

11/19/91

N. H. ETHICS OPINIONS ANNOTATED

FO 1987-88/9

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1987-88/9
Ethical Considerations in Attorney-Fiduciary Role
(Dual Capacity; Conflict of Interest; Fees)
September 15, 1988

RULE REFERENCES:

- *Rule 1.4
- *Rule 1.4(a)
- *Rule 1.4(b)
- *Rule 1.5
- *Rule 1.5(a)
- *Rule 1.5(b)
- *Rule 1.7
- *Rule 1.7(a)
- *Rule 1.7(b)
- *Rule 1.8(a)
- *Rule 1.8(c)
- *Rule 2.1

CODE REFERENCES:

- *DR2-106(a)(b)
- *DR5-101(a)
- *EC2-17
- *EC5-2
- *EC5-6

STATUTORY REFERENCES:

- *RSA 7:19
- *RSA 506:7
- *RSA 547:3
- *RSA 551:3
- *RSA 564-A:3(III)(x)

SUBJECTS:

- *Adverse Effect on Professional Judgment
- *Adverse Representation
- *Attorney-Client Relationship
- *Conflict of Interest
- *Client Communications
- *Estates
- *Fees
- *Probate
- *Wills

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ANNOTATIONS:

Subject to significant ethical restraints and concerns, an attorney may act as a fiduciary, and may charge for fees rendered in both capacities, when the transaction is fair and equitable to the client. (Rules 1.7; 1.8(a); 1.8(c))

There is an immediate duty of disclosure to the client if an attorney may become a fiduciary, as to the various duties of a fiduciary and the fee generation and fee charging of the attorney-fiduciary. (Rules 1.4; 1.4(a); 1.4(b))

An attorney may not represent a client if named as a fiduciary in a will or trust, unless the representation will not be adversely affected, and the client consents after consultation and with knowledge of the consequences. (Rules 1.7; 1.7(b); 1.8(a))

The lawyer must insure that, in acting as fiduciary-attorney, he or she can at all times continue to exercise independent professional judgment and render candid advice. (Rule 2.1)

A fiduciary-attorney cannot charge or collect an illegal or clearly excessive fee. (Rules 1.5; 1.5(a))

Legal fees charged by a fiduciary-attorney, are subject to ethical restraints and considerations, as well as where required, judicial review and approval. (Rule 1.5)

I. QUESTIONS:

1. Under our Rules of Professional Conduct, is an attorney-fiduciary prohibited from acting as the attorney for the estate, trust, etc?
2. What ethical mandates are to be considered by any attorney who contemplates acting as an attorney-fiduciary?
3. What, if any, ethical constraints or considerations are imposed upon an attorney-fiduciary in the manner in which fees are charged against the estate or trust?

II. FACTUAL BACKGROUND:

It is not uncommon in New Hampshire for an attorney to act as a fiduciary (e.g., administrator, executor, trustee, guardian, conservator, or attorney-in-fact). Those concentrating in probate practice frequently find themselves called upon by their clients or their firm to act as a fiduciary in estate planning matters. In an active probate practice, it is not unusual for a client of long-standing to ask the attorney to perform as a fiduciary, by being named an executor or trustee (or alternate). This is usually preceded by the attorney or the firm having handled the client's affairs for a number of years, being familiar with the client's needs and concerns, and with the client having the utmost faith in the ability of that particular attorney or firm. To such a client, an attorney having the legal expertise and experience in dealing with fiduciary matters may be a very attractive and comfortable candidate for the fiduciary role, which is of course an integral part of that client's estate plan. The practitioner in this area should previously have instructed the client as to the important functions that the fiduciaries named in the estate documents will perform.

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There are other instances where the attorney may be asked either by interested relatives or by court appointment to serve in other fiduciary capacities (e.g., guardian or conservator). Once acting as a fiduciary, the attorney may typically utilize the services of the attorney's office, which will then become a charge against the estate, trust, ward, etc.

While there are many areas which might subject fees charged by an attorney-fiduciary to close scrutiny (e.g., probate court's review of accounts), there will be other situations where no formal court or administrative supervisory review is involved (e.g., non-charitable inter vivos trust).

