

State Bar of South Dakota

Ethics Opinion 95-1

April 4, 1995

- *Rules: 1.2, 1.6, 1.7, 3.3*
- *Subject: Estate or administrator as client; Duty to heirs of estate*
- *Summary: Attorney hired by executor and paid by estate has obligations to executor, estate and beneficiaries.*

FACTS

A number of years ago, your partner performed estate planning work for a husband and wife. Husband had two daughters who were stepdaughters to the wife. When husband died, the stepdaughters, who were named as co-executrices of their father's estate, hired your partner to handle the father's estate. Before husband's death, wife became incompetent. Husband created a trust for the wife which trust was to terminate at the death of wife and any property in the trust was to be distributed to the stepdaughters.

After husband's death, stepdaughters petitioned the court to become stepmother's co-guardians. They assumed responsibility as co-guardians in September of 1986. Your partner had represented the stepdaughters at all stages of the proceedings and filed accountings on behalf of the stepdaughters until your partner's death in 1989. Thereafter, you were retained by the stepdaughters to file annual accountings.

The final accounting filed during the year 1994 reflected that the co-guardian stepdaughters had expended all of their stepmother's personal funds on her behalf. Since stepmother had been a long-term nursing home resident, the co-guardian stepdaughters fulfilled their obligation under the trust, contributing from the trust assets \$18,000.00 for the stepmother's care. As a result of stepmother's death and according to husband's will provisions, the trust terminated upon the stepmother's death and the balance of the trust funds were distributed to the stepdaughters as their own property.

Prior to the stepmother's incompetency, she executed a will which provided, among other things, that after payment of funeral expenses, debts, etc., the sum of \$10,000.00 was to be paid to her cousin (an individual not related by blood to father or stepdaughters).

At the time you were preparing the stepmother's final accounting, the individual identified as the cousin in stepmother's will called you and asked you whether or not stepmother had any assets remaining in her estate, as he believed he was named in her will to receive property. At that time, you advised the cousin that the stepmother had no assets in her estate since they were completely used up for her care and that, in fact, the sum of \$18,000.00 had been contributed by the stepdaughters from trust funds for stepmother's care.

Approximately one month after you spoke with the cousin, stepdaughter's advised you that stepmother had two old life insurance policies, each with the value of \$1,000. The original application on those insurance policies identified the deceased husband as the beneficiary of those policies. The policies were silent as to contingent beneficiaries. At the direction of stepdaughters,

you wrote the insurance companies asking them to advise as to whom the beneficiaries were under the policies. The insurance companies responded by informing you that since the primary beneficiary (stepfather) was deceased, the policy proceeds were payable to the stepmother's estate. After stepdaughters were advised of the insurance companies response, they advised you to do nothing further as far as attempting to collect the proceeds of the insurance policies on stepmother's life. Stepdaughters also directed you not to contact the cousin to advise him of the insurance policies. Stepmother's will identified and nominated stepdaughters as co-executrices.

You believe that even if the cousin were advised and obtained authority through the stepmother's estate to claim the insurance proceeds, the stepdaughters could seek reimbursement to themselves for having purchased a prepaid burial plan for the stepmother, as well as claiming trustee compensation which previously had been waived.

Based upon the above facts, you have posed the following question to this Committee:

Whether or not you have an ethical obligation under the South Dakota Rules of Professional Conduct to advise the cousin of the existence of the insurance proceeds that are assets of stepmother's estate.

### **OPINION**

The answer to your question depends upon a determination of who your client is in the above-described situation. This Committee addressed this issue in Ethics Opinion 92-8. In Ethics Opinion 92-8 this Committee stated as follows:

This is not an easy question to answer and the Rules of Professional Conduct does not provide a definitive answer to the question. According to the comment to Rule 1.7:

“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 the most common situation the client is the executor and the lawyer owes a duty to the executor. This is so because advising the executor how to act appropriately as a fiduciary is ultimately in the best interest of the estate and its beneficiaries. Your situation is not, however, the common situation as the possibility exists that the executor has engaged in conduct which may be not in the best interest of the estate and its beneficiaries. It is the opinion of this Committee that counsel employed by the executor, but paid with funds from the estate, has a duty to both the executor and the estate. This view is consistent with an earlier opinion of this Committee. See Ethics Opinion 87-1. The attorney's duty of loyalty runs to the executor as a primary client but also extends to the protection of the beneficiaries interests as secondary clients. Thus, it is the opinion of this Committee that the correct response for you is to make disclosure to the beneficiaries of what you currently know and what you learn from your investigation. Support for this position is found in Rules 1.2, 1.6, and Rule 3.3.

Based upon Ethics Opinion 92-8, it is the opinion of this Committee that if you believe the action which the stepdaughters have instructed you to take is not in the best interest of the estate and its beneficiaries then you have a duty to make a disclosure to the cousin of what you have learned

pertaining to the insurance policies. Whether the conduct of the stepdaughters is not in the best interest of the estate and its beneficiaries is a question that you must answer based upon all of the facts, including, but not limited to, the fact that if the stepdaughters could successfully make claim for reimbursement for the prepaid burial plan and for trustee compensation there would be no insurance proceeds payable to the cousin.

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State Bar of South Dakota