

New York State Bar Association Committee on Professional Ethics

Opinion 649 - 6/8/93 (24-92)

Topics: Attorney-Client Privilege;
Client Secrets; Conflicts

Digest: Where executor proposes to or has engaged in knowing wrongdoing to estate's detriment, attorney for executor has duty to call upon executor to fulfill its fiduciary obligations to the estate; disclosure of wrongdoing to beneficiaries turns on whether information is legally privileged as a confidence or whether applicable law requires disclosure of an otherwise protected secret

Code: DR 4-101(A), (B); DR 5-109;
DR 7-102(B)(l); EC 4-4; EC 5-18

QUESTIONS

(1) What are the responsibilities of the attorney for the executor of an estate upon learning that the executor plans to breach its fiduciary duties?

(2) Does the attorney for an executor have a duty to disclose to the beneficiaries or the court supervising the estate that the executor has taken action in breach of its fiduciary obligations?

OPINION

Central to any response to these questions is a determination of the party or parties to whom a lawyer owes duties in the course of providing professional services to the executor of an estate. This determination is in part a matter of law, and to that extent falls outside the scope of this Committee's jurisdiction.¹

¹ See generally Ronald C. Link, Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Model Rules of Professional Conduct, 26 *Real Prop. Prob. & Trust J.* 1, 49-51 (1991) (discussion of

The questions also are governed at least in part by the Code of Professional Responsibility. We have addressed related questions on several occasions. *E.g.*, N.Y. State 140 (1970) (will provision mandating retention of lawyer drafting the will is generally improper); N.Y. State 168 (1970) (executor's lawyer may not disclose executor's misappropriation where executor has made full restitution); N.Y. State 356 (1974) (lawyer-beneficiary may act as counsel for executor in absence of conflict); N.Y. State 477 (1977) (executor's lawyer may advise surviving spouse to retain independent counsel concerning right of election); N.Y. State 512 (1979) (lawyer for co-executors may not represent one in action against other); N.Y. State 610 (1990) (lawyer generally should not draft will naming lawyer as beneficiary and executor).

We have held that while the executor's lawyer has a "duty to represent the executor with undivided loyalty," the executor's counsel is prohibited from "taking any position antagonistic to the estate or inconsistent with the executor's duty to carry out the testatrix' will." N.Y. State 477. We reiterated in N.Y. State 512 that

the lawyer, although retained by the executors, has a duty not only to represent them individually, but also to serve the best interests of the estate to which they, in turn, owe their fiduciary responsibilities.

We are not alone in recognizing these obligations of the executor's counsel. See 1 Geoffrey C. Hazard, Jr. & William W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §1.3:108, at 78 (2d ed. 1990) ("The beneficiary (a non-client) may be entitled to the loyalty of the lawyer almost as if he were a client").² The law in New York is consistent with this ethical duty. See *e.g.*, *In re Clarke's Estate*, 12 N.Y.2d 183, 188 N.E.2d, 237 N.Y.S.2d 694 (1962) (attorney for

cases from California, Ohio and Virginia that reach different conclusions on the legal issue whether estate beneficiaries may bring a malpractice claim against executor's counsel, and an unpublished decision compelling disclosure to testamentary trust beneficiaries of communications between trustee and its counsel).

² The Comment to Rule 1.7 of the Model Rules of Professional Conduct acknowledges the lack of clarity in the duties of the executor's counsel: "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." Whatever the scope of the lawyer's duty to serve the "estate" as a general matter, the executor's lawyer by virtue of that retention cannot also be deemed to serve the interests of specific individual heirs or beneficiaries. Indeed, in N.Y. State 477, we referred to the beneficiaries of the estate as "potentially adverse parties," in the context of determining the lawyer's ethical constraints on advising the surviving spouse concerning a right of election against the will. Accordingly, absent specific circumstances to the contrary, beneficiaries have no attorney-client relationship with the executor's lawyer. See *Kramer v. Belfi*, 106 A.D.2d 615, 484 N.Y.S.2d 1015 (2d Dep't 1984) (beneficiaries may not sue executor's attorney for malpractice); *Weingarten v. Warren*, 753 F.Supp. 491 (S.D.N.Y. 1990) (trust remaindermen may not sue trustee's attorney for malpractice, but may sue trust's attorney for breach of fiduciary duty).

fiduciary owes same undivided loyalty to beneficiaries as to fiduciary-client; beneficiary has standing to seek return of compensation received improperly by attorney); *In re Bond & Mortgage Guarantee Co.*, 303 N.Y. 423, 103 N.E.2d 721 (1952) (attorneys for trustee owe beneficiaries equally high degree of fidelity; where such duty is breached, attorney must surrender profits).

