



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1253 (02/23/2023)

Topic: Conflicts of interest among family members

Digest: A lawyer who represents the Executor of an estate and simultaneously represents a beneficiary of the estate in an unrelated matter does not have a concurrent conflict of interest. “Differing interests” may arise where lawyer simultaneously represents both an estate’s Executor/beneficiary and a co-beneficiary as co-defendants in civil litigation for damages and, if so, the lawyer may not continue the representation of both co-defendants unless the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. If the Executor instructs the lawyer to file a cross-claim against the co-beneficiary in the civil litigation, then the conflict would become non-consentable.

Rules: 1.0(f) and 1.7(a)(1)-(2) & (b)(1), (b)(3) & (b)(4)

FACTS:

1. The inquiring lawyer (“Lawyer”) represents an estate in several matters arising from the conduct of the decedent (“Father”) and the decedent’s two adult children (“Son” and “Daughter”).
2. Father entered into a contract to sell a parcel of real estate. When negotiating the contract and preparing for the closing, Father asked Son to speak for him and act as his agent. We are told by Lawyer that Father, the contract vendee (“Buyer”), the real estate broker, and the attorney who represented both Father and Buyer in the transaction all understood that Son was speaking and acting not for himself but rather for Father.
3. The contract of sale never closed. Buyer sued Father for breach of contract and sued Son for tortious interference with the contract (“Real Estate Litigation”). Since Lawyer believes that everyone in the real estate transaction understood that Son was acting as an agent for a disclosed principal, Lawyer believes that Buyer’s separate claim against Son is meritless.
4. Father and Son jointly retained Lawyer to defend them in the litigation. As part of that retention, Father and Son signed a “Conflict Waiver.” Father, however, did not sign personally. Rather, the retainer agreement and the conflict waiver were executed by Daughter pursuant to a power of attorney as Father’s “Attorney-in-Fact.”
5. Father and Son each agreed to pay Lawyer’s attorney fees in the Real Estate Litigation equally while the suit was pending, with the understanding that they would be fully reimbursed out of the net proceeds of the sale when the property at issue was ultimately sold. (Son did not own any interest in the property.)
6. At the time of his Father’s death, Lawyer was also representing Father in the sale of a separate and unrelated parcel of real property (the “Unrelated Sale”) — but in that sale Lawyer was dealing with Father exclusively through Daughter in her capacity as the holder of Father’s

power of attorney. (Son was not involved in any way in the Unrelated Sale.)

7. While the Real Estate Litigation and the Unrelated Sale were pending, Father died, and by operation of law Father ceased to be Lawyer's client. Father's estate plan named Daughter as Executor of Father's estate. Lawyer entered an appearance in Surrogate's Court on Daughter's behalf and prepared a petition seeking letters testamentary for Daughter. The Real Estate Litigation (which is pending in different court) has been stayed until Father's personal representative (Daughter) is formally substituted for Father, but that has not yet occurred. Father's will bequeathed all of his property per stirpes, so Daughter and Son will eventually split the estate equally. Lawyer is not aware of any disagreement between Daughter and Son over the validity of the will or any of its terms.

8. When Lawyer and Daughter were discussing a retainer agreement for Lawyer to represent Father's estate, however, Daughter asked Lawyer if Son should be blamed for the failure of the real estate transaction and forced to pay his own attorney fees for defending himself in the Real Estate Litigation, rather than reimbursing Son for his attorney fees (per the agreement between Father and Son) out of the proceeds from the eventual sale of the property.

9. Lawyer explained to Daughter the "dangers" of attempting to shift blame onto Son, whereupon Daughter told Lawyer that she was only asking questions and did not herself blame Son. Lawyer recognizes that Daughter's hypothetical inquiry regarding Son's conduct raises the potential for conflict between Daughter and Son, but Lawyer nevertheless believes that she can provide competent and diligent representation both (i) to Daughter as Executor and (ii) to Daughter and Son as co-defendants in the Real Estate Litigation.

QUESTIONS:

10. Lawyer poses three related questions:

- A. May Lawyer continue to represent Daughter, in her capacity as Executor of Father's estate, in the sale of the separate and unrelated parcel of real property in Father's estate?
- B. May Lawyer represent Daughter generally in her capacity as Executor of Father's estate?
- C. May Lawyer continue to represent Daughter, again in the capacity as Executor of Father's Estate, as well as Son, as defendants in the Real Estate Litigation?

OPINION:

11. All Lawyer's questions involve conflicts with current clients (as opposed to conflicts with former clients or prospective clients). We begin, therefore, by setting out Rule 1.7 of the New York Rules of Professional Conduct (the "Rules"). Rule 1.7 provides as follows:

Rule 1.7 Conflict of Interest: Current Clients

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
 - (1) the representation will involve the lawyer in representing *differing interests*; or
 - (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*.

(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*, confirmed in writing. [Emphasis added.]

Question A: Representing Daughter as Executor in the Unrelated Real Estate Sale

12. Rule 1.7 does not prevent Lawyer from representing Daughter in her capacity as Executor of Father's estate for purposes of completing the Unrelated Sale of Father's real property. Son is not a party to the Unrelated Sale, and nothing suggests that Son has "differing interests" from Father's estate with respect to the Unrelated Sale.