The manner in which an attorney-fiduciary may charge for fees rendered as an attorney by himself or herself or the law firm with which the attorney is associated (which hereafter will simply be referred to as attorney charges) may vary from practice to practice, but typically involves one or more of the three following scenarios:

1. Where the attorney-fiduciary charges separately on any fiduciary accounting for attorney charges, apart from other general fiduciary services or compensation;
2. Where the attorney-fiduciary simply charges a straight fiduciary fee or compensation without breaking out or charging separately for attorney charges; or
3. Where the attorney-fiduciary charges an hourly rate for all services rendered, whether they be strictly legal services (that a non-attorney-fiduciary would otherwise have an attorney's office prepare), or non-legal services (e.g., collection of assets, payment of debts, investment, administrative, or other typical functions of a fiduciary), so that all work performed by an attorney-fiduciary is charged at an hourly rate.

The scope of this inquiry is intended to include any factual pattern where an attorney-fiduciary is charging, or including in such charges, work performed by the attorney or the attorney's office for related legal services.

III. ATTORNEY AS FIDUCIARY: NO ETHICAL PROHIBITION

All of the bar associations that have, through their ethics committees, considered the issue of an attorney acting as fiduciary under the ABA's Model Code of Professional Responsibility (a version of which was in effect in New Hampshire until February 1, 1986) have upheld the ability of the attorney to act as fiduciary and charge for fees rendered in both capacities, see, e.g., Alabama Op. 86-82, and Op. 81-105; Nebraska Op. 81-5; Philadelphia Bar Association Op. 86-39; Oklahoma Op. 298 (Feb. 28, 1981). Each of these opinions was founded upon the Code of Professional Responsibility, and the cited provisions dealt primarily with excessive fees (DR2-106(a) (b), and EC2-17), maintaining independent professional judgment, and avoiding areas that might be affected by the attorney's own financial, business, property or personal interests (DR5-101(a), EC5-2, and 5-6).¹

Another concern often stressed in these ethical opinions is that the attorney must give careful consideration to limiting charges to reasonable fees for services rendered (Oklahoma Op. 298; Nebraska Op. 81-5).

New Hampshire's present Rules of Professional Conduct (effective February 1, 1986, and based upon the ABA Model Rules of Professional Conduct) are virtually silent with respect to the attorney-fiduciary role. However, a prior Ethical Consideration (EC 5-6), under the Code of Professional Responsibility, cogently addressed the issue:

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A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

This ethical consideration, however, was not embodied in the recently adopted Rules of Professional Conduct (hereafter, "Rules"). Apparently, it was felt by the drafters that this issue was adequately covered by the general conflict-of-interest rules (Rules 1.7, and 1.8(a)) which prohibit a lawyer from entering into a business transaction with a client unless the transaction is fair and equitable to the client.

The only specific reference in the present Rules to this general area of practice is Rule 1.8(c), which provides that

[a] lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.²

On May 6, 1973, the American Bar Association's Real Property, Probate and Trust Law section endorsed a statement of principles regarding probate practices and expenses, which was adopted by the House of Delegates in August 1975. The fourth principle states as follows:

Even if he is the sole personal representative, an attorney may serve both as a personal representative of a decedent's estate and as counsel to the personal representative, and may receive reasonable compensation for his aggregate services and responsibilities.

This principle, however, has been characterized as being motivated more to perpetuate profit instead of remedying public criticism of the legal profession in the estate area, see, Louis D. Laurino, "Legal Fees and Administration," ALI-ABA Course of Study, Post-Mortem Planning and Estate Administration (1986).

In conclusion, the present Rules do not prohibit an attorney from acting as fiduciary. However, there certainly are significant ethical restraints and concerns of which an attorney acting as fiduciary should be cognizant, which are addressed in the balance of this Opinion.

IV. ATTORNEY AS FIDUCIARY: DUAL CAPACITY, CONFLICTS, AND INDEPENDENT JUDGMENT

Because the attorney expects remuneration for his or her legal services, either directly as a fiduciary, or as the attorney to be employed by the estate or other entity, there is at the very least a potential for a conflict of interest arising as a result of the attorney's dual capacity. At the time of the drafting of the will or other estate planning document, the client obviously is the testator (or, of an inter vivos trust, the grantor). In order to fulfill the lawyer's duty to keep the client reasonably informed (Rule 1.4(a)) and the duty to explain the legal and practical aspects of any will or estate planning document as "reasonably necessary to permit the client to make informed decisions" (Rule 1.4(b)), it becomes necessary for the attorney to explain to the client the various duties of a fiduciary, the fees that can be generated by a fiduciary, and how that prospective attorney-fiduciary intends to charge for legal and non-legal services. Rule 1.4, therefore, imposes an immediate duty of disclosure at the very moment that it is contemplated that the attorney may become a fiduciary.

