ETHICAL ISSUES IN FIDUCIARY ADMINISTRATION

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Estate Administration: Who is the Client?

The intersection of fiduciary duty and the rules of professional responsibility often create some unexpectedly complex dilemmas. The most common of these, and the one most difficult to explain to those participating in the estate administration process, is when an attorney represents an estate who is the client. In many cases an attorney has a relationship, often of long-standing, with the decedent and his or her family. The executor or administrator is likely a relative of the decedent who knows the attorney well. In most cases, the fiduciary assumes that the attorney is merely continuing his representation of the decedent and his family. Similarly, the estate beneficiaries often also make the same assumption. Therefore, it is important at the outset to establish who is the client in the administration of an estate.

The general rule is that the client is the estate, similar to representation of a corporation or limited liability company.[1] As the estate can only communicate through its fiduciary, an attorney-client relationship also arises between the attorney and the estate's fiduciary, albeit for the ultimate benefit of the estate. This attorney-client relationship does not extend to the other beneficiaries of the estate, no matter how beneficial the attorney's representation of the estate may prove to be to them. As there is an attorney-client relationship with the fiduciary and there is none with the beneficiaries, usual ethical concerns about client confidentiality and conflicts of interest arise in the dealings between the attorney and the beneficiaries other than the fiduciary.[2]

If in the course of representation, it becomes apparent to the attorney that the beneficiaries believe that they are also the clients of the attorney, the attorney has a duty to communicate with them at least to the extent of advising them that they are not his clients.[3] This is particularly true in estate administration in light of the common assumption that the attorney for the estate also represents the beneficiaries.[4] Therefore, an attorney representing the estate should make it clear from the beginning to all of the beneficiaries that he is not their attorney, but represents the estate.

[1] LEO No. 1452 (Copy attached).
[2] *See generally* LEO No. 1452.
[3] Butler v. State Bar, 42 Cal. 3d 323, 721 P.2d 585 (1986).
[4] LEO No. 1599 (Copy attached).

If the personal representative is also a beneficiary of the estate, the representation can create significant conflicts of interest. The personal representative has a fiduciary duty not only to the beneficiaries of the estate but also to its creditors.

> It is the duty of an executor or administrator to protect the claimants in an estate. In a sense he holds all receipts in trust for the payment of the debts of the decedent.[5]

Thus, to the extent that claims reduce or eliminate the beneficial interest of the personal representative there is a conflict between the individual as beneficiary and the fiduciary duties which the individual owes in administering the estate as the personal representative. To the extent that the attorney owes a duty to both the estate and to the personal representative, the attorney-client relationship includes an inherent conflict.

This conflict, however, is not a conflict between multiple clients. The Virginia State Bar has opined that the client of an attorney representing an estate is the fiduciary.[6] The Bar finds no conflict in representing the fiduciary in that role and individually. The Bar approved the representation of the decedent's husband both in his role as personal representative of the decedent's estate and in his election against the decedent's will, stating "the attorney … has only one client: the deceased's husband. While the client may have two legal needs, his role as administrator and his choice to elect against the will, he remains only one client."[7] The Bar did caution that the attorney should be mindful of the client's fiduciary duties to the beneficiaries, as advising the client to breach those duties could violate Rule 1.2 of the Rules of Professional Conduct, which prohibits assisting a client in illegal or fraudulent activity.

Even more difficult is the ethical position of the attorney when there is a conflict between the beneficiaries. The Virginia State Bar has opined that it is not ethically impermissible for an attorney to represent the estate and the personal representative/beneficiary in a course of conduct intended to increase the inheritance of the personal representative at the expense of the remaining beneficiaries.[8] While such a course of conduct may be ethical in the view of the Bar, it also violates the fiduciary duty which the personal representative owes to all the beneficiaries. The Bar noted that the attorney does not assume the fiduciary responsibilities of the personal representative as a result of his attorney-client relationship; however, the Bar cautions that the attorney who counsels such a course of conduct may well be in violation of DR:7-102(A)(7) (present Rule 1.2) which prohibits counseling or assisting a client in illegal or fraudulent activity.

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[5] General Creditors of Harris' Estate v. Cornett, 416 P.2d 398, 402 (Okla. 1966). *Accord*, 31 AM. JUR. 2d *Executors and Administrators* § 649 (2008).
[6] LEO No. 1778.
[7] *Id.*
[8] LEO No. 1599.

From the perspective of the commissioner's office, such a course of conduct will lead to the removal of the fiduciary and the chargeback of all legal fees to the fiduciary's personal account. This is consistent with the position of the Fairfax Circuit Court in *Gaymon v. Gaymon*,[9] in which Judge Vieregg surcharged the fiduciary with the payment of $63,029,21 in legal fees incurred by the estate to advance the personal interests of the fiduciary and removed him from his appointment as executor of the estate.[10] The fiduciary was denied any protection for his reliance upon the advice of his counsel as the court found it was his own fiduciary duty which he breached.

