

Represent an Estate? Then Who's Your Client?



I'll bet a majority of lawyers in Tennessee have at some time uttered these words: "I represent the estate." Most likely, that was not an accurate statement. The crucial question when representing an estate is who, exactly, is your client? It is rarely if ever the estate, and almost always individuals.

Kudos to Steven J. Christopher of the Board of Professional Responsibility for his recent helpful and well-researched treatise addressing this very question under Tennessee law.[1] Estate lawyers should save it as a reference. This column will highlight a few of its key findings and provide supplemental commentary.

There are three legal theories as to whom you might represent, and all three theories are the law of the land in at least some states.

(1) Only the personal representative (PR) in his or her fiduciary capacity, since an estate is only a collection of assets and liabilities, akin to a bankruptcy estate.

(2) Both the PR and all the beneficiaries, with a primary duty to the PR but an essential secondary duty to the beneficiaries, akin to representing both an insured and an insurance carrier.

(3) The estate as a legal entity, with a primary duty to the PR as the entity's agent but a secondary duty to beneficiaries, akin to representing a corporation with its concurrent duties to officers and shareholders.

Without knowing which theory governs, almost anyone involved in an estate administration, whether PR, beneficiary or perhaps even a creditor, might reasonably infer that the "estate's lawyer" represents their interests as well or at least has duties on their behalf. The problem, of course, is that so many estate administrations contain some sort of inherent conflict.[2]

Historically, probate was court-supervised in order to deal with the reality that fiduciaries often faced so many conflicts of interest. The latter half of the 20th century saw a movement away from court supervision in order to reduce expense, nuisance and delay. Reforms such as the Uniform Probate Code accelerated the shift to more sim-

plified estate administration, allowing a PR considerable flexibility to carry on unless an interested party objected. This was a cost/benefit judgment by our legislatures that PRs should be trusted to uphold fiduciary duties even when conflicted, provided that aggrieved parties could bring issues to the court's attention as needed.

But this only highlights the importance of an attorney's need to know to whom he or she owes duties that could potentially be breached. Mr. Christopher's treatise analyzes how each theory affects the attorneys' duties such as confidentiality, attorney-client privilege, and how to handle concurrent representation.

Unfortunately (and perhaps oddly), the Tennessee courts and legislature have never adopted any one of these theories to the exclusion of the others. A majority of states have adopted the position that the only client is the PR as fiduciary, most likely because that theory seems to provide the clearest structure for defining and dealing with potential conflicts of interest in both theory and practice.[3]

What is needed is a thoughtful engagement letter for estate administration, presumably with the PR as the only client, or else spelling out how the lawyer will deal with any concurrent representations. While some lawyers may not always use engagement letters, the uncertain law in Tennessee suggests that estate administration is at least one situation where clarity is desirable in every case.

One source for an engagement letter in Tennessee is Albert W. Secor, 18 *Tenn. Practice*, Probate Law, Chapter 30, Forms 30:1 through 30:5. The last two forms specifically state that the attorney represents an individual only in their capacity as PR and not individually.

Perhaps the best source for a sample engagement letter is the website of the American College of Trust and Estate Counsel (ACTEC).[4] The sample form includes various optional clauses, but it specifically defines to whom you have duties and to whom you do not.

Always use these letters. Don't be the Alcibiades[5] of conflicts of interest.

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Notes

1. Steven J. Christopher, "Identifying the Client When Probating an Estate," *Board Notes*, Fall 2021, available at https://docs.tbpr.org/pub/board-notes-fall-2021-2nd-issue.pdf. Mr. Christopher is the deputy chief disciplinary counsel of investigations at the Tennessee Board of Professional Responsibility.

2. Common conflicts of interest may include any of these situations, but the variations are virtually endless: (1) the PR is also a beneficiary; (2) the PR is the surviving spouse who is not the parent of the decedent's children; (3) the PR or a beneficiary wishes to buy an asset from the estate; (4) the determination of a reasonable PR fee; (5) the existence of co-PRs; (6) the PR or a beneficiaryis a creditor or alleges a contract with the decedent; (7) the attorney discovers misconduct by the PR.

3. For example, effective July 1, 2013, new *Indiana Code* section 29-1-10-20 states, in relevant part, that "[e]xcept as otherwise provided in a written agreement between the estate lawyer and an interested person, an estate lawyer … represents and owes a duty only to the personal representative." The Indiana provisions apply only to estates, not to trusts. Perhaps the Tennessee legislature should consider a similar provision.

4. The ACTEC public website is www.actec.org. Click on Professionals, then Resources, then Engagement Letters, or else go directly to https://actecfoundation.org/trust-and-estate-professional-resources/engagement-letters-for-lawyers. Chapter 5 contains engagement letters for representing the PR. Also worth viewing on this website are the ACTEC Commentaries on the Model Rules. Click on Professionals, then Resources, then Commentaries, or else go directly to https://actecfoundation.org/trust-and-estate-professional-resources/professional-conduct-rules-for-trust-and-estate-practitioners. Attorneys should also be aware that representing a Trustee of a trust, or any fiduciary for that matter, may involve the same issues and the same need for a well-crafted engagement letter. The ACTEC website includes a form engagement letter for representing a Trustee as well.

5. Alcibiades (c.450-404 BC), was a prominent Athenian, raised by Pericles, tutored by Socrates, and considered the most handsome and persuasive man of his time. While leading a campaign against a Spartan ally in the Peloponnesian war, he was accused by some enemies in Athens of impious behavior, so rather than face trial, he defected to Sparta, where he aided Sparta in military victories over Athens. After seducing the Spartan king's wife, however, he defected to Persia, where he served as advisor to the satrap in harming both Athens and Sparta. Amazingly, he then negotiated a return to Athens, citing his influence with Persia to restore peace, and was made an Athenian general. His military losses led to exile, where he was assassinated by Persians. Despite apparent serial conflicts of interest, perhaps Alcibiades never had any real conflict if his only client was himself, a bad precedent for any attorney.

