduct with respect to a lawyer's representation of the fiduciary of a decedent's estate or trust, and the lawyer's responsibilities to the beneficiaries of estates and trusts. In order to provide the requested advice, explain the Committee's position on these issues, and to give insight into the applicable Rules of Professional Conduct, the following questions are presented for response and discussion.

Question 1: Does a lawyer's representation of a fiduciary of a decedent's estate or trust expand or limit the lawyer's obligation to the fiduciary under the Rules of Professional Conduct?

Answer: No.

Question 2: Does a lawyer's representation of a fiduciary of a decedent's trust or estate impose on the lawyer obligations to the beneficiaries of the decedent's trust or estate that the lawyer would not have toward third parties?

Answer: No.

Question 3: Is the lawyer's obligation to preserve client confidences under Rule 1.6 altered by the fact that the client is a fiduciary?

Answer: No.

Question 4: May the lawyer for the fiduciary also represent the beneficiaries of the decedent's trust or estate?

Answer: Qualified Yes.

References: ABA Formal Op. 94-380 (1994); *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary*, 30 Real Property, Probate and Trust Journal 541 (1996); *ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 Real Property, Probate and Trust Journal 865 (1994); *Developments Regarding*

the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct, 26 Real Property, Probate and Trust Journal 1 (1991); *When Loyalties Collide: Courts Resolve Conflicting Duties*, 135 Trusts & Estates 22 (1996); *Professional Responsibility Issues Keep Practitioners on Their Toes*, 135 Trusts & Estates 22 (1996); and *The Fiduciary, His Counsel And The Attorney - Client Privilege*, 136 Trusts & Estates 29 (1997); §73, *Duty to Certain Non-Clients*, Restatement, The Law Governing Lawyers.

OPINION

From time to time Kentucky lawyers have requested advice from the Committee regarding a lawyer's responsibilities in the context of the administration of trusts and estates. The primary problem in answering such questions arises from the fundamental question: Whom does the lawyer represent? Does the lawyer represent the beneficiaries of the estate or trust; does the lawyer represent the estate or trust entity or does the lawyer represent the fiduciary? The complexity of this problem is acknowledged in Comment 12 to Rule 1.7, which states:

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.

By issuing this Opinion it is the Committee's intent to clarify a Kentucky lawyer's obligations under the Rules of Professional Conduct.

The examination of these issues must focus on Rule 1.7, Conflict of Interest: General Rule, and the problems generated by a lawyer's multiple representation of clients. The American College of Trust and Estate Counsel, hereafter referred to as "ACTEC," adopted Commentaries to the Model Rules of Professional Conduct in October 1993, and their Commentaries and the Reporter's Notes on the ACTEC Commentaries are helpful to this analysis. The Reporter's Notes contained the following statements:

Lawyer for Fiduciary. Under the majority view, a lawyer who represents a fiduciary ... stands in a lawyer-client relationship with the fiduciary and not with respect to the fiduciary estate or the beneficiaries. ...

Duties to Beneficiaries. The lawyer who represents a fiduciary generally is not usually considered also to represent the beneficiaries. However, most courts have concluded that the lawyer owes some duties to them. Some courts subject the lawyer to the duties because the beneficiaries are characterized as the lawyer's "joint," "derivative" or "secondary" clients. Other courts do so because the lawyer stands in a fiduciary relationship with respect to the fiduciary, who, in turn, owes fiduciary duties to the beneficiaries. The duties, commonly called "fiduciary duties," arise largely because of the nature of the representation and the relative positions of the lawyer, fiduciary, and beneficiaries. However, note that the existence and nature of the duties may be affected by the nature and extent of the representation that a lawyer provides to a fiduciary. Thus, a lawyer who represents a fiduciary individually regarding a fiduciary estate may owe few, if any, duties to the beneficiaries apart from the duties that the lawyer owes to other nonclients.

In addition to the Reporter's Notes, this Committee finds the following comments from the ACTEC Commentaries on Model Rule 1.7 instructive for purposes of clarifying the lawyer's obligations to the fiduciary, to the beneficiaries of an estate or trust, and the problems of multiple representation.

General Nonadversary Character of Estates and Trusts Practice: Representation of Multiple Clients. It is often appropriate for a lawyer to represent more than one member of the same family in connection with their estate plans, more than one beneficiary with common interests in an estate or trust administration matter.... In some instances the clients may actually be better served by such a representation, which can result in more economical and better coordinated estate plans prepared by counsel who has a better overall understanding of all of the relevant family and property considerations. ... Multiple representation is also generally appropriate because the interests of the clients in cooperation, including obtaining cost effective representation and achieving common objectives, often clearly predominate over their limited inconsistent interests. ...

