

You Do Not Represent the Estate

by

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Callers to the Office of Lawyers Professional Responsibility's advisory opinion service sometimes start a conversation with the words "I represent the estate."

While some attorneys likely just use this phrase as shorthand, other attorneys do not seem to understand that, in fact, they are not representing the actual estate but are representing the personal representative of the estate in his or her fiduciary capacity. It is important that lawyers understand this distinction because failure to do so may lead to violations of the Minnesota Rules of Professional Conduct.

Rule 1.2 of the MRPC allows attorneys to limit the scope of a representation. Because the personal representative of an estate also is frequently an heir of the estate, in representing a personal representative in his or her fiduciary capacities, the attorney must be clear about the scope of representation. Failure to define the scope of representation may lead to an impermissible conflict of interest if the personal representative's individual interests diverge from his or her responsibilities as a fiduciary.

As pointed out by the American College of Trust and Estate Counsel, it is important that lawyers advise personal representatives regarding her fiduciary role and the need for impartiality in handling the affairs of the estate.[Ftn1](#)

When there are co-personal representatives, a lawyer may endeavor to represent both fiduciaries; the lawyer must, however, advise both regarding the potential problems with joint representation.

For example, the fiduciaries need to understand from the beginning of the representation that all information received by the lawyer can be shared with the other fiduciary.[Ftn2](#) In other words, a lawyer cannot keep information from the other fiduciary merely because the one fiduciary asks him or her to do so. If the fiduciaries are unable to agree on a course of action or otherwise become in conflict with each other, the lawyer will most likely have to withdraw from the representation of both.

Another frequent issue that the Director's Office sees involves complaints which contain the phrase "the attorney for the estate."

These complaints usually go on to criticize the lack of communication on the part of the attorney; frequently such complaints come from a beneficiary of the estate. At the core of these complaints is generally a possible failure of a lawyer to comply with the requirements of Rule 4.3 of the MRPC because the lawyer did not recognize his or her capacity and has identified himself or herself as the attorney "for

the estate” rather than the attorney for the fiduciary. The lawyer has failed to fully explain his or her role and who he or she represents. While it may be important and in some instances desirable for the lawyer representing the personal representative in his or her fiduciary capacity to talk to the beneficiaries of the estate, it is important that the lawyer clearly identify his or her role.

To the extent there is a duty to communicate with beneficiaries, it is a duty of the personal representative. The duty of the lawyer to communicate does not extend beyond the client (the fiduciary) and it is important that beneficiaries understand this point.

When the beneficiary is unrepresented, pursuant to Rule 4.3, the lawyer must clearly identify his or her interest in the matter, identify where the interests of the lawyer’s client are adverse to the person the lawyer is speaking to, clear up any misunderstanding regarding the lawyer’s role, and not provide any advice other than telling the beneficiary to consult with an attorney of his or her own. Clear definition of the attorney’s role goes a long way to quell unrealistic expectations of the beneficiaries.

¹ American College of Trust and Estate Counsel Commentaries on the Model Rules of Professional Conduct, Fourth Edition, 2006, commentary on 1.2. The commentaries were created to provide further ethical guidance to trust and estate lawyers.

² See Comments 29-33 to MRPC Rule 1.7.