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Recent Developments in Risk Management

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Representing the Estate Executor – Ethical Duty – Confidentiality – Withdrawal

New York State Bar Association Ethics Opinion No. 1194

Risk Management Issue: Does a lawyer for an estate executor have an ethical duty to the estate's beneficiaries? What disclosures or other steps, if any, is a lawyer permitted and/or required to make if the lawyer suspects wrongdoing by the client executor?

The Opinion: In a June 11, 2020 opinion, the New York State Bar Association's Committee on Professional Ethics considered the following estate-related topics: (1) whether a lawyer representing an estate's executor owes ethical duties to the estate's beneficiaries; (2) whether an executor's lawyer may withdraw if the lawyer suspects wrongdoing by the executor; (3) what disclosures the executor's lawyer is required or permitted to make in that circumstance; and (4) how to treat the executor's fee after a withdrawal.

In the matter at issue, the lawyer represented an executor in the probate of an estate. The decedent's will provided for a gift to the executor, but left most of the decedent's estate to charitable organizations. After the probate petition was filed, the lawyer learned of the existence of a transfer-on-death designation, which gave the executor a significant portion of the decedent's estate.

In New York, TOD designations do not necessarily require the involvement of an attorney or witnesses. This particular TOD designation was created after the decedent's will. Thus, many of the decedent's assets that would have been distributed to charities were instead be transferred to the executor. In fact, before the lawyer knew about the TOD designation, the executor had already transferred funds into the executor's own account.

The executor gave the lawyer conflicting explanations regarding how the decedent executed the TOD designation. The lawyer repeatedly requested a copy of the TOD designation, but the executor refused to provide it. Furthermore, the lawyer had reason to believe the executor would not disclose the TOD distribution to the court. In the lawyer's opinion, both the court and the New York Attorney General's Charities Bureau would consider such an omission to be misleading and fraudulent.

Based on these circumstances, the lawyer stated an intent to withdraw from representing the executor, and returned the advance fee payment. The executor directed the lawyer to keep the fee because it was earned; however, the lawyer refused to do so.

In responding to the lawyer's inquiry, the Committee referred the lawyer to a prior ethics opinion, NYSBA Ethics Op. 1034, where the Committee opined that an executor's lawyer owes no duty to the beneficiaries of an estate. The Committee avoided comment on whether privity with the estate lawyer is required for an heir to have standing to bring a legal malpractice case against the lawyer.

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With respect to the lawyer's withdrawal from the representation, the Committee concluded that the lawyer had the right to withdraw from the representation, based on RPC 1.16, which permits and—in certain circumstances—requires a lawyer to withdraw from representing a client. According to the Committee, several of the circumstances enumerated in 1.16 permitted the lawyer to withdraw, including where: (1) the client insists upon taking action with which the lawyer fundamentally disagrees; (2) the client fails to cooperate in the representation or makes the representation unreasonably difficult for the lawyer; or (3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent. In addition, the Rules require the lawyer to withdraw if the lawyer's continued representation would result in a violation of any of the Rules of Professional Conduct or of the law.

As to the lawyer's duty to make disclosures regarding the executor's conduct, the Committee cited Rules 1.6 and 3.3, which, respectively, require a lawyer to maintain client confidentiality and take remedial measures when the lawyer knows a client is engaging—or intending to engage—in criminal or fraudulent conduct related to a proceeding before a tribunal. Those remedial measures may include disclosing confidential information about a client's fraudulent intentions or actions.

The question here is whether this lawyer had the requisite knowledge of the client's intent to commit fraud on the court. First, the lawyer needed to determine whether the client's omission of the TOD designation would be fraudulent or criminal conduct; the Committee did not speak to that legal issue. But, even assuming that omission was fraudulent or criminal, the lawyer only had a "suspicion" that the client would keep the TOD designation from the court. According to the Committee, the lawyer must *know* that the client will omit the fact in order to trigger the lawyer's duty to engage in remedial measures, including potential disclosure to the court.

