DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS
OPINION 1989 - 4

A member of the Delaware Bar has requested the opinion of the Committee on Professional Ethics of the Delaware State Bar Association (the "Committee") as to whether he may properly represent the individual interests of an executor of an estate in a matter in which the attorney has been "representing the estate." Specifically, a beneficiary of the estate has filed an exception to the final accounting challenging a previous inter vivos gift made by the testator to the executor. The beneficiary claims the gift was wrongful and the property given to the executor should revert to the estate. In the resulting litigation the beneficiary has noticed the executor's deposition both in his role as an executor and as donee of that inter vivos gift, and the attorney has inquired whether it would be a conflict of interest for him to represent the executor in both capacities.

CONCLUSION

It is the Committee's opinion that under Delaware law the term "estate" merely refers to the aggregate property interests of a decedent and is not a separate legal entity with its own legally cognizable interests. Therefore, we are of the view that while in common usage an attorney is said to represent "the estate," in fact he or she represents the executor in the management of that estate, and accordingly there is no conflict between representation of the executor as such and representation of the executor in his or her individual capacity.

DISCUSSION

Rule 1.7 of the Delaware Lawyers' Rules of Professional Conduct provides, among

other things, that:

> "(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless
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> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after consultation."

Rule 1.7 thus prohibits a lawyer from representing directly adverse interests unless (i) all affected clients consent, and (ii) the lawyer can make a professional judgment that there will be no actual adverse effect on his relationship with any client. The question presented to the Committee here is whether such directly adverse interests exist under these circumstances. That question, in turn, presents the question of who is the lawyer's client, the executor or the estate?

The argument that a directly adverse relationship exists under these circumstances proceeds as follows: The current litigation involves an inter vivos gift to the executor. If that gift is found to have been improper, the property given to the executor will revert to the estate. Thus, to the extent the lawyer's duty is to the estate as a cognizable entity, he is bound to support (or at least not oppose) those measures increasing the value of the estate. Therefore, since it would increase the value of the estate for the property to be forfeited, the lawyer may not properly represent the executor in attempting to uphold the validity of the gift. If, however, the executor is seen as the lawyer's client, then there would not appear to be a directly adverse interest sufficient to require the lawyer to decline to represent the executor individually.

Authorities outside Delaware have touched upon this issue, but they are not

especially helpful to its resolution. In the two such decisions referred to us, the American Bar Association Committee on Ethics and Professional Responsibility's Informal Opinion 1017 (Dec. 7, 1967), and In The Matter Of Walter 0. Estes, Mich. Sup. Ct., 221 N.W. 2d 322 (1974), the authorities in question appear to assume their conclusions to reach essentially opposing results.

In Informal Opinion 1017, the American Bar Association Committee was asked whether "an attorney employed by two co-executors to represent an estate is disqualified from seeking additional compensation for the co-executors for the estate." The Committee conceded that the attorney had a fiduciary responsibility to the estate but concluded, without any analysis of the point, that [t]he attorney's clients are the executors and not the heirs or beneficiaries" and that the attorney therefore had a duty to seek additional compensation on the executor's behalf. Thus, without explaining the basis for its conclusion, the Opinion treats the "estate" as having no independent existence but instead looks directly to the interests of the person having claims upon the estate.

The Supreme Court of Michigan in In The Matter Of Walter 0. Estes, supra, apparently operated from a contrary presumption. There, the attorney in question was a co-executor of, and apparently the attorney for, an estate. A question arose as to whether the co-executor had properly received certain property of the testatrix before her death, and the attorney represented his co-executor "against the estate" in the ensuing litigation. The Michigan court held that this conduct "clearly warranted disciplinary action" since the attorney was "named and appointed co-executor of the estate" but had "represented a client whose claim was contrary to the

provisions of the will and was antithetical to the best interests of the estate and beneficiaries. This is a self-evident basis for discipline." While self-evident to the Court, it is not entirely clear whether the Court believed that the lawyer had violated his duties as a lawyer to the estate as well as his duties as an executor.

