

# The Responsibilities of an Attorney Serving as Trustee, Executor or Administrator

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# Attorney Scrivener as Executor

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- ▶ RPC 1.8(c) provides that a lawyer shall not prepare an instrument giving the lawyer, or a person related to the lawyer, any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- ▶ Question: May the scrivener properly draft a will or trust in which the scrivener names himself or herself as executor or trustee?

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- ▶ RPC 1.8(c) provides that a lawyer shall not prepare an instrument giving the lawyer, or a person related to the lawyer, any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.
- ▶ Answer: Yes.

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- ▶ NJ Eth. Op. 683 (1996)
- ▶ NJ Eth. Op. 487 (1981)
- ▶ This conclusion is specifically assumed by N.J.S. 3B:18-6, which allows the attorney fiduciary to collect a “just counsel fee” in addition to commissions.
- ▶ If the client does request the lawyer to act, the lawyer must avoid even the appearance of impropriety.
  - ▶ Make full disclosure of compensation
  - ▶ Advise as to alternatives
  - ▶ Other jurisdictions require a written disclosure

# RPC 1.7(b)(2) – Conflict of Interest

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(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) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation,** provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

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

(3) the representation is not prohibited by law; and

(4) 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.

# N.J.S. 3B:18-6

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## Legal fees for attorney also serving as fiduciary

- ▶ “If the fiduciary is a duly licensed attorney of this State and shall have performed professional services in addition to his fiduciary duties, the court shall, in addition to the commissions provided by this chapter, allow him a just counsel fee. If more than one fiduciary shall have performed the professional services, the court shall apportion the fee among them according to the services rendered by them respectively.”

# N.J.S. 3B:18-6

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## Legal fees for attorney also serving as fiduciary

- ▶ The burden is on the attorney to substantiate the legal fees being claimed, and New Jersey courts will consider a number of factors in determining whether such amounts are reasonable:
  - ▶ Size and complexity of the estate;
  - ▶ Required time needed to complete the work;
  - ▶ The degree and skill level required;
  - ▶ Whether the estate was involved in litigation and the outcome;
  - ▶ Any other factors the court deems important.

# N.J.S. 3B:18-6

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## Legal fees for attorney also serving as fiduciary

- ▶ In re Estate of Simon, 93 N.J. Super. 579 (App. Div. 1967)
- ▶ In re Estate of Seabrook, 127 N.J. Super. 135 (App. Div. 1974)
- ▶ Estate of Olivo v. C.I.R., T.C. Memo. 2011-163 (2011)



# Estate of Simon (1967)

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In re Estate of Simon, 93 N.J. Super. 579 (App. Div. 1967)

- ▶ Appeal involving a challenge to the adequacy of an award of counsel fees where one of the executors was also the attorney for the estate and who received separate compensation for work performed in that capacity.
- ▶ Ultimately, the court has discretion to look at the services performed and to allocate fees and commissions appropriately.

# Estate of Seabrook (1974)

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In re Estate of Seabrook, 127 N.J. Super. 135 (App. Div. 1974)

- ▶ Estate with the primary asset being shares of stock in a single corporation managing real property.
- ▶ There were 6 executors who also served as the company's board of directors.
- ▶ Several executors, including one attorney, also received salaries from the company for various services in addition to commissions.
- ▶ Court again looked to the nature of services rendered in apportioning fees and commissions.

# Estate of Olivo v. C.I.R. (2011)

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## Estate of Olivo v. C.I.R., T.C. Memo. 2011-163 (2011)

- ▶ United States Tax Court had the opportunity to evaluate a claim of attorney fees and commissions in the context of an estate tax audit.
- ▶ The attorney served as administrator of his mother's estate.
- ▶ He claimed a deduction of \$44,200 for statutory commissions and estimated a deduction for attorney fees at \$50,000.
- ▶ Commissions were allowed but attorney fees were denied because the attorney could not substantiate the legal services actually performed.