When a lawyer is named as a fiduciary in a will or trust, the lawyer anticipates benefiting from that position and acquiring his or her "own interest" (in the parlance of Rule 1.7) as that fiduciary. Rule 1.7(b) specifically prohibits a lawyer from representing a client "if the representation of that client may be materially limited . . . by the lawyer's own interests, unless: (1) the lawyer reasonably believes the

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representation will not be adversely affected; and (2) the client consents after consultation³ and with knowledge of the consequences. . . ."

The attorney should also clearly focus at all times on exactly who the "client" is. The ABA Model Code Comments, under Rule 1.7, Other Conflict Situations, point out this potential for confusion as follows:

In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is a fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship involved.

In the typical estate situation, most attorneys in this state appear to view themselves as being the attorney for the fiduciary-client, and not necessarily for the estate, although there appears to be no common or statutory law or court rule clearly defining this role. When the attorney-fiduciary contracts to perform legal services, it could well be argued that the attorney-fiduciary is entering into a business transaction, or acquiring some type of pecuniary interest potentially adverse to a client thereby invoking Rule 1.8(a).⁴

The dilemma facing the attorney-fiduciary, in fulfilling his or her obligation under Rule 1.8(a), is, whom must the attorney consult with and obtain consent from if the "client" is defined as the same person as the attorney-fiduciary? The only logical way to resolve this dilemma is to assume that whatever business transaction the attorney-fiduciary may be entering into occurs at the very drafting of the instrument at which time he or she would have an opportunity to consult with the "client" (e.g., testator) and obtain consent. In those cases where the client cannot consent (e.g., a ward in a guardianship), and especially under unusual circumstances that would generate extraordinary legal fees or expensive litigation, then court approval should be obtained.

In analyzing Rules 1.7(a) and 1.8(a), the lawyer must also insure that, in acting as a fiduciary-attorney, he or she can at all times continue to "exercise independent professional judgment and render candid advice" as required under Rule 2.1. Even when there is no reasonable expectation that a client's interest may be adversely affected at the formation of the attorney-fiduciary role, innumerable circumstances could arise during the continuance of that role that could significantly affect an attorney's independent judgment, thereby disqualifying him or her from acting in a specific matter (e.g., a claim of the estate against another client of that attorney) or perhaps even from further acting as that fiduciary either temporarily or permanently (e.g., if the estate discovers a malpractice claim against the attorney's firm). In short, the attorney must be extremely sensitive to developments and circumstances as they may arise.

Recently the Connecticut Bar Association Committee on Professional Ethics, Informal Opinion 88-5, examined the sensitive fiduciary-attorney role where an attorney was acting as an attorney-in-fact, under a power of attorney with the authority to sell real estate. In the event of sale, the attorney was entitled to receive a two percent commission. The Committee reaffirmed its earlier opinion (87-10) involving an executor attorney acting as the lawyer in effectuating the sale of the estate's real property, and it found that there was no absolute ethical prohibition against collecting such fee. However, it urged that caution was clearly necessitated as a result of Rule 1.7(b). The Committee further noted that, in the lawyer's efforts to bring about a sale, he might also violate Rule 2.1, requiring the lawyer to exercise independent professional judgment and render candid advice. Concern was also expressed that the two-percent fee could be considered excessive depending on the particular circumstances of any given sale of real estate (Rule 1.5).

These and similar considerations mandate care on the part of any lawyer drafting estate documents to consult with and inform the client about the role the lawyer will assume as fiduciary and the fees he or she may thereby earn and charge. This is perhaps best summarized by Louis D. Laurino, op. cit.:

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Because of the confidential relationship, the lawyer is duty bound to fully explain to the testator the functions of an executor and more importantly the commissions an executor would be allowed for performing. It is also a lawyer's duty to explain that the executor may have an attorney to help probate the estate and where permitted by statute or decisional law, the attorney/fiduciary will retain himself or herself and will be paid fees in both capacities. The failure of this minimal effort to fully inform is unethical and should be recognized and condemned as such.

V. FEES CHARGED BY AN ATTORNEY-FIDUCIARY:

Assuming there is no legal impediment to a fiduciary employing (or continuing to employ) himself, herself or the attorney's firm as an attorney (and being mindful that this issue has not been directly decided by the New Hampshire Supreme Court⁵ and no opinion is being rendered by this Committee), the attorney then is guided by Rule 1.5 and by general New Hampshire probate practice, in the fees he or she is entitled to charge. Rule 1.5(a) prohibits a lawyer from charging or collecting an illegal or clearly excessive fee.⁶

The ABA Model Rules, Comments, under "Disputes over Fees," also provides the following:

Law may prescribe a procedure for determining a lawyer's fees, for example in representation of an executor or administrator, a class or person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with prescribed procedure.