Disclosures to Multiple Clients. Before, or within a reasonable time after, commencing the representation, a lawyer who is consulted by multiple parties with related interests should discuss with them the implications of a joint representation (or a separate representation if the lawyer believes that mode of representation to be more appropriate and separate representation is permissible under the applicable local rules). In particular, the prospective clients and the lawyer should discuss the extent to which material information imparted by either client would be shared with the other and the possibility that the lawyer would be required to withdraw if a conflict in their interests developed to the degree that the lawyer could not effectively represent both of them. The information may be best understood by the clients if it is discussed with them in person and also provided to them in written form, as in an engagement letter or brochure.¹

This Committee adopts the ACTEC Commentaries because the Commentaries properly set forth a lawyer's ethical obligations. Further, this Committee agrees with ABA Formal Opinion 94-380, and adopts the majority view; that is, that a lawyer who represents a fiduciary does not also represent the beneficiaries. We reject the view that a lawyer who represents a fiduciary also owes fiduciary obligations to the beneficiaries that in some circumstances will override obligations otherwise owed by the lawyer to the fiduciary, such as the obligation of confidentiality. We also reject the view that when a lawyer represents a fiduciary in a trust or estate matter, the client is not the fiduciary, but is the trust estate. We adopt the following comments made in the ABA's Formal Opinion:

¹ The Rules of Professional Conduct define "consult" or "consultation" as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." A lawyer is obligated to disclose to the client the existence of the conflict, that multiple representation is sought, and then disclose the implications thereof, including its *risks and advantages*. This Committee recommends that all communications between a lawyer and multiple clients regarding conflicts be in writing, and that the client's consent be evidenced in writing; however, the Committee is not imposing an additional ethical requirement that the lawyer commit the matter to writing.

When the fiduciary is the lawyer's client all of the Model Rules prescribing a lawyer's duties to a client apply. The scope of the lawyer's representation is defined by and limited by Model Rule 1.2. The lawyer must diligently represent the fiduciary, *see* Model Rule 1.3, preserve in confidence communications between the lawyer and the fiduciary, *see* Model Rule 4.1(a). The fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's responsibilities under the Model Rules of Professional Conduct.

A lawyer's duty of confidentiality to a client is not lessened by the fact that the client is a fiduciary. Although the Model Rules prohibit the lawyer from actively participating in criminal or fraudulent activity or active concealment of a client's wrongdoing, they do not authorize the lawyer to breach confidences to prevent such wrongdoing.

The ABA's Opinion, in Footnote 6, included the following important caveats:

6. The Model Rules impose a number of limitations on a lawyer representing a fiduciary. For example, a lawyer may not participate in a breach of fiduciary duty by the fiduciary that involves fraud or criminal activity because the lawyer's conduct is limited by Model Rule 1.2(d), which provides that a lawyer may not actively participate in a client's criminal or fraudulent activity. This rule applies to all lawyers, not just those representing fiduciaries. Lawyers are also prohibited from actively concealing client breaches of fiduciary duty, or actively assisting in such concealment, by Model Rules 4.1(a) (a lawyer shall not lie to third parties) and 3.3(a)(1) and (2) (a lawyer shall not lie to or conceal information from a tribunal). If a lawyer knows that a breach of fiduciary duty has occurred, and that an accounting is misleading in that it hides wrongdoing committed by the fiduciary, the lawyer is expressly prohibited by Model Rule 3.3(a) from presenting the accounting to the court. Further, the lawyer is prohibited by Model Rule 4.1(a) from representing to the beneficiaries that a false accounting is accurate. These rules apply to a lawyer with a fiduciary client to the same extent as, but no farther than, they apply in any other lawyer/tribunal/third party scenario.

Continuing in the text of the Opinion, the ABA Ethics Committee then made the following comments:

Although a lawyer may not disclose confidences of the fiduciary, if the fiduciary insists on continuing a course of fraudulent or criminal conduct, the lawyer may be required to terminate the representation because the lawyer's services will be involved in that conduct, so as to invoke Rule 1.16(a)(1), or may have the option of a voluntary withdrawal under Rule 1.16(b)(1). If either of these provisions of Rule 1.16 applies, this will be not because the client is a fiduciary, but because the client is acting in the manner described by the Rule. The client's status is irrelevant.

Based upon the instructive comments of the ACTEC Commentaries and the ABA Formal Opinion, this Committee concludes with the following advice for Kentucky lawyers.

1. In representing a fiduciary the lawyer's client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate.
2. The fact that a fiduciary has obligations to the beneficiaries of the trust or estate does not in itself either expand or limit the lawyer's obligations to the fiduciary under the Rules of Professional Conduct, nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.
3. The lawyer's obligation to preserve client's confidences under Rule 1.6 is not altered by the circumstance that the client is a fiduciary.
4. A lawyer has a duty to advise multiple parties who are involved with a decedent's estate or trust regarding the identity of the lawyer's client, and the lawyer's obligations to that client. A lawyer should not imply that the lawyer represents the estate or trust or the beneficiaries of the estate or trust because of the probability of confusion. Further, in order to avoid such confusion, a lawyer should not use the term "lawyer for the estate" or the term "lawyer for the trust" on documents or correspondence or in other dealings with the fiduciary or the beneficiaries.
5. A lawyer may represent the fiduciary of a decedent's estate or a trust and the beneficiaries of an estate or trust if the lawyer obtains the consent of the multiple clients, and explains the limitations on the lawyer's actions in the event a conflict arises, and the consequences to the clients if a conflict occurs. Further, a lawyer may obtain the consent of multiple clients only after appropriate *consultation* with the multiple clients at the time of the commencement of the representation.²

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.

² See footnote 1 above.