

BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 10-03 Topic: Conflict of Interest

Digest: It is not unethical for a lawyer, when acting as executor of an estate, to engage separate counsel and sue a former client of the lawyer for damages resulting from injuries suffered by the decedent; however, the lawyer-executor remains obligated to preserve the former client's confidences.

Rules: 1.6, 1.7, 1.9, and 3.7

QUESTION

May a lawyer, acting as the executor of an estate, engage separate counsel to commence an action on behalf of the executor against a former client, for damages resulting from injuries suffered by the decedent?

FACTS

This opinion assumes the truth of the following facts.

Pursuant to the terms of her deceased mother's probated will, a lawyer was appointed as executor. The lawyer and her siblings are also beneficiaries of the will.

The deceased mother's estate has a potential medical malpractice claim against her treating physician and the hospital that provided healthcare services to her before her death. The lawyer never represented the hospital but did previously represent the physician in a matter that involved efforts by the hospital to limit the physician's privileges based on other incidents. None of the transactions and occurrences involving the lawyer's mother were at issue in the lawyer's representation of the physician. The physician is not currently a client of the lawyer.

The lawyer plans to engage separate counsel to represent her as executor in pursuing the claim for medical malpractice against the hospital and the physician.

In addition to her roles as the former attorney for her mother's physician, the executor of her mother's will, and a beneficiary of the estate, the lawyer also expects to testify as a witness on behalf of the estate and describe her observations when she accompanied her mother to the hospital and her interactions with her mother's healthcare providers, including the physician, concerning her mother's care.

OPINION

Rule 1.7 of the New York Rules of Professional Conduct sets forth rules relating to conduct by a lawyer in representing differing interests. The rule regulates the conduct of lawyers acting in their capacity as lawyers. It refers to situations in which “a lawyer shall not represent a client” and where “the lawyer’s professional judgment on behalf of a client will be adversely affected,” with stated exceptions in which “a lawyer may represent a client” (emphasis added). See also, Rule 1.9 (Duties to Former Clients), comment [1], stating that, under this rule, “a lawyer has certain continuing duties with regard to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules” (emphasis added).

When acting as executor, the lawyer is not acting as a lawyer and is not representing a client. As noted above, the Rules of Professional Conduct generally relate to actions by a lawyer in her capacity as a lawyer and do not regulate conduct by an executor as a potential litigant. Moreover, in the facts assumed here, the former representation related to incidents other than the transactions and occurrences involving the decedent. Although not entirely free from doubt, it appears from the assumed facts that the present claim by the estate is not “the same or a substantially related matter” within the meaning of Rule 1.9.

Thus, the New York Rules of Professional Conduct relating to conflicts of interest do not prohibit the lawyer, acting as executor, from commencing an action against the physician she previously represented in the other matter. Since this situation does not give rise to a conflict of interest as described in the rules, those rules do not require the lawyer-executor to obtain the consent of the beneficiaries or the consent of the former client, either to accept the role of executor or, as executor, to assert the claim of the estate.

Similarly, Rule 3.7 (Lawyer as Witness) refers to situations in which a lawyer should not act as both a witness and an advocate. According to the assumed facts, the lawyer plans to engage separate counsel and would not be acting as an advocate in pursuing the estate’s claim against the former client.

Notwithstanding the absence here of a conflict of interest as defined in Rules 1.7 and 1.9(a) and (b), the lawyer remains obligated to protect the confidences of the former client pursuant to Rules 1.6 and 1.9(c), and the lawyer must adhere to those obligations even if, as executor, she becomes the plaintiff in an action against her former client, and even if, as a witness, she testifies on behalf of the estate against her former client.

This opinion does not address situations where (a) the lawyer’s client is a current client rather than a former client; (b) the former representation was the same as, or substantially related to, the estate’s claim, or (c) the executor intends to assert the claim without retaining separate counsel for the estate. This opinion also does not address any questions of law concerning the qualifications, eligibility, and duties of executors, which lie outside the scope of the Rules of Professional Conduct.

CONCLUSION

A lawyer, when acting as executor, is not ethically prohibited from engaging counsel to commence an action against the lawyer's former client for damages resulting from injuries suffered by the decedent. However, the lawyer-executor must continue to maintain the former client's confidences under Rules 1.6 and 1.9(c), and may not use such confidences to the disadvantage of the former client, except as may be permitted by those rules.