

**DELAWARE STATE BAR ASSOCIATION COMMITTEE
ON PROFESSIONAL ETHICS
OPINION 1992-2**

February 3, 1992

**THIS OPINION IS MERELY ADVISORY AND IS NOT BINDING ON THE
INQUIRING ATTORNEY OR THE COURTS OR ANY OTHER TRIBUNAL.**

A member of the Delaware Bar ("Attorney") requested an opinion as to whether he may continue to represent a decedent's estate where he has been so requested by a successor administratrix, but where he reasonably believes the original administratrix has embezzled most of the estate assets. If the Attorney may continue to represent the estate, he wishes to know whether he may report the initial administratrix's embezzlement of funds to the criminal authorities. The relevant facts are as follows:

Decedent died intestate in April of 1990, leaving a brother and sister. Neither the brother nor the sister wished to act as administrator. Brother and sister asked that the brother's daughter ("Daughter") be appointed. The Daughter was subsequently appointed administratrix.

All assets of the estate were eventually consolidated into an estate bank account, with a partial disbursement of the proceeds of the sale of real estate being made to brother and sister. At that time, the Attorney was aware that there were sufficient funds to pay all remaining expenses of the estate.

When the time came to file the estate inventory, the Daughter refused to act. After failing to respond to a Motion for a Rule to Show Cause, the Daughter was removed as administratrix by Order of the Chancery Court. Daughter's sister was thereafter appointed as successor administratrix.

After filing the Inventory and Inheritance Tax Return, it was discovered that there were insufficient funds to pay certain bills and the inheritance tax. Additionally, the Attorney has

received copies of all bank records regarding the estate account. A review of these records made it clear that the initial administratrix had embezzled estate funds.

Finally, it is important to point out that Daughter had informed the Attorney, prior to the time she was removed as administratrix, of her unauthorized use of estate funds. It should also be noted that Attorney had previously represented Daughter in a minor personal injury action.

CONCLUSION

The Committee believes that Attorney may be disqualified from representing the successor Administratrix for two reasons. First, such representation would almost assuredly involve a conflict of interest with the Attorney's former client, the Daughter. Second, the Attorney would likely be required to act as advocate at a trial in which he would be a necessary witness. Both of these limitations on Attorney's representation of the estate would impede, or perhaps prevent, the prosecution of a civil or criminal action against Daughter.

The Attorney may avoid disqualification, however, if he retains outside counsel to prosecute a civil action against the Daughter. In addition, Attorney could avoid even the appearance of impropriety if he were to obtain Daughter's consent to representation of the successor administratrix.

Regardless of whether Attorney complies with the aforementioned recommendations and becomes counsel for the successor administratrix, he still may not report the Daughter's embezzlement to criminal authorities. Attorney could, however, give all confidential estate documents to the lawyer who he refers all or a part of the matter to. In addition, the successor administratrix could consent to the release of estate documents to criminal authorities.

ISSUES

The fundamental issues to be examined are:

1. Whether the Daughter is a "client" whom the Attorney represented?
2. Whether the Attorney may represent the successor administratrix in light of the fact that such representation might require Attorney to pursue criminal or civil sanctions against

Daughter and possibly require the Attorney to be a witness in a civil trial in which he also would act as advocate?

3. Whether the Attorney may report the Daughter's embezzlement to criminal authorities?

DISCUSSION

Issue 1

A client is "a person who employs or retains an attorney or counsellor, to appear for him in courts, advise, assist and defend him in legal proceedings and to act for him in any legal business." Black's Law Dictionary 230 (5th ed. 1979). Under Rule 502(a)(1) of the Delaware Uniform Rules of Evidence, a client is a "person . . . or other organization or entity . . . who is rendered professional legal services by a lawyer" The administrator or administratrix of an estate is charged with certain duties and responsibilities in the administration of an estate. See 12 Del. C., Ch. 15. An administratrix may hire an attorney to aid her in carrying out her duties. See Vrendenburgh v. Jones, Del. Ch., 349 A.2d 22 (1975) and Chancery Court Rule 192. See also In re Faust's Estate, Pa. Supr., 73 A.2d 369, 370 (1950).

In order to determine whether the Daughter was a client of the Attorney, the standard to be applied is a subjective one that focuses on the client's belief that such a relationship exists. Slusser v. Billet, 762 P.2d 350, 351 (Wash. App. 1988); In Re Petrie, 742 P.2d 796, 800-01 (Ariz. 1987); In Re McGlothlen, 663 P.2d 1330, 1334 (Wash. 1983); DSBA Ethics Comm. Opin. 1991-3 at 7. The reasonableness of the client's belief depends on the facts and circumstances of each case. In Re Petrie, 742 P.2d at 801.

