

Identifying your client

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Several recent admonitions issued by the Director's Office involved representation of a personal representative to an estate when that PR has some additional interest in the estate.

For example, it is not uncommon (though it may be ill-advised) for a testator to name as personal representative someone who also is a beneficiary of the estate. If the PR/beneficiary comes to believe that the wishes of the testator may not have been accurately stated in the testamentary instrument, then the desire to contest the will may come into conflict with the PR's fiduciary duty toward the estate. This situation becomes even more complex when multiple PRs, who are also beneficiaries, are named.

When a lawyer looks across his desk at his client, who may have conflicting duties, it is crucial that the lawyer always be able to clearly answer the question, "Who's my client?"

Recently, a case came to the attention of the Office of Lawyers Professional Responsibility in which a young lawyer was hired to assist a family after the death of a family member. Another lawyer in the firm had drafted a simple will for the decedent. That will named two of the children, both of whom were beneficiaries under the will, as co-personal representatives.

The lawyer did not execute any written fee agreement. He later said he didn't see any need to, as it appeared that all family members were in agreement as to the disposition of the assets and the matter would be handled on a flat fee basis.

Then, one of the siblings made her feelings known that she didn't think that the will reflected the testator's intent. There were tense meetings, attended by all of the siblings, in which one sibling indicated that she had been consulting with an attorney regarding her rights as a beneficiary. There were ever-growing disputes among the siblings about the disposition of small items of personal property.

At the first hearing date in the probate matter, one of the siblings appeared with new counsel and stated her intent to contest the will, much to the surprise of the young lawyer. He withdrew the day after that first hearing date, and one of the siblings filed a disciplinary complaint against him.

What steps could this lawyer have taken to recognize and avoid this complicated and uncomfortable situation?

A written fee agreement would have been a good first step. Reducing one's fee agreement to writing is

“preferred” though not required for most representations. (See MRPC Rule 1.5(b), which requires written fee agreements in the case of nonrefundable availability fees, and Rule 1.5(c), which requires written fee agreements in contingent fee matters.) However, the simple act of filling out the name of the client in that fee agreement and stating the scope of the representation serves several purposes.

First, it forces the lawyer to state the identity of his client. In the case above, the lawyer stated during the ensuing disciplinary investigation that he represented “the family.” Jokes about organized crime aside, is “the family” a legal entity? Who has the authority to sign a retainer agreement, or any other contract, on behalf of “the family?” When the client is “the family,” to whom does the lawyer owe his duty of communication? The lawyer’s failure to clearly identify his client was the seed that blossomed into a conflict of interest.

A second function of the written fee agreement is to provide some indication of the scope of the representation. Clearly defining that scope at the beginning of the representation can go a long way toward settling later disputes about what the lawyer did or did not promise to do. If the lawyer can answer the question of what he was hired to do, and by whom, the lawyer has taken the first step in identifying and avoiding conflicts.

The lawyer in the case above was issued a private admonition for representing clients with a concurrent conflict of interest without obtaining informed consent and a written waiver, in violation of MRPC Rule 1.7. If the lawyer had executed a written fee agreement at the beginning of the representation, and undertaken the critical thought necessary to identify the client and the services to be provided to that client, he may have been able to avoid a brush with the disciplinary system.