Even if RPC 3.3 did not mandate disclosure to the court, the lawyer could still make a disclosure under RPCs 1.6(a)(3), 1.6(b)(2), or 1.6(b)(6). Those Rules permit, but do not require, disclosure where a lawyer "reasonably believes" that disclosing the information is "necessary" to "prevent the client from committing a crime" or if it is required by "law or court order." This situation assumes that the client's omission of the TOD designation constitutes a crime, fraud, or other violation of law.

Finally, with respect to the advance fee, the Committee indicated that the lawyer was free to keep the funds, donate them to one of the estate's beneficiaries, or donate them to a charity of the lawyer's choosing.

Risk Management Solution: Where a lawyer represents the executor of an estate and believes that the executor may be acting fraudulently or criminally, the lawyer owes no duty to the estate's beneficiaries and may withdraw pursuant to RPC 1.16. The lawyer has a duty to disclose confidential information to the court only when the client's intended actions in the proceeding constitute criminal or fraudulent conduct, if other remedial measures have failed, and if the lawyer knows the client has engaged—or will engage—in such conduct. The level of knowledge required is quite high. When faced with this difficult situation, lawyers should carefully review their state's version of the Rules and related comments, and consult with general or ethics counsel.

Legal Fees – Cryptocurrency – Business with Clients

District of Columbia Bar Ethics Opinion 378

Risk Management Issue: What are the ethical implications for a lawyer who accepts cryptocurrency as payment for legal fees?

The Opinion: In June 2020, the District of Columbia Bar released the latest opinion addressing acceptance of cryptocurrency as payment for legal fees. Other ethics opinions have addressed this issue as well, including Nebraska Ethics Op. No. 17-03 and New York City Bar Opinion 2019-5.

Cryptocurrency is a virtual asset that exists only in electronic form. In other words, it is virtual money. No authority controls the currency and it is not backed by any tangible security or real estate. Cryptocurrency functions by means of algorithms which control the creation of new units of a cryptocurrency and record transactions. A virtual transaction ledger—or blockchain—maintains all related data and is distributed on every cryptocurrency's network.

There are thousands of cryptocurrencies currently in existence. They may be spent like regular currency or held like an investment asset. Cryptocurrency is typically stored in a digital "wallet" in an online platform, hard drive, USB port, or paper. The wallet contains a public key to share with others so they may send currency to the holder. It also contains a private key whereby the holder can access the currency and initiate transactions.

The D.C. Bar compared cryptocurrencies to gold, because a cryptocurrency's "exchange value is tied directly to market demand." Digital currency values are extraordinarily volatile.

According to the D.C. Bar, a lawyer may ethically accept cryptocurrency as payment for legal fees, so long as the fee is reasonable. However, a lawyer who accepts cryptocurrency as an advance fee must "ensure that the fee arrangement is reasonable, objectively fair to the client, and has been agreed to only after the client has been informed in writing of its implications and given the opportunity to seek independent counsel." A lawyer who holds a client's cryptocurrency must also take reasonable security precautions to safeguard client property.

The form of the payment does not change the requirement of RPC 1.5 that "[a] lawyer's fee shall be reasonable." Reasonableness depends on a variety of factors, including the attorney's experience, nature of the representation, and complexity of the case. RPC 1.5 does not explicitly address whether an asset like cryptocurrency may be accepted as payment. However, the D.C. Bar concluded that cryptocurrency is similar to property, and Comment 4 to the Rule permits a lawyer to accept property as payment for fees. Extra care is required because cryptocurrency's value fluctuates, sometimes wildly. The reasonableness of a cryptocurrency fee agreement will depend on the terms of the agreement, whether payment is rendered in advance, and "how well the lawyer explains the nature of a client's particularized financial risks."

RPC 1.8 bars attorneys from entering into business transactions with a client or acquiring adverse ownership interests unless certain requirements are met, including fair and reasonable terms, full disclosure in writing, the opportunity for independent counsel, and written client consent. The D.C. Bar noted these special precautions are not necessary when a client opts to pay cryptocurrency for legal fees *after* receiving the bill calculated in dollars. However, if the client pays cryptocurrency *in advance* or if fees would be calculated in cryptocurrency, RPC 1.8 requirements apply.