Although we reach the same conclusion reached by the American Bar Association Committee, we believe the question presented here cannot be solved by the methodology used in either of these opinions. Rather, we believe it is first necessary to inquire into the nature of an estate to determine whether it has an independent legal existence sufficient to enable it to be a "client" as that term is used in Rule 1.7. Only then is it possible to determine whom the lawyer actually represents.

A review of the Delaware decisions indicates that as a technical matter the word "estate" in fact only refers to the actual property of the decedent. For example, in Tippett v. Tippett, Del. Ch., 7 A.2d 612 (1939), the Court was called upon to construe "estate" as that word was used in a will, and concluded that it meant "in a broad and comprehensive sense... all class of property belong to the testator." Id. at 617; see also In re Spicer's Estate, Del. Orph. Ct., 120 A.90 (1923); Harman v. Eastburn, Del. Ch., 76 A.2d 315 (1950). Our research has not uncovered any Delaware decision that expresses the logical corollary to this definition -- that while the term is often used loosely, an estate in fact has no independent legal existence. Cases in other jurisdictions, however, have so held, and it is the Committee's view they express the law of Delaware as well.

For example, in Tanner v. Best's Estate, 104 P. 2d 1084 (Cal. App. 1940), a

California Court of Appeals dismissed a lawsuit brought solely against an estate because in its view an estate could not be sued as a separate entity. As stated by the Court:

> "[the] 'estate' of a decedent is not an entity known to the law. It is neither a natural nor an artificial person. It is merely a name to indicate the sum total of the assets and liabilities of a decedent."

Id. at 1086. A similar view was expressed by the Supreme Court of Pennsylvania in Jones v. Beale, 66 A. 254 (Pa. 1907):

> "there is no such legal entity [as an estate]. It is a convenient phrase sometimes to identify the subject of litigation in the Orphan's Court, and in proceedings in rem it may be treated as a harmless superfluity."

Id. at 256; see also Webster v. State Mutual Life Assurance Co., 50 F. Supp. 11, 17 (S.D. CAL. 1943) (the term estate "is a word used to describe a condition of property and not to describe its owner").

Accordingly, we are of the view an "estate" has no legal existence, but instead describes the property and debts of a decedent. Given that conclusion, we do not believe an estate can be a "client" as that term is used under Rule 1.7, and the commonly used phrase "attorney for the estate" incorrectly describes the relationship existing between a lawyer and the executor. An attorney does not serve as an attorney for the estate; rather he or she serves as an attorney for the executor or other personal representative in that person's dealings concerning the estate of the decedent.

This conclusion is buttressed by other Delaware cases as well, although it should be noted these decisions also show evidence of the confusion engendered by the common, though

technically incorrect, use of the term to describe an estate as if it were an independent entity. For example, in Vredenburgh v. Jones, Del. Ch., 349 A.2d 22 (1975), an attorney in question was repeatedly referred to by the Court as the "attorney for the estate." Yet, the estate's executor, who was found liable for various breaches of fiduciary duty, sought contribution from the attorney for alleged professional negligence in the advice he rendered the executor. See 349 A.2d at 40-41. As the Court stated the matter:

> "[T]he basis for this claims is that in acting to acquire estate property for himself and in selling it to his friends and associates, [the executor] relied on the advice of [the attorney], and that consequently any liability to [the executor] for his action as executor must be charged to [the attorney]."

Id. at 40.

The Court held the attorney had not committed malpractice, but the nature of the inquiry demonstrates the Court assumed that the executor was the attorney's client, since, if the estate was his client then the attorney could have only been held liable for advice that injured the estate rather than the executor.*