The present questions arise in a context of possible conflict between the lawyer's dual obligations to the executor and to "serve the best interests of the estate." We turn to these questions with the foregoing ethical and legal principles in mind.

(1)

With respect to the first question, where the executor proposes to act contrary to the interests of the estate (as the lawyer reasonably perceives them) to further the executor's individual interests, the lawyer's obligation is clear: to call upon the executor to act as the executor's fiduciary obligation requires, to decline to assist the misconduct in any way, and to consider whether the is permitted or required to withdraw as counsel if the executor declines to do so. DR 2-110(C)(1)(b); DR 2-110(B) (2); DR 4-101(C) (3). We have already held just that in N. Y . State 512, where a bank co-executor had violated its fiduciary obligations:

... the lawyer is duty bound to call upon the bank to do that which the lawyer deems necessary to the proper administration of the estate and, further, to refrain from counseling or assisting the bank in conduct which he deems to be inconsistent with the best interests of the estate. If the bank fails or refuses to follow his advice, he may withdraw from its employ.

(2)

The second question, concerning the obligation of the lawyer with respect to disclosure of actual (rather than proposed) misconduct by the executor, is more complicated. Surely both the court charged with supervision of the estate and the beneficiaries have a paramount interest in learning of material misconduct by the executor. The lawyer's ethical duty "to serve the best interests of the estate" therefore would mandate disclosure of intentional wrongdoing by the executor if the lawyer is otherwise permitted by the Code to make disclosure. Yet, DR 4-101(B)(1) bars the lawyer from revealing a confidence or secret of a client unless such disclosure is permitted elsewhere in the Disciplinary Rules, or is required by law or court order as provided in DR 4-101(C)(2). In turn, DR 7102(B)(1) compels the lawyer to reveal a client's fraud "except when the information is protected as a confidence or secret."

In sum, disclosure is barred if the information qualifies as a protected confidence or secret. See, e.g., N.Y. State 168 (executor's counsel barred by DR 4-101(B) from disclosing executor's misappropriation of funds where executor made full restitution at lawyer's request).

The availability of the attorney-client privilege to protect an executor's communications with counsel concerning conduct in breach of the executor's fiduciary obligations is an issue of law. DR 4-101(A) defines "confidence" as "information protected by the attorney-client privilege *under applicable law*" (emphasis supplied). This Committee therefore cannot determine the circumstances under which an executor's communications with counsel qualify as privileged, and therefore as a "confidence."

If the information about the executor's misconduct was not obtained in a confidential communication with the executor, or the attorney-client privilege is otherwise inapplicable, disclosure is barred only if the information qualifies as a "secret" under DR 4-101(A).

DR 4-101 (A) broadly defines client secrets to encompass any information "gained in the professional relationship," and can apply even to information that is publicly available. EC 4-4. DR 4-101 (A) imposes its duty of secrecy on counsel only where "the client has requested [the information] be held inviolate" or where disclosure "would be embarrassing or would be likely to be detrimental to the client." These additional requirements would appear to be readily satisfied with respect to information obtained by an executor's counsel about the executor-client's intentional misconduct. However, DR 4-101(C)(2) specifically permits disclosure of secrets whenever "required by law or court order."³

We therefore conclude with respect to the second question that the attorney has a duty to call upon the executor to rectify the misconduct, and to withdraw from the representation if the executor declines to do so. The attorney has a further duty not to assist in any conduct or communication which misstates any facts or circumstances.

Finally, in the absence of a clear, advance understanding with the executor as to the scope of the lawyer's duty in such circumstances, the attorney's obligation or ability to disclose the information to the beneficiaries depends, with respect to information that qualifies as a client secret, upon whether the applicable law requires disclosure, and with respect to information obtained directly from the executor, upon whether such communication is protected by the attorney-client privilege under the law applicable to the circumstances.

CONCLUSION

For the reasons stated above, we conclude with respect to the first question that in such circumstances the executor's lawyer must request that the executor refrain from

³ Whether the proposition that a fiduciary's attorney owes the same loyalty to the beneficiary as does the fiduciary itself (*In re Clarke's Estate, supra*) imposes a legal duty of disclosure is an issue of law outside the scope of this Committee's jurisdiction.

breaching its fiduciary duties, decline to assist such misconduct in any way, and consider whether withdrawal as counsel is required or advisable if the executor does not accept counsel's advice.

With respect to the second question, we conclude that the lawyer should disclose the executor's past misconduct unless such disclosure is prohibited because the information qualifies as privileged or a secret; determination of whether the information so qualifies turns on issues of law. In addition, counsel should request the executor to rectify the misconduct, withdraw from the representation if the executor declines to do so, and not assist in any conduct or communication that is false or misleading.