13. Thus, we perceive no conflict of interest under Rule 1.7(a)(1) flowing from Lawyer's representation of Daughter as Executor in the Unrelated Sale, and we see no need for Lawyer to obtain informed consent to a conflict (because there is no conflict requiring consent). Lawyer may ethically continue to represent Daughter as Executor in the Unrelated Sale.

Question B: Representing Daughter as Executor Generally

14. In contrast, representing Daughter as Executor generally raises the potential for conflict. Daughter could revisit and reconsider the role Son played in the real estate transaction and decide to blame Son for the failure of the Real Estate Litigation. (Shifting blame from Father's estate to Son would leave more money in Father's estate for Daughter to inherit.) Daughter could also search for grounds to rescind the fee reimbursement arrangement to which Father had agreed. Thus, Daughter and Son could eventually come to loggerheads, which would require Lawyer to represent one current client (Daughter as Executor) against another current client (Son). Under Rule 1.7(a)(1), a lawyer may not represent one current client against another current client without informed consent from both clients, confirmed in writing.

15. Although Daughter apparently arrived at a point where she told Lawyer that she was only asking him a "hypothetical question" about blaming Son and has said she does not actually intend to blame Son or to unwind the fee reimbursement arrangement, the potential for Daughter to back-pedal is plainly there. Indeed, the potential for Daughter to turn against Son would exist even if Daughter had said nothing, because Lawyer should advise Daughter how to maximize Father's estate, and Daughter is entitled to Lawyer's unconflicted advice on whether she could or should act against Son which might include denying Son legal fee reimbursement or even cross-claiming against Son in the Real Estate Litigation.

16. Rule 1.7(a)(1) precludes representation without informed consent if the representation

“will” involve a lawyer in representing “differing interests.” The term “differing interests” is defined in Rule 1.0(f) to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.” A helpful explanation of this language appears in Comment [8] to Rule 1.7, which provides as follows:

[8] Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. ... The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

17. If Daughter has a non-frivolous basis to blame Son for the failure of the real estate transaction and a non-frivolous basis for depriving Son of reimbursement for legal fees in the Real Estate Litigation, that would create “differing interests,” and thus a concurrent conflict under Rule 1.7(a)(1). As such, Lawyer could not jointly represent both Daughter in her general capacity as Father’s executor and Son at the same time unless (i) the conflict arising out of the Real Estate Litigation were consentable and (ii) Lawyer obtained the requisite informed consent from “each affected client” (meaning both Daughter and Son). This means that Lawyer must reasonably believe that she “will be able to provide competent and diligent representation to each affected client,” per Rule 1.7(b)(1), and “each affected client gives informed consent, confirmed in writing,” per Rule 1.7(b)(4).

18. Here, we think the conflict is consentable (i.e., waivable) under Rule 1.7(b), given Daughter’s statement that she does not intend to act against Son and given Lawyer’s belief that Daughter has no valid basis to do so. On these facts, as long as Daughter (as Executor) does not change her mind and decide to take action against Son, it will be reasonable for Lawyer to believe that she can provide competent and diligent representation both to Daughter (as Executor and beneficiary) and to Son (as a co-beneficiary).

Question C: Jointly Representing Daughter and Son in the Real Estate Litigation

19. Representing both Son and Daughter as defendants in the Real Estate Litigation is another variation of the potential conflict of interest that Lawyer faces. In the litigation, Daughter and Son have the same differing interests already described with respect to the Daughter’s general capacity as executor and the Son’s capacity as an estate beneficiary. That is, Daughter, as Executor for Father’s estate, has an interest in maximizing the value of Father’s estate (perhaps by cross-claiming against Son for damages and denying Son reimbursement for legal fees) and an interest in maximizing her own inheritance (by the same means). Son, in contrast, has an opposite interest in minimizing his own liability for damages and in minimizing his own legal fees.

20. The existence of these “differing interests” is perhaps more obvious in the context of the Real Estate Litigation because Lawyer would be representing two clients in the same lawsuit, and Rule 1.7(a)(3) prohibits a lawyer from representing “one client against another client represented

by the lawyer in the same litigation ... before a tribunal.” But the source and nature of the conflict is the same. Accordingly, as is the case with respect to Lawyer’s representation of Daughter as Executor generally, Lawyer cannot specifically represent both Son and Daughter in the Real Estate Litigation unless Lawyer reasonably believes that she can provided competent and diligent representation to both Daughter and Son (i.e., the conflict is consentable) and Lawyer obtains informed consent from each client per Rule 1.7(b)(4).

21. We have not been asked to address the validity or scope of the conflict waiver that Father and Son signed when retaining Lawyer to jointly represent them in the Real Estate Litigation. Nonetheless, Lawyer should be aware that the scope, terms, and disclosures relating to the waiver are critical to establish its validity.

CONCLUSION:

22. A lawyer who represents the Executor of an estate and simultaneously represents a beneficiary of the estate in an unrelated matter does not have a concurrent conflict of interest. “Differing interests” may arise where a lawyer simultaneously represents both an estate’s Executor/beneficiary and a co-beneficiary as co-defendants in civil litigation for damages and, if so, the lawyer therefore may not continue the representation of both co-defendants unless the lawyer reasonably believes that she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. If the Executor instructs the lawyer to file a cross-claim against her co-beneficiary in the civil litigation, then the conflict would become non-consentable.

(15-22)