Conflicts of Interest when the Attorney is the Fiduciary

Fiduciary services can create legal ethical obligations. The Virginia State Bar has opined that a lawyer who serves as an estate fiduciary is barred from representing clients adverse to the estate after he has resigned as fiduciary.[11] In the hypothetical presented to the Bar, a lawyer for one of the estate beneficiaries was appointed as co-administrator with a lawyer for a second beneficiary. When conflicts between the beneficiaries arose, both resigned as fiduciaries. Although the hypothetical indicates that the fiduciaries administered the estate during their appointment, there is no discussion of any legal services rendered to the estate. The Bar found that the attorney as fiduciary "was his own client for practical purposes." Therefore, having an attorney-client relationship with the fiduciary of the estate, the attorney was barred from taking a position adverse to the estate representing the original client who had asked him to take the appointment as a fiduciary.

The most frequent problem which the commissioner's office must address with fiduciaries, both lay and professional, is self-dealing. A fiduciary has control of the funds of the estate and there are no effective controls upon the use of those funds other than post-transaction review of the commissioner's office. Thus in many cases our oversight must seek to redress self-dealing rather than to prevent it. Not only is the use of such funds for the fiduciary's personal needs a violation of the fiduciary duties which he owes to the estate, the beneficiaries and the creditors, when the fiduciary is an attorney, it is a violation of Rules 1.8 and 1.15 of the Rules of Professional Conduct.

[9] 63 Va. Cir. 264 (2003).
[10] *Accord*, In re the Estate of Alice R. Wicker, 58 Va. Cir. 331 (Henrico Circuit Court 2002).
[11] LEO No. 1720.

Ethical implications of failing to respond to the entreaty of your Commissioner

An attorney's service as a fiduciary is subject to the same disciplinary rules as an attorney's legal services. The Virginia State Bar has consistently ruled that actions as a fiduciary which would violate ethical duties in an attorney-client relationship may be disciplined as if the violation occurred when rendering legal services.[12] Thus, an attorney's duty as a fiduciary to account for estate funds is on equal footing with an attorney's duty to account for client funds.[13] Thus, compliance with the accounting requirements of § 26-8 of the Virginia Code will also meet the requirements of Rule 1.15 of the Rules of Professional Conduct. Concomitantly, failure to account will result in a violation of the Rules of Professional Conduct. Therefore, if the commissioner must pursue enforcement of fiduciary filings with an attorney, the attorney incurs a substantial risk of ethical and disciplinary violations as well.

If a fiduciary fails to comply with his statutory duties, the commissioner is charged with responsibility to enforce the performance of those duties.[14] In most cases, the commissioner will provide a final written notice to the fiduciary that enforcement proceedings will commence absent compliance with his statutory duties. In egregious situations or well-established instances of non-compliance, the commissioner may omit the written notice.

To enforce compliance, the commissioner has statutory authority under § 26-13 to issue a summons to the fiduciary. The commissioner first issues a summons requiring the fiduciary to act within 30 days. The summons is formally served upon the fiduciary. If the fiduciary still does not comply, the summons is reported to the court and the commissioner applies to the court for issuance of a rule to show cause against the fiduciary. Again, this motion is served upon the fiduciary. If the court issues the rule to show cause, a return date is established and the rule to show cause is served upon the fiduciary. Generally the court prefers personal service of the rule. With personal service of process, at the return of the rule, the court has the full authority of its contempt power to enforce compliance. Although rare, the judges of the Circuit Court of Fairfax have been known to incarcerate recalcitrant fiduciaries if the fiduciary does not show a sincere intent to meet his statutory duties.

If the fiduciary fails to appear on the return date for the rule to show cause and personal service has been made upon the fiduciary, the court will generally issue a *capias* for the arrest of the fiduciary, to be held until the court can hear the matter. The *capias* will usually include a bond amount for the fiduciary to be released from custody pending

[12] LEO Nos. 1325, 1442, 1487, and 1617.
[13] LEO No. 1617.
[14] *See* VA. CODE ANN. § 26-13. *See also* VA. CODE ANN. §§ 26-15, 26-18, and 64.1-122.2

the hearing. In the experience of this commissioner, these measures are more than sufficient to enforce the probate system in Virginia.

Where the fiduciary is also a licensed Virginia attorney, the enforcement proceedings have an additional wrinkle. When the summons is reported to the court, the commissioner must also mail a copy of the report to the Virginia State Bar. [15] This notice triggers a Virginia State Bar investigation on a par with other ethics investigations. Under the disciplinary procedures, both the district committees and the bar disciplinary board have authority to suspend an attorney's license for failure to comply with a bar summons for an estate, trust or other fiduciary account. Bar counsel has authority to request that suspension as well.