In this case, in light of Attorney's prior representation of Daughter, and Daughter's frankness with Attorney, it is likely that Daughter reasonably believed she was Attorney's client, and it is likely that a Delaware Court would find Daughter to be Attorney's client under this subjective standard. An even more compelling reason for finding that Daughter was a client of

Attorney is found in the DSBA Ethics Comm. Opin. 1989-4, in which this Committee determined "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." Id. at 4. Consequently, Daughter must be considered to be Attorney's client, and for purposes of this opinion, it is not necessary for the Committee to determine whether the estate was also a client of Attorney.

Issue 2

Under the Delaware Lawyer's Rules of Professional Responsibility, a lawyer who has previously represented a client in one matter, is prohibited from representing another person in a substantially related matter in which the other person's interests are materially adverse to those of the former client. Rule 1-9(a). The comment to Rule 1.9 indicates that "[w]hen a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited."

Disqualification under Rule 1.9 is based on a facts and circumstances test. Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co., 632 F. Supp. 418, 423 (D. Del. 1986). This test, applied to the facts of this case, is as follows:

1. Did the Attorney have an Attorney-Client relationship with the Daughter?
2. Is representation of the successor administratrix the same, or substantially related to the matter the Attorney worked on for the Daughter?
3. Are the interests of the successor administratrix materially adverse to the Daughter's interests?
4. Did the Daughter consent to representation of the successor administratrix? See Nemours at 422.

In this case, the Attorney had an Attorney-Client relationship with the Daughter. See Discussion of Issue 1, supra. The test for determining whether a present matter is "substantially related" to a former matter is "whether it can reasonably be said that in the course of the former representation, the Attorney might have acquired information related to the subject matter of his subsequent representation." Jack Eckerd Corp. v. Dart Group Corp., 621 F. Supp. 725, 731 (D. Del. 1985), citing Richards v. Hamilton International Corp., 469 F.2d 1382, 1385 (3d. Cir. 1972), cert. den. 411 U.S. 986 (1973). Since it is reasonable to say that Attorney may have obtained information from representation of Daughter related to representation of the successor administratrix, the matters are substantially related. In addition, the interests of the successor administratrix would be materially adverse to those of Daughter. The successor administratrix would be duty bound to pursue recoupment of embezzled funds from Daughter.

Based on the foregoing, therefore, Attorney would be disqualified absent consent from Daughter. While the Daughter's consent to the Attorney's representation of the successor Administratrix would eliminate the Rule 1.9(a) prohibition, the Attorney might still be disqualified by reason of Rule 3.7.

In a civil proceeding instituted against the Daughter, Attorney would undoubtedly be a material witness. See Emerald Partners v. Berlin, Del. Ch., 565 A.2d 670, 677 (1980). Rule 3.7 of the Delaware Lawyers Rules of Professional Conduct provides that:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work a substantial hardship on the client.

In any civil action filed against Daughter, Attorney's testimony would likely be contested, his testimony would not relate to the nature and value of his legal services rendered, and his disqualification would not cause the successor administratrix a substantial hardship. Consequently, Attorney cannot act as counsel for the successor administratrix in a civil action against Daughter. In fact, the rules require that the Attorney not do so where, as here, "the representation will result in violation of the rules of professional conduct . . ." Rule 1.16(a)(1).

It should be noted, however, that all difficulties with Rules 1.9 and 3.7 could be avoided if the Attorney hired outside counsel to prosecute the civil action against Daughter. By hiring another attorney to pursue the recoupment of embezzled funds, the attorney would not be representing interests of the successor administratrix which would be materially adverse to the Daughter's interests¹. Attorney would simply be probating the estate, which is precisely the same interest he was representing on behalf of Daughter. In addition, Attorney would not be acting as an advocate at the trial in which he would be likely called as a witness.

This conclusion comports with the modern trend among courts to not disqualify counsel solely on the basis of an "appearance of impropriety." Nemours at 428. The Attorney, however, would have to adopt a "cone of silence" regarding confidences of the Daughter. Id. The "cone of silence" is appropriate in this case since the Attorney could farm out the litigation to another law firm and be physically removed from the civil action against the Daughter. In addition, the Attorney has manifested his intention to comply with all applicable ethical rules by coming to the Committee for advice. See Id.

¹ Of course, the question of material adversity is mooted if the Attorney obtains the Daughter's consent to represent the successor administratrix.

Issue 3

Regardless of whether Attorney complies with the aforementioned requirements and represents the successor administratrix, he cannot approach the criminal authorities regarding the embezzlement. In addition, Attorney may not reveal Daughter's inculpatory statement to the attorney to whom he refers the successor administratrix. Attorney's duty of confidentiality

towards the Daughter continues to run even after the representation has ceased. Comment to Rule 1.6. The release of confidential estate documents necessary to prosecute a criminal action, however, could be consented to by the successor administratrix, pursuant to Rule 1.6(a). Of course, the referral attorney would automatically have free access to estate documents for purposes of a civil suit against Daughter.

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