

June 2019 *Multnomah Lawyer Ethics Focus*

Estates and Trusts: Who Is the Client?

**By Mark J. Fucile
Fucile & Reising LLP**

One of the most fundamental questions in law firm risk management is: “Who is the client?” The answer is often more difficult than the question suggests—particularly in estates and trusts practice where there may be a mix of current and former fiduciaries, the estates and trusts themselves and various beneficiaries. In this column, we’ll look at two interwoven issues: (1) who is the client of a lawyer representing a personal representative or a trustee? and (2) who falls within the attorney-client privilege in those contexts?

Who Is the Client?

Defining the client is a core element of law firm risk management in any given representation because it tells us to whom we owe our principal civil and regulatory duties. Oregon State Bar Formal Opinions 2005-62 (rev 2016) and 2005-119 (rev 2016) create a “black letter” dividing line in Oregon. For estates, the opinions stress that the lawyer’s client is the personal representative. Opinion 2005-62 (at 1) summarizes Oregon authorities on this point and concludes: “Under Oregon law, a lawyer for a personal representative represents the personal representative and not the estate or the beneficiaries[.]” Opinion 2005-119 (at 5) takes the same approach for trusts: “[T]he lawyer for a trustee represents the trustee and not the trust or its beneficiaries.”

The OSB opinions also discuss two related nuances.

First, Opinion 2005-119 notes that when representing a fiduciary, the lawyer is representing that person (or, by implication, a corporate fiduciary). In other words, there is not “Mr. Smith, an individual” and “Mr. Smith, a fiduciary”—there is only one “Mr. Smith.” Opinion 2005-119 (at 2) puts it this way:

“Representing one person who acts in several different capacities is not the same as representing several different people.” It follows in the view of Opinion 2005-119 (at 2) that there can be no multiple client conflict in this situation because there is only one client: “Consequently, the current-client conflict rules in Oregon RPC 1.7 do not apply[.]” That is not to say that prudent lawyers shouldn’t define the scope of their representation under RPC 1.2(b)—for example, specifying in an engagement agreement that the lawyer is only representing our “Mr. Smith” as personal representative. But, for conflict purposes, there is only one “Mr. Smith.”

Second, Opinion 2005-62 finds that because an attorney represents the individual rather than the office, a lawyer who has represented one personal representative (or, by implication, a trustee) does not automatically represent a successor. Rather, Opinion 2005-62 treats them as two separate individuals. The opinion allows that—assuming there is no adversity between the two—a

lawyer could represent them sequentially. It cautions, however, that if there is adversity—using the example (at 3) of “[r]epresenting Second Personal Representative against First Personal Representative in First Personal Representative’s claim to recover fees and expenses”—then a former client conflict would exist under RPC 1.9.

Finally, although the OSB opinions draw “bright lines,” conflicts can still arise if lawyers blur them. The test in Oregon for whether an attorney-client relationship exists is twofold under *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990): (a) does the putative client subjectively believe the lawyer is representing the client? and (b) is that subjective belief objectively reasonable under the circumstances? If a lawyer representing a personal representative gave gratuitous legal advice to a beneficiary, the lawyer may have inadvertently taken on another client in the same matter with the potential risk of conflicts.

Privilege

Under Oregon Evidence Code 503(3), a personal representative succeeds to a decedent’s attorney-client privilege—subject to exceptions under OEC 503(4)(b) for claimants through the same decedent and 503(4)(d) where the lawyer who prepared an attesting document is also an attesting witness. By contrast, under OEC 503(1)(a) a personal representative or trustee is the “client”

for purposes of the attorney-client privilege on matters of, respectively, estate or trust administration. In *dicta*, the Court of Appeals in *Roberts v. Fearey*, 162 Or App 546, 553 n.3, 986 P2d 690 (1999), implied that a subsequent fiduciary would not automatically share privilege with a prior fiduciary on matters of administration.

Opinion 2005-119 addresses the difficult issue of whether a lawyer representing a fiduciary can reveal otherwise confidential information if the lawyer discovers that the fiduciary has committed fraud or an ongoing crime in administering the estate or trust. In doing so, the opinion (at 4-5) distinguishes between past and continuing wrongdoing:

“Lawyer cannot assist . . . [fiduciary] . . . in withholding or misrepresenting information she must disclose to the probate court . . . In fact, Lawyer would be obligated to seek leave to withdraw if not withdrawing would cause Lawyer to become directly involved in wrongdoing . . . In withdrawing, however, Lawyer cannot disclose . . . [fiduciary’s] . . . past wrong or other information protected by Oregon RPC 1.6.

“The result would be somewhat different if . . . [fiduciary’s] statements were not simply communications about past wrongs, but also communications of an intention an intention to commit a future crime . . . Lawyer could then ethically disclose the intention of . . . [fiduciary] to commit the crime and the information necessary to prevent it . . . As an ethics matter, however, disclosure in this case would be permissive rather than mandatory.”

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.