Under New Hampshire probate practice, a fiduciary (including an administrator or executor, conservator, guardian, or testamentary trustee) must file periodic accounts with the probate court. These accounts specifically itemize separate charges for fiduciary commissions and attorneys' fees. The probate courts, in reviewing commission charges and attorneys' fees, are guided by the "Probate Court Fee Guidelines,"⁷ which sets forth guidelines for the combined fees of fiduciary and attorney (amended January 16, 1981). Paragraph 4 of this schedule provides:

[i]f the fees submitted exceed the percentage above the attorney and fiduciary have the burden of showing that fees are reasonable under the circumstances, and should furnish an itemized statement of services rendered, the fee for each service and an itemized list of expenses.

Paragraph 5 states that: "[a]ll fiduciaries and attorneys should be prepared at all times to justify any fees submitted, either within the maximum fee schedule or in excess of the schedule."

Attorney's fees paid in a probate estate are within the jurisdiction of the probate court as a matter relating to the settlement and final distribution of the estate, RSA 547:3, In re Bergeron Estate, 117 N.H. 963, 966 (1977). In the Bergeron case⁸ the Supreme Court stated: "[t]he determination of reasonable compensation for the attorney was a matter resting within the sound discretion of the probate court," id. at 967; McInnes v. Goldthwaite, 94 N.H. 331, 337 (1947).

Many practitioners in this state closely adhere to the probate court guidelines, acknowledging that in modest estates they may not be compensated for the actual work done and services rendered in the estate but that this is compensated for in larger estates (using the analogy of contingent fee cases). Criticism is leveled by probate judges saying that these guidelines are just that, guidelines, and in no event should be viewed as minimum allowable fees. The discretion in approving both fiduciary commissions and attorneys' fees, however, rests with the probate court (in those situations involving accounts).

All charitable trusts are required to be registered with and provide periodic written reports to the Director of Charitable Trusts under the Attorney General's office, pursuant to RSA 7:19, et seq. The

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legislature has also recently enacted a procedure compelling an accounting of an attorney-in-fact acting under a power of attorney (RSA 506:7).

Consequently, required accountings filed by fiduciaries are subject to close scrutiny by the courts and, where applicable, the Director of Charitable Trusts. This, of course, does not alleviate the attorney's independent duty and ethical obligation to avoid illegal or clearly excessive fees (Rule 1.5). There are no definitive guidelines establishing any particular method of how an attorney-fiduciary should charge for legal fees or which one of the three typical scenarios outlined in section II above is most appropriate in any given situation. What is clear, however, is that the attorney-fiduciary under our present probate practice must justify all fees submitted as being reasonable, and under our ethical rules is prohibited from charging clearly excessive fees. The attorney-fiduciary charging fees should not rely solely on the court's "guidelines" but instead should be able to justify fees charged based on the particular facts of that estate. Whether or not an hourly-fee basis is adopted, clear record keeping by the attorney's office, for all time and services rendered, is essential and if the total commission and fees exceed the probate schedule, such an itemized statement of services rendered is required under present probate practice.

On the other hand, charging straight hourly rates in all instances may not necessarily be either reasonable or not excessive, depending, of course, on the particular facts and circumstances involved. Charging on an hourly basis will certainly not insulate the attorney from claims of having performed unnecessary legal work (as later determined by a probate court judge, for example), or being an inappropriate method or manner of billing for certain nonprofessional services.

While it may sometimes be practically difficult, keeping separate accountings for strictly legal work and fiduciary functions may also be appropriate.⁹

VI. SUMMARY:

While there are no ethical prohibitions against an attorney acting as a fiduciary and charging for legal services rendered by the attorney-fiduciary or the attorney's firm, the attorney is subject to close scrutiny from the probate court, the Director of Charitable Trusts (if applicable), the beneficiaries of any estate or trust, and the Professional Conduct Committee. Although any fiduciary under our law is held to a high standard of care in dealing with assets owned by others, the attorney acting as fiduciary is subjected even further to the additional ethical obligations imposed upon him or her by the Rules of Professional Conduct. At a minimum, an attorney, proposing to act as a fiduciary and intending to charge for legal services rendered in that attorney-fiduciary capacity, must (1) fully apprise the client (testator, grantor, etc.) at the outset of the ramifications of this role (pursuant to Rule 1.4); (2) carefully analyze not only the facts and circumstances of each potential nomination and appointment as a fiduciary, but also his or her ongoing conduct and performance as the fiduciary, to insure he or she can perform the duties without adversely affecting the client (which for this purpose may include the estate or trust and its beneficiaries) (Rule 1.7(b)) and at the same time continually maintain independent judgment (Rule 2.1); and (3) insure that fees charged for the attorney's services, both legal and non-legal, are not excessive (Rule 1.5). While there undoubtedly are many cases justifying an attorney serving a client in this role, it should not be assumed without great consideration on the part of the attorney and certainly not without first fully explaining the ramifications of the role to the client when drafting the instruments.

