ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 91-2

Responsibilities of Attorney Representing Personal Representative of Estate When a Conflict Exists Between the Personal Representative and the Heirs of the Estate

The Committee has been asked whether an attorney representing the personal representative of a probate estate should advise the personal representative to seek independent counsel when there is a "conflict" between the personal representative and the heirs regarding settlement of the estate.

It is the opinion of the Committee that an attorney representing the personal representative of an estate is not prohibited from representing the personal representative in disputes with heirs. The attorney may not, however, represent the personal representative in such disputes if the attorney has obtained relevant confidential information from the heirs while acting for the personal representative; nor may the attorney assist or counsel the personal representative in conduct inconsistent with the best interests of the estate.

An analysis of the issue presented must begin by first considering the identity of the "client" being represented when an attorney is providing services related to the probate of an estate. There appears to be a tendency to consider the estate as an entity that is acting through the personal representative, and that the estate is therefore the client of the attorney, much the same as a corporation or other organizational client. However, while the estate is an entity for some limited purposes, such as taxation, it is for probate purposes a collection of assets rather than an organization, and is not an entity involved in the probate proceedings.

AS 13.16.410(21) provides, in pertinent part, that:

> [A] personal representative, acting reasonably for the benefit of the interested persons, may properly
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> . . .
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> (21) employ persons, including attorneys . . . even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties . . . .

There is no reference in that section or elsewhere in the probate code to the estate retaining the services of an attorney, nor to an attorney representing the estate. It is clear, therefore, that the attorney handling a probate proceeding is representing the personal representative and not the estate.

Opinions from other bar associations almost uniformly reach the same conclusion, and further advise that an attorney representing the personal representative in the probate of an estate is not precluded from also representing the personal representative in the representative's individual or personal capacity. For example, the Mississippi Bar Association found that counsel for an executor could represent the executor in a dispute with beneficiaries who took exception to the final accounting of the executor because the attorney represents the executor and not the estate. Opinion 46, 25 Mississippi Lawyer 9 (December 1978). In its Opinion No. 237, the Los Angeles County Bar Assn. determined an attorney for an administratrix of an estate might also represent the administratrix in her individual capacity as an heir in a contest with other heirs if the attorney has gained no relevant information from the other heirs while acting for the administratrix. The Alabama Bar expressed the opinion that an attorney can represent a client as administratrix of an estate and as creditor in her claim against the assets of the estate. Alabama Bar Assn., Opinion 83-167 (November 16, 1983).

A personal representative in Alaska is under a duty to settle and distribute the estate of the decedent in accordance with the probated will and applicable statutes as expeditiously and efficiently as is consistent with the best interests of the estate. The authority conferred by the statutes and court orders must be used by the personal representative for the best interests of successors to the estate. AS 13.16.350. The attorney for the personal representative has a duty to advise the client of actions deemed necessary for the proper administration of the estate and to refrain from counseling or assisting the personal representative in conduct the attorney deems inconsistent with the best interests of the estate. Opinion 512, New York State Bar Assn. (July 11, 1979). The attorney does not, however, have a duty to advise heirs or creditors of the estate, and is prohibited from informing beneficiaries or the court of facts that would be adverse to the personal representative, or from taking any position hostile to the personal representative's interests.

The opinions discussing the prohibition against disclosure of information adverse to the personal representative make it clear that a personal representative is entitled to the same protections and loyalty as any other client, notwithstanding the fiduciary relationship to the estate. The Bar Association of Greater Cleveland, for example, advised that an attorney for an executor who becomes aware, through information provided by the executor, of an asset that should be included in the estate, may not disclose that information to the beneficiaries or bring a declaratory judgment action against the executor on behalf of the child beneficiaries. If the executor refuses to include the asset in the estate, the lawyer was advised he must withdraw. Opinion 125 (September 2, 1976). Oregon State Bar Opinion 314 (February 1976) similarly holds that an attorney for the personal representative has no duty to disclose to beneficiaries that property they propose to select from the estate is worthless, but if the representative has the duty to make such a disclosure to do so and refuses, counsel should withdraw.

The Michigan Bar similarly held that an attorney who believed a co-representative he was representing was guilty of misconduct in managing the

estate could not reveal the alleged misdeeds to the other devisees of the estate, but could only withdraw. Opinion 47 (May 10, 1984). However, if information received by the attorney **clearly establishes** his client has perpetuated a fraud upon a person or a tribunal, the attorney must promptly advise the client to remedy the results of that fraud, and if the client refuses or cannot make the correction, the attorney shall reveal the fraud to the court and may reveal the fraud to the affected person. DR 7-102(B)(1). (See Rules 3.3(a)(2) and 4.1(b) of the Model Rules of Professional Conduct presently under consideration by the Alaska Supreme Court.)

An attorney for an administrator is prohibited from petitioning for the removal of the administrator who has become incompetent due to drug addiction, but was advised to notify the court and the administrator that he was withdrawing because the administrator's conduct rendered him unable to fulfill his obligations to the court in the orderly and timely closure of estates in probate. Oregon State Bar Association, Opinion 100 (October 1961). An attorney representing an executor in Virginia is not obligated to advise an estate beneficiary, whose interests are potentially in conflict with those of the executor, to seek independent counsel, but should advise the client that the conflict exists and that the executor should recommend that the other beneficiary retain independent counsel. Informal Opinion 239, Virginia Bar Association (no date).

The request to this Committee for this opinion expressed concern with the apparent unfairness if the estate paid the fees of the attorney for the personal representative in the conflict situation, while the other beneficiaries were required to pay their own fees. That result does not necessarily follow. Under AS 13.16.440, the court is authorized to determine the propriety of the employment of the attorney and the reasonableness of the compensation. To the extent attorney fees are incurred to protect the interests of the personal representative as a beneficiary or creditor of the estate, and not in furtherance of its administration, the personal representative is not entitled to reimbursement. Matter of Estate of Stephens, 117 Ariz. 579, 574 P.2d 67, 73 (1978); Estate of Riemcke v. Schreiner, 80 Wash. 2d 722, 497 P.2d 1319, 1327 (1972).

Approved by the Alaska Bar Association Ethics Committee on November 14, 1990.

Adopted by the Board of Governors on January 18, 1991.

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