RPC 1.15 requires that a lawyer "appropriately safeguard" property. The D.C. Bar concluded that "[j]ust as with fiat currency or any client property, a lawyer must use reasonable care to minimize the risk of loss." The duty of competence outlined by RPC 1.1 is also implicated. Thus, lawyers using cryptocurrency are required to reasonably safeguard against theft or loss.

Risk Management Solution: Law firms and lawyers are permitted to accept cryptocurrency as payment for legal fees. However, depending upon the form of the fee agreement and the relationship with the client, some additional precautionary measures are required. If accepting cryptocurrency for payment or in trust, lawyers should have—or associate with a person who has—a basic understanding of cryptocurrency storage, transactions and exchange, and security.

As suggested by the D.C. bar, a lawyer accepting cryptocurrency should include a clear explanation in the engagement agreement about how the client will be billed, when fees become earned, and at what point in time the currency is valued. A comprehensive and clear fee agreement will help both parties understand the implications of using such an inherently volatile asset as payment. The fee agreement should detail the risks involved in paying with cryptocurrency; an asymmetric understanding of cryptocurrency or how fees will be billed is likely to result in client disputes and lead to ethics complaints.

Social Media "Friending" Between Judges, Lawyers, and Parties

***Miller v. Carroll (In re B.J.M.),* 2020 WI 56, 2020 Wisc. LEXIS 134.**

Risk Management Issue: What are the dangers when a litigant is the social media "friend" of a judge presiding over the litigant's case?

The Opinion: While presiding over a child custody dispute between a mother and father, a judge accepted the mother's Facebook friend request. The mother "liked" 18 of the judge's Facebook posts and commented on two. None of the "likes" or comments related to the pending litigation. The judge did not "like" or comment on any of the mother's posts, nor did he reply to any of her comments. During the same time, the mother also "liked" multiple third-party posts and "shared" one third-party photograph related to domestic violence, which, notably, was at issue in the custody dispute. Though there was no evidence the judge viewed the posts, this activity could have appeared on the judge's "newsfeed."

When the father learned of the Facebook friendship, he filed a motion to reconsider a recent order modifying custody based on an alleged violation of his due process right to an impartial judge. The motion was denied.

On appeal, the Wisconsin Court of Appeals declined to establish a bright line rule prohibiting judges from using social media. However, the court held that the judge's actions created the appearance of partiality. The court noted that the judge becoming Facebook "friends" would cause a reasonable person to question the judge's partiality, because the mother was a current litigant in a proceeding in which the judge was the sole decision-maker. The mother wasn't one of the thousands of people who had requested to friend the judge before she was a litigant in his court, so the timing created a risk of actual bias. The court further concluded that although a Facebook friendship does not denote a traditional "friendship," it is unquestionably evidence of an affirmative social connection. The appearance of partiality was heightened because the relationship was not disclosed to the other parties. Finding a due process violation, the appellate court remanded the denial of the motion to reconsider and ordered the matter for rehearing in front of a new judge.

The Wisconsin Supreme Court accepted a petition for review, and subsequently affirmed the Court of Appeals decision in a 77-page decision, by a 4-3 margin with three concurrences and a dissent. The majority concluded that "the extreme facts of this case rebut the presumption of judicial impartiality and establish a due process violation." Further, the majority determined that a party asserting judicial bias was required to rebut the presumption that judges act fairly, impartially, and without bias. According to the Court, the presumption was rebutted in this case because of the timing of the request, volume of the Facebook activity, content of the activity, and the lack of disclosure. The Court also found the judge had access to off-the-record facts that were relevant to the dispute, including the mother's character and fitness.

Risk Management Solution: The Wisconsin Supreme Court did not create a bright line rule prohibiting judicial use of social media. However, the court's holding prohibits a judge from establishing an undisclosed Facebook connection with a litigant appearing before the judge in pending litigation, because it gives the appearance of partiality in violation of due process. The Wisconsin Supreme Court referenced a case featured in a previous *Lawyer's Lawyer Newsletter*, noting several persuasive authorities agree that judicial use of social media, standing alone, does not require judicial disqualification.

Numerous other states have also contemplated whether a lawyer's social media friendships with a presiding judge create the appearance of impropriety or bias. As always, you should consult your jurisdiction's authority to determine the specific implications of an attorney or client being a social media friend with a judge.