NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 865 (5/10/11)

Topic: Estate planner serving as attorney for executor; conflict of interest; legal malpractice

Digest: Lawyer who prepared estate plan for decedent may represent executor despite recent change in law of legal malpractice in *Estate of Schneider v. Finmann* (N.Y. 2010) provided that lawyer does not perceive a colorable claim of legal malpractice arising out of the estate planning.

Rules: 1.7, 1.10(a), 1.16.

FACTS

1. The inquirer prepared an estate plan for his client and supervised the execution of a Will in furtherance of the plan. The Will named the deceased client's nephew executor of his estate. The client has recently died, and the estate is ready for administration. The nephew has asked the inquirer to represent him in connection with the estate's administration, but the inquirer is concerned because a recent change in the law permits executors to sue estate planners for malpractice, and both the estate plan and the Will were prepared well within any period of limitations possibly applicable to the inquirer's conduct (meaning that the statute of limitations will not be available as a defense to any claim).

QUESTION

2. In light of *Estate of Schneider v. Finmann,* 15 N.Y.3d 306 (2010), may an attorney who prepared an estate plan for a client agree to act as counsel to the executor after the client's death?

OPINION

3. On June 17, 2010, in *Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (2010), the New York Court of Appeals overruled a long line of cases in the estate planning field. The overruled cases had held that the doctrine of privity effectively barred the estates of deceased estate planning clients from filing a legal malpractice suit against the lawyers who planned the decedent's estate. In *Schneider,* the Court of Appeals held that the

executor or personal representative of the decedent "stands in the shoes of the decedent," and therefore has "the capacity to maintain a malpractice claim on the Estate's behalf." *at* 309.

4. Shortly after publication of the Court's decision in *Schneider*, a number of authorities speculated on the consequent expansion of an executor's obligations and liabilities, as well as the obligations and liabilities of lawyers providing estate planning services. Although the Court did not expressly give the estate's *beneficiaries* the right to bring a suit for legal malpractice, some commentators suggested that an aggrieved beneficiary might ask the executor to sue a lawyer whose alleged incompetence had caused them to receive less from the estate than they believed they otherwise would have obtained. *See, e.g.,* David Siegel, *New York State Law Digest*, No. 607, at 3-4 (July 2010). Others questioned whether an attorney could ethically agree to represent an executor in connection with the administration of any estate that the attorney had planned.

The relevant rule: Rule 1.7

5. We begin our analysis with Rule 1.7 of the Rules of Professional Conduct, which states in relevant part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that … (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
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> (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 … (2) the representation is not prohibited by law … (3) the representation does not involve the assertion of a claim by one client against the another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

6. Before applying Rule 1.7, we distinguish three different situations:

A. The lawyer who prepared the estate plan realizes at the outset – before commencing representation of the executor in the administration of the estate – that he (the lawyer) may have committed legal malpractice and that the executor would have a colorable malpractice claim against him.

B. The lawyer at the outset of representing the executor in the administration of the estate does not perceive any basis for claiming that he (the lawyer) committed malpractice, and does not believe the executor would have a colorable malpractice claim against him.

C. The lawyer did not initially perceive any basis for a legal malpractice claim against him, but has come to realize during the representation of the executor that he (the lawyer) may have committed legal malpractice and that the executor would have a colorable malpractice claim against him.

Situation A: Lawyer perceives colorable legal malpractice claim at outset

7. In the first situation – the lawyer who prepared the estate plan and/or drafted the Will realizes at the outset that the legal work was negligent to a degree that gives rise to a colorable (*i.e., prima facie*) claim of malpractice – a conflict of interest arises under Rule 1.7(a)(2). The conflict arises because there is a "significant risk" that the lawyer's professional judgment will be adversely affected. Moreover, if the lawyer realizes that the executor could assert a colorable claim of malpractice against the lawyer, the consent provisions of Rule 1.7(b) could not be satisfied. To permit the lawyer to undertake such a representation would place the lawyer in the manifestly untenable position of having to counsel the executor on whether to sue himself (the lawyer). In such circumstances, the lawyer could not "reasonably believe[]" that he could provide "competent and diligent representation" to the executor. In that instance, Comment [14] to Rule 1.7 is instructive. It says:

> [S]ome conflicts are nonconsentable. If a lawyer does not reasonably believe that the conditions set forth in paragraph (b) can be met, the lawyer should neither ask for the client's consent nor provide representation on the basis of the client's consent. A client's consent to a nonconsentable conflict is ineffective. …

8. Accordingly, if the preparer/drafter believes at the outset that the executor has a colorable claim of legal malpractice against him, then the preparer can neither ask for the executor's consent to the conflict nor represent the executor if the executor volunteers consent to the conflict. Therefore, the lawyer may not agree to represent the executor – and pursuant to the imputation rule, Rule 1.10(a), no other lawyer in the lawyer's firm may represent the executor either.