· More problematic is the Court's recognition that the lawyer had a fiduciary duty to the estate. This raises the questions of what are the sources of this duty and how extensive is it? If the duty is seen as derivative of the lawyer's duty to the executor who is also a fiduciary to the ultimate beneficiaries, it is less troubling (if somewhat theoretically murky) than if it is seen as a direct duty to the estate, which would seem to imply both that the estate had an independent legal existence and that it was somehow the lawyer's client. If an estate is a distinct entity to which a direct duty is owed, however, then it is difficult to understand how the lawyer also owes a duty to the executor. Given the problematic nature of analyzing such questions, which deal with the fundamental definition of words, we believe it is appropriate to use a more functionally oriented analysis, which focuses upon the results the court is trying to reach. See, e.g., Katz v. Oak Industries, Del. Ch., 508 A.2d 873 (1986) (describing the problems inherent in

This view is supported in a number of other cases as well. For example, in In re Estate of Whiteside, Del. Supr., 258 A. 2d 279 (1969), the Court addressed the position taken by the New Castle County Register of Wills that commissions paid to an executor ordinarily would be expected to cover all attorney's fees as well. See also Chancery Court Rule 192 (establishing normal 11commission and fee allowable for the personal representative and attorney"). The Court held to the contrary. As stated by the Court: "[w]hen [an executor] is obliged in good faith to employ others in order to properly protect the interests of the estate, he is entitled to credit for them ... We are given no reason why an executor's commission should be affected simply because he finds it necessary to employ legal counsel." 258 A.2d at 282. (emphasis added).

The interesting point for present purposes is that both positions -- that of the Register and that of the Court -- seem to assume it is the executor who employs the attorney rather than the estate as an entity. The Register assumes -- and that is an assumption that appears to be built into Chancery Rule 192 as well -- that the executor should pay the attorney out of the executor's own commission, rather than from the estate. Under these circumstances,it would be clear the executor is personally paying for the attorney; if he does not hire an attorney his personal compensation increases. The Court disagreed that the fee should necessarily come from the executor's commission, but in its statements appeared to assume counsel was hired to assist the

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attempting to reach a conclusion purely through the application of formal logic to vaguely defined terms). Under such an analysis, the utility of holding that an attorney may, under the proper circumstances, be held accountable by the beneficiaries as well as by his client, the executor, would seem apparent. Such an analysis, however, might also lead to a conclusion that a lawyer should be seen to represent the interests of the beneficiaries at all times. The problems with that conclusion is it would be at odds with the case law and

executor in the executor's obligation to protect the estate. See also Bodley v. Jones, Del. Supr., 65 A.3d 484, 488 (1948) (attorney for the estate "rendered valuable service to [the executor]"); cf., Matter Of The Estate of duPont, Del. Ch., 376 A.2d 91, 94 (1977) (holding that an attorney, who serves as a co-executor, is entitled only to executor's commission and may not separately bill for time associates spent on the matter).

Thus, the Committee believes, based upon both the court decisions defining the word "estate," and the implications arising from their treatment of lawyers "representing estates," that the Delaware Courts would conclude an attorney "for" an estate represents (and indeed could only represent) the executor and not the estate as a separate entity. From this we draw the further conclusion that there is no conflict between the lawyer's representation of the executor when serving in such role and in his role as the donee of an inter vivos gift. We base this conclusion upon the fact that a lawyer represents a client, and not the underlying function that client performs. See, e.g. Rule 1.2. Thus while the executor might have an internal conflict of interest between his different roles, the lawyer has no such conflict because he represents the person and not the role. We note, however, that this conclusion leaves unresolved certain tensions relating to a lawyer's potential fiduciary duties to the beneficiaries of an estate. Although we have found no court decision that thoroughly explores those duties, they do appear to exist, and thus raise questions relating to the lawyer's conduct in relation to the beneficiaries. But, whatever the nature and extent of a lawyer's duties to a decedent's beneficiaries, we do not view them as rising to a level that would implicate a lawyer's duty of loyalty as expressed in Rule 1.7. Accordingly, we believe the attorney here may

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create an untenable position for the attorney.

properly represent the executor in his capacity as the donee of the inter vivos gift.*

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* In this Opinion, we have not addressed the fee arrangements between the attorney and the executor, although to the extent the attorney is representing the executor in the executor's capacity as the donee of the inter vivos gift, his fee should, of course, be paid by the executor personally.