

**INFORMAL NEBRASKA ETHICS ADVISORY OPINION  
No. 12-08**

A LAWYER IS NOT PROHIBITED BY CONFLICT OF INTEREST RULES FROM REPRESENTING A TRUSTEE WHO IS ALSO A BENEFICIARY OF THE TRUST WHEN THERE IS A DISPUTE WITH ANOTHER BENEFICIARY OF THE TRUST OVER THE VALIDITY OF A PROVISION OF THE TRUST.

**QUESTION PRESENTED**

HOW DO THE CONFLICT OF INTEREST RULES APPLY WHEN A LAWYER REPRESENTS A TRUSTEE OF AN EXPRESS TRUST IN A CONTESTED MATTER WITH A BENEFICIARY OF THE TRUST?

**FACTS**

A lawyer asks whether he is disqualified by conflict of interest rules from representing the trustees of an express trust in the following situation. The lawyer was employed by husband and wife to create trusts for each of them. The trusts name their children as beneficiaries upon their deaths. After the death of wife, husband employed a different lawyer to amend his trust. The amendment reduced the shares of the trust estate that would go to two of the children named as beneficiaries. The other two children, whose shares were not reduced, were named as successor trustees upon the death of husband. The trustees have employed the lawyer to provide legal services to them in their capacities as trustees.

One of the beneficiaries whose share was reduced by the trust amendment now disputes the validity of the amendment that reduced her share. She asserts, through her lawyer, that the trustees have a conflict of interest in any contest over her challenge because they are also beneficiaries. Presumably

a decrease in her share of the trust produces an increase in the shares to be received by the trustees in their capacities as beneficiaries. She also asserts that the lawyer cannot represent the trustees in an adversary action regarding the validity of the trust amendment because of the asserted conflict of interest that the trustees have.

The lawyer who presents the question has never provided legal services to either of the trustees personally, and has never provided legal services to the contesting beneficiary in any capacity.

### **APPLICABLE RULES OF PROFESSIONAL CONDUCT**

#### **§ 3-501.7. Conflict of interest; current clients.**

**(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**

**(1) the representation of one client will be directly adverse to another client; or**

**(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.**

**(b) Notwithstanding the existence of a concurrent conflict of interest under [paragraph \(a\)](#), a lawyer may represent a client if:**

**(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**

**(2) the representation is not prohibited by law;**

**(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same**

**litigation or other proceeding before a tribunal; and**

**(4) each affected client gives informed consent, confirmed in writing.**

## **COMMENT**

...

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under [paragraph \(a\)](#) and obtain their informed consent, confirmed in writing. The clients affected under [paragraph \(a\)](#) include both of the clients referred to in [paragraph \(a\)\(1\)](#) and the one or more clients whose representation might be materially limited under [paragraph \(a\)\(2\)](#).

...

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

## **DISCUSSION**

The beneficiary asserting a conflict of interest has never been a client of the lawyer in question, so rule 501.9, regarding conflicts with former clients, is not applicable. Rule 501.8 has specific rules applicable to current client conflicts but

none of them is relevant to this request. Therefore, the only possible rule of professional conduct that could apply is 501.7.

As suggested by comment [2] to rule 501.7, the answer to this inquiry requires identification of the client or clients whose interest may be affected by a conflict of interest. The rule only applies to relations between the lawyer and his own clients, not the clients of another lawyer.

Once the identity of the client is clarified, the answer to this inquiry becomes clear. There is no conflict because the only applicable rule concerns the relationship between the lawyer and the trustees, and no fact has been presented that suggests a conflict among them. 501.7(a)(1) states that a concurrent conflict of interest exists if representation of one client will be directly adverse to another client. That is not the case here, as there is no suggestion of adversity between the trustees themselves or between them and any other of the lawyer's clients. 501.7(a)(2) states that a concurrent conflict exists if the lawyer's representation of his clients will be materially limited by any of several other listed factors. There is no fact brought to the committee's attention that presents a question under any of those factors. The conflict that may exist between the trustees in their individual capacity and the unhappy beneficiary is irrelevant.

Therefore, none of the three rules that might possibly apply to these facts supports disqualification of the lawyer. The "appearance of impropriety" is not grounds for disqualification either. *Jacob North Printing v Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010).

Neither is the lawyer in a conflict simply because he represents trustees who are also beneficiaries of the trust. Under the Nebraska Uniform Trust Code the trustees are under a duty to administer the trust according to its terms. Neb. Rev. Stat. §30–3869. The terms of the trust prevail except on specified topics, none of which is presented in this request. Neb. Rev. Stat. §30–3805. And there is no doubt that the trustees are allowed to employ the attorney of their choosing

to obtain advice and representation in their management of the trust. With that being the case, the lawyer employed by the trustees has no conflict of interest simply because his clients seek to enforce the trust according to its terms contrary to the desires of one of the beneficiaries.

### **CONCLUSION**

A lawyer is not prohibited by conflict of interest rules from representing a trustee who is also a beneficiary of the trust in a when there is a dispute with another beneficiary of the trust over the validity of a provision of the trust.