¹An illustrative opinion is Alabama Ethics Opinion 81 503, stating: "[a] lawyer acting as administrator of an estate may also perform legal services for the estate and receive fees for his services in each capacity. Although the code does not prohibit such an arrangement, a lawyer must insure that personal interests do not impair his exercise of independent professional judgment on behalf of a client. DR5-101(a); EC5-2, 5-6."

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²Similarly, with respect to will drafting, RSA 551:3 voids any witness signing a will who receives a "beneficial devise or legacy" under that will. An executor named in a will, however, is a competent attesting witness, as well as one named as a trustee, see e.g., Leonard v. Stanton, 93 NH 113 (1944).

³"Consultation" is defined in the ABA Model Code Comments as follows: "denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Under its Rules, the New Hampshire Comments further state: "[t]he lawyer must effectively communicate the risks and ramifications to the client. The sufficiency of information so communicated will depend on the actual knowledge and capacities of the particular client." It is noted, however, that in adopting the New Hampshire Rules of Professional Conduct, the Supreme Court of New Hampshire has not adopted or approved the ABA comments, the New Hampshire comments, or the Committee Notes to Decisions.

⁴Rule 1.8(a), Conflict of Interest: Prohibited Transactions, sets forth as follows:

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms in which the lawyer acquires the interest are: (i) fair and reasonable to the client, and (ii) agreed to by the client after consultation;
 - (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
 - (3) the client consents in writing to the essential terms of the transaction.

⁵The majority common law rule appears to be that, in the absence of a statute providing otherwise, an executor or administrator is not entitled to extra compensation for legal services rendered by the executor or administrator in connection with the estate, which is based upon the old common law rule that a fiduciary cannot profit by employing himself or herself, because in doing this he or she cannot perform one part of his or her trust, namely that of seeing that no improper charges are made. See Annotation, "Right of executor or administrator to extra compensation for legal services rendered by him," 65 ALR 2d 809, 811 (1958). A recognized exception to this common law rule is that where a will expressly directs that the executor-attorney shall render the legal services required in the administration, or where the will expressly stipulates that he or she shall receive extra compensation for his or her services, then he or she shall be entitled to extra compensation, id. at 810. There is, however, a strong minority view to the contrary, id. at 815; Re Estate of Hackett, 366 N.E.2d 1103 (Ill. App. 1977), arguing that usually money is saved by the dual services of the attorney executor, and that the best practice would be to include compensation for both legal and non-legal services in a single fee. No New Hampshire cases could be found specifically on point, and the legal issue presented does not appear to have been definitively decided in New Hampshire. As a matter of practice, however, New Hampshire probate courts have historically allowed attorney-fiduciaries to charge for legal services as set forth in their accounts. See also RSA 564-A:3,III(x) for statutory authorization for a trustee to employ trustee's own law firm.

⁶Rule 1.5(a) states as follows:

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

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- (3) the fee customarily charged in the locality for similar legal services.
- (4) the amount involved and the results obtained.
- (5) the time limitations imposed by the client or by the circumstances.
- (6) the nature and length of the professional relationship with the client.
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
and
- (8) whether the fee is fixed or contingent.

⁷Misnomered as "Probate Court Maximum Fee Schedule" on page 98 of the 1988 New Hampshire Law Directory and Daybook.

⁸This case specifically dealt with a claim for an attorney's contingency fee charged by the executor-attorney in a collection action brought before the superior court.

⁹An attorney, however, will often find himself or herself, even while representing an independent fiduciary, in the position of being called upon by that fiduciary (particularly when the fiduciary may be an out-of-state resident) to perform what otherwise may be deemed ministerial functions and not strictly legal services. In such instances, the attorney should engage in full disclosure of the ramifications of this work with the client, which should preferably be confirmed in writing (see, i.e., Rule 1.5(b)). Assessing hourly legal fees, in such a case, may be justification for significantly lowering or eliminating the fiduciary commission charged against the estate.