The ethics of practice before the Commissioner of Accounts

The Unauthorized Practice Rules of the Virginia State Bar prohibit a non-lawyer from representing the interests of another before any tribunal, judicial, administrative or executive, in the settlement of an estate or trust.[16] It also limits a non-lawyer from the preparation and filing of accountings and conferring with the commissioner in contested proceedings. The comment goes on to note that "[i]n administering and settling the affairs of an estate, a fiduciary is not acting primarily for himself … and appearance at probate hearings by a non-lawyer … ordinarily constitutes the unauthorized practice of law."[17]

In the opinion of your commissioner, this rule conflicts with the statutory duties of both the fiduciary and the commissioner and is contrary to direct statutory direction. The Virginia Code provides that commissioner of accounts "shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts."[18] In the performance of his duties, the commissioner must meet and confer with the fiduciaries under his charge, be they lay or professional fiduciaries. Moreover, the failure of a fiduciary to respond to a summons from the commissioner requiring the fiduciary to answer his inquiries would be grounds for the imposition of fines and findings of contempt of court.[19]

Secondly, the hearings before the commissioner are generally conducted in an informal manner without rigid application of the rules of evidence or procedure. As an example of the informality, the Virginia Code expressly provides that one need not be a member of the Virginia Bar to participate in a hearing before the commissioner. Virginia

[15] VA. CODE ANN. § 26-13.
[16] UPR 4-104.
[17] UPC 4-8.
[18] VA. CODE ANN. § 26-8.
[19] VA. CODE ANN. § 26-13.

Code § 26-29, concerning general objections to accounts, states that an interested party or any person who "appears as next friend for another interested in any such account" may present matters to the Commissioner.[20] Thus, the statutory scheme contemplates non-legal representatives of interested parties addressing matters before the Commissioner. While the concept of next friend generally refers to those unable to present matters on their own behalf,[21] it clearly contemplates non-legal representatives acting on behalf of interested parties before the Commissioner. Thus, the practice in Fairfax has been to permit the fiduciaries to deal directly on matters affecting their responsibilities and to permit non-lawyers to participate in hearings before the commissioner.

Ethical and Fiduciary Duties when dealing with Clients with Diminished Capacity

Both the legal ethics rules and the responsibilities imposed upon guardians and conservators create ethical and fiduciary duties when dealing with clients with diminished capacity. In most cases, the court conditions orders appointing conservators "so as to permit the incapacitated person to care for himself and manage property to the extent he is capable."[22] Similarly, Rule 1.14 requires that an attorney maintain a normal client-lawyer relationship with an impaired client, as far as reasonably possible. Thus, the commissioner must have some flexibility in approving the use of the ward's funds. Generally, in Fairfax the commissioner will permit the conservator to provide a reasonable sum to the ward for cash expenditures for which vouchers and receipts will not be strictly required; however, the conservator should be guided by the factors relating to gifts from the estate, to the extent relevant, in determining the amount of such an allowance.

These factors are set forth in § 37.2-1024.A of the Virginia Code as follows:

> (i) the size and composition of the estate; (ii) the nature and probable duration of the incapacity; (iii) the effect of the gifts or disclaimers on the estate's financial ability to meet the incapacitated person's foreseeable health, medical care, and maintenance needs; (iv) the incapacitated person's estate plan; (v) prior patterns of assistance or gifts to the proposed donees; (vi) the tax effect of the proposed gifts or disclaimers; (vii) the effect of any transfer of assets or disclaimer on the establishment or retention of eligibility for medical assistance services; and (viii) other factors that the court may deem relevant.

In any event, the total amount of these expenditures should not exceed the aggregate annual gift restriction of $500 contained in § 37.2-1024.B. The commissioner prefers, but will not strictly require upon a showing of good cause, that receipts be provided for individual expenditures of

[20] *See* Harrison, WILLS AND ADMINISTRATION IN VIRGINIA AND WEST VIRGINIA § 530(4) (3rd ed. 1989).
[21] Jackson v. Counts, 106 Va. 7, 54 S.E. 870 (1906).
[22] VA. CODE ANN. § 37.2-1009.

more than $25.00.[23] Of course, reasonable expenditures which are supported by receipts or vouchers would not fall within these limitations.

By the same token, it is important to recognize that clients with diminished capacity for whom a fiduciary has been appointed are not deemed capable of managing their own affairs. A fiduciary who allows the ward unrestricted access to funds or who fails to protect the assets within his control from waste by the ward will have breached his fiduciary duty to the ward, and will have personal responsibility to restore the funds to the estate.[24] By contrast, the attorney has no affirmative duty to act in such circumstances, the rule providing only that "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer *may* take reasonably necessary protective action …" (emphasis added). As the failure to act is not a breach of any ethical duty, it would appear that the breach of fiduciary duty for failure to act would not be subject to disciplinary action.

[23] *Cf.* VA. CODE ANN. § 26-17.9.
[24] VA. CODE ANN. § 64.1-145