

L.E.O. No. 2007- 01

**POTENTIAL CONFLICTS OF INTEREST FOR ATTORNEYS
REPRESENTING PERSONAL REPRESENTATIVES IN
WRONGFUL DEATH CLAIMS**

Introduction

The Office of Disciplinary Counsel frequently receives requests for advice from attorneys, who represent personal representatives in the recovery of damages under the wrongful death act, regarding whether a conflict of interest exists if they continue to represent the personal representative when the apportionment of damages is disputed by one (1) or more of the beneficiaries. It is the opinion of the Lawyer Disciplinary Board that, while a conflict of interest does not necessarily exist, one may exist under certain circumstances. The Lawyer Disciplinary Board has addressed this issue several times in the past, and it seems to be a reoccurring controversy because there is often some ambiguity or confusion, perhaps in the minds of the lawyers as well as their clients, over whether the lawyer represents "the estate" (that is, the personal representative and all of the beneficiaries), or whether the lawyer represents the personal representative exclusively. Perhaps the practitioners describe their role as lawyer for "the estate" even when they only intend to represent the personal representative, or perhaps they just have not contemplated the distinction.

Rule 1.7 of the Rules of Professional Conduct provides as follows:

Rule 1.7. Conflict of Interest: General rules.

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes that the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Comment Section to Rule 1.7 provides that “[i]n estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.”

In *Maynard v. Adkins*, 193 W.Va. 456, 457 S.E.2d 133 (1995), the West Virginia Supreme Court, *in dicta*, cited to the ABA Formal Op. 94-380 which stated: “The majority of jurisdictions consider that a lawyer who represents a fiduciary does not also represent the beneficiaries[.]” See also *Trask v. Butler*, 123 Wash.2d 835, 872 P.2d 1080 (1994); *Succession of Wallace*, 574 So.2d 348, 357 (La. 1991). However, Justice McHugh, writing for the majority, then said “we . . . decline to address the complex issues concerning the scope of legal representation in estate matters. We leave a more extended discussion of the law in that area for another day”, *Maynard*, 193 W.Va. at 138, 457 S.E.2d at 461.

Nevertheless, the outcome of the case implied approval of the principle that the lawyer for the fiduciary does not automatically have an attorney/client relationship with the beneficiaries.

In *Maynard*, Mr. Adkins had been granted a new trial because the circuit court had found that it was improper for the attorney to litigate the personal injury action against Mr. Adkins while the attorney also represented the administrator of an estate of which Mr. Adkins was a beneficiary. However, the West Virginia Supreme Court reversed the lower court's decision by finding that

Where an attorney, as co-counsel, represented a plaintiff in a personal injury action and, in an unrelated matter, represented the personal representative of an estate of which the defendant was a beneficiary, the trial court abused its discretion in granting a new trial for the defendant upon those circumstances, where (1) the defendant attended neither the trial nor any pretrial proceedings with regard to the personal injury action and (2) the record revealed no discussion or meetings between the attorney and the defendant with regard to either the personal injury action or the estate matter.

Syl. pt. 3, *Maynard*, 193 W.Va. 456, 457 S.E.2d 133 (1995). The Court implicitly adopted the decision of the Lawyer Disciplinary Board in the related ethics violation proceeding, that there was no attorney/client relationship created between the lawyer and the beneficiary, and, therefore, there was no duty of loyalty and no conflict of interest.

Keeping in mind Justice Oliver Wendell Holmes' observation that "the life of the law has not been logic; it has been experience" (*The Common Law*, Lecture 1, Page 1, The Dover Edition, 1991), try as we might, we can never anticipate the myriad of factual circumstances


that may present themselves to the practitioner. Under various circumstances, he or she may choose to represent the personal representative exclusively, which we believe is generally the better course, or he or she may choose to represent “the estate” for reasons that he or she deems good and sufficient. If the latter course is chosen, the clients should all be advised of the hazard attendant to that course, which is that the attorney will be conflicted out of representing either the personal representative or any of the beneficiaries if the apportionment of damages is disputed, absent a bona fide consent and waiver from all parties.

In light of these considerations, the Lawyer Disciplinary Board recommends that when attorneys are engaged to pursue damages for wrongful death, they should explain the scope of their representation; *i.e.*, that he or she is counsel for the personal representative in his or her fiduciary capacity or attorney for “the estate”. Even if counsel has carefully explained that he or she represents the personal representative and not the other beneficiaries, and has not formally created an attorney/client relationship with the beneficiaries, if there are communications or conduct on the part of the attorney that creates an impression that the attorney represents the beneficiaries, or that communications between the attorney and the beneficiaries are confidential, then the attorney may disqualify him/herself from representing an adverse interest at the distribution stage or, at the very least, the attorney may be prohibited from using information obtained in communications against the beneficiary.¹

¹ See also; *Trail et al. v. Hawley, etc.*, 163 W. Va. 626, 259 S.E.2d 423 (1979), in which the Court held that: [h]eirs, who will be the ultimate beneficiaries of a wrongful death award, may bring a declaratory judgment action against the personal representative of the decedent’s estate to determine if the representative

In conclusion, unless and until the West Virginia Supreme Court of Appeals has the occasion to address this issue further, the Lawyer Disciplinary Board does not consider this to be a settled question and advises attorneys who are in this situation to proceed carefully from the beginning of their representation. They should clarify the scope of their representation to both the personal representative and to the other beneficiaries. They should not create the impression that an attorney/client relationship exists with the beneficiaries other than the personal representative, unless they specifically intend to represent both the personal representative and the other beneficiaries. If they choose the latter course, they should explain the potential conflicts of interest that may create to all parties.

APPROVED by the Lawyer Disciplinary Board on the 11th day of May, 2007.



David A. Jividen, Chairperson
Lawyer Disciplinary Board

is acting in consonance with his or her fiduciary duty to the heirs when a real controversy over matters relating to the prosecution of a wrongful death action exists.