9. Moreover, we have held that an attorney is ethically bound to report to a client any significant error or omission that may give rise to a claim of malpractice. *See, e.g.,* N.Y. State 734 (2000) (legal services organization must report to client a "significant error or omission that may give rise to a possible malpractice claim"); N.Y. State 275 (1972) (lawyer has "affirmative duty" to advise client that lawyer's failure to act resulted in claim being barred by statute of limitations). An executor "stands in the shoes of the decedent" (*Schneider*). Thus, a lawyer in the first situation must report to the client (who was formerly the decedent, but is now the executor) that the lawyer's preparation of the estate plan has given rise to a colorable claim of malpractice against him. The same opinions, however, have noted that not all errors or omissions will give rise to a claim of malpractice. Some errors or omissions are insignificant, and there is no need to report them. That is essentially the second situation, which we address next.

Situation B: Lawyer *does not* perceive colorable legal malpractice claim at outset

10. In the second situation – the lawyer who prepared the estate plan or drafted the Will does not believe at the outset that the executor could assert a colorable claim for legal malpractice against him – our conclusion is different. If the preparer/drafter perceives no apparent basis for a claim of malpractice, then no "significant risk" arises that the lawyer's professional judgment on behalf of the executor will be adversely affected by the lawyer's own interests, and the need to obtain consent under Rule 1.7(b) is not triggered. Accordingly, there is no reason to require the lawyer or the lawyer's firm to decline representation of the estate. In such cases, the Court's decision in *Schneider* should have no effect on the long established practices of the trusts and estates bar, and the lawyer may agree to represent the executor after the client's death. Moreover, even if the lawyer perceives some insignificant error or omission in the prior representation, the lawyer has no duty to report it to the client.

Situation C: Lawyer perceives colorable legal malpractice claim during representation

11. In the third situation -- the lawyer does not perceive any basis at the outset for claiming that he committed malpractice, but comes to believe during the representation that the executor has a colorable claim for malpractice against the lawyer -- the conflict again becomes nonconsentable. Just as in the first situation, the lawyer is in the untenable position of having to counsel the executor on whether to sue the lawyer. Rule 1.7(a)(2) does not distinguish between conflicts that exist at the outset of a representation and conflicts that arise during a representation. In either situation, the conflict is nonconsentable, both for the lawyer and for all other lawyers associated with his firm. Pursuant to Rule 1.16(b)(1), the lawyer must withdraw (with the court's permission, if required) to avoid a violation of the Rules, and must upon withdrawal "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client" (the executor). Moreover, as in the first situation, the lawyer must report the apparent legal malpractice to the executor.

12. In sum, if the lawyer who prepared the estate plan knows at the outset or anytime after the representation of the executor commences that the quality of the plan is subject to a colorable challenge (or where the plan has in fact been challenged) on grounds that it was incompetently prepared, the lawyer cannot represent the executor, and furthermore must disclose to the executor any facts that would permit the executor to evaluate the apparent malpractice. If not, the lawyer may represent the executor in the administration of the estate.

13. Thus, the Court's decision in *Schneider* has not changed the basic conflicts issues in cases where legal malpractice in preparing the estate plan is not apparent. Lawyers who are engaged in estate planning have traditionally handled the administration of the estates that they have planned. For example, it has long been held that fiduciaries may retain their own firms to act as counsel on the estates that they

administer. *See, e.g.,* N.Y. State 471 (1977) (receiver in a mortgage foreclosure action may retain the law firm of which he is a member as his counsel). The apparent risk in such retention has been viewed as outweighed by various advantages – both practical and economic – in permitting lawyer-fiduciaries and their firms to serve in both capacities. These advantages are outweighed only when the lawyer who prepared the plan perceives a colorable claim of legal malpractice, in which case Rule 1.7(b)(1) makes the conflict nonconsentable.

Settling a legal malpractice claim

14. A lawyer may settle a claim for malpractice with a client provided three conditions are satisfied: (a) the client has been fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer; (b) the lawyer has been discharged or has withdrawn from the representation; and (c) the lawyer has advised the client to secure independent counsel in the negotiation of the settlement agreement. *See, e.g.,* N.Y. State 591 (1988) ("A lawyer may ethically negotiate with a former client for the settlement or release of potential malpractice claims, but only after the lawyer takes specific steps to insure that the negotiations are fair," including withdrawing from representation). To satisfy this line of opinions, a lawyer who perceives a colorable malpractice claim against himself for his estate planning must withdraw pursuant to Rule 1.16 before seeking to settle the claim, and must apprise the client (the executor) of the facts giving rise to the malpractice claim and of the desirability of engaging independent counsel to evaluate the claim.

CONCLUSION

15. In light of *Estate of Schneider v. Finmann,* a lawyer who prepared an estate plan for a client may agree to act as counsel to the executor after the client's death as long as the lawyer does not perceive a colorable claim for legal malpractice before or during the representation of the executor. However, if the lawyer does perceive a colorable claim for legal malpractice before or during the representation, then the conflict is nonconsentable and the lawyer (and all other lawyers associated with his firm) must decline or withdraw from the representation and the lawyer must inform the executor of the facts giving rise to the claim.

(50-10)