# RPC 1.5 Fees

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- ▶ A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
  - ▶ the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - ▶ the fee customarily charged in the locality for similar legal services;
  - ▶ the time limitations imposed by the client or by the circumstances;
  - ▶ the nature and length of the professional relationship with the client;
  - ▶ the experience, reputation, and ability of the lawyer or lawyers performing the services;
- ▶ When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

# Fees vs. Commissions

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- ▶ The court will distinguish between those duties that actually required legal expertise from those that were performed as executor or administrator.
- ▶ The burden is on the attorney to substantiate the legal fees being claimed.
- ▶ **Examples:**
  - ▶ Filing the petition for probate;
  - ▶ Filing the estate tax return;
  - ▶ Handling the estate tax examination;
  - ▶ Litigation;
  - ▶ Selling real property;

# Responsibilities of Executor to Estate

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- ▶ An executor is required to settle and distribute an estate as expeditiously and efficiently as is consistent with the best interests of the estate. N.J.S. 3B:10-23.
  - ▶ This includes payment of the decedent's lawful debts.
- ▶ Executors have the non-delegable duty to collect and preserve the estate assets, to supervise the administration of the estate and to exercise the care that an ordinary, prudent person would employ in like matters of his or her own. See In re Mild's Estate, 25 N.J. 467, 480 (1957); N.J.S. 3B:10-26.
- ▶ When and if an executor fails to act in the best interests of the estate, then he or she may be discharged. See N.J.S. 3B:14-21

# Responsibilities of Executor to Estate

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- ▶ An attorney is not necessarily held to a higher standard though the attorney will not have the benefit of the doubt when mistakes are made.
- ▶ Examples might be:
  - ▶ Failing to provide proper notice;
  - ▶ Failing to keep proper records and to account;
  - ▶ Failing to settle and distribute an estate as expeditiously and efficiently as possible;
- ▶ Also, mistakes may trigger a review by the Office of Attorney Ethics.

# IMO Gerald C. Kelly

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- ▶ Disciplinary proceeding stemming from Mr. Kelly's handling of one estate as executor and another related estate as attorney for the estate.
- ▶ The action resulted in disbarment.



# Estate of Spencer v. Gavin

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What responsibility does an attorney have when he is aware that another attorney who is acting as executor is mishandling the estate's property?

- ▶ Estate of Spencer v. Gavin, 400 N.J. Super. 220 (App. Div. 2008)
- ▶ Attorney-Executor stole \$400,000 from three related estates shortly before his death.
- ▶ Another attorney who had been assisting him was sued for his failure to notify the proper authorities.

## RPC 8.3(a)

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A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

# Attorney as Trustee

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- ▶ In re Munger's Estate, 63 N.J. 514 (1973)
- ▶ Question was whether the trustee under the decedent's will was empowered to invest in real property by reason of a clause allowing the trustee to invest in "securities"
- ▶ The decedent's attorney who was then serving as trustee essentially acted as his own attorney when he interpreted the language of the will to allow him to invest in the real property.
- ▶ The beneficiaries objected and the attorney-trustee was surcharged almost \$200k.

# Munger's Estate (Cont.)

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- ▶ Transamerica Insurance Co. v. Keown, 451 F.Supp.397 (D.N.J. 1978)
- ▶ The attorney's malpractice carrier brought an action to determine its responsibility under the policy.
- ▶ Question was whether the attorney was covered for acts taken in his capacity as trustee.

# Responsibilities of Executor to Beneficiaries

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- ▶ An executor has a fiduciary duty to act in the best interests of all the beneficiaries under the will. Branch v. White, 99 N.J. Super. 295, 306 (App. Div. 1968).
- ▶ The most fundamental duty owed by an executor to the beneficiaries is the duty of loyalty, see, e.g., Wolosoff v. C.S.I Liquidating Trust, 205 N.J. Super. 349 (App. Div. 1985), and the executor is obligated to deal impartially with all beneficiaries, In re Koretzky Estate, 8 N.J. 506, 530 (1951).
- ▶ The executor of the estate must, at all times, act with the best interests of the estate in mind, Taylor v. Errion, 137 N.J. Eq. 221 (Ch. Div. 1945), aff'd 140 N.J. Eq. 495 (1947), and must attempt to ensure that the estate is distributed according to the decedent's wishes. In re Duke, 305 N.J. Super. 408, 439 (Ch. Div. 1997).
- ▶ It is beyond peradventure that an executor cannot use his or her position to further his or her own personal interests. Estate of Sauer, 2011 N.J. Super. Unpub. LEXIS 1431 citing Taylor, supra, 137 N.J. Eq. at 225-227.

# Responsibility of Executor's Attorney

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- ▶ Barner v. Sheldon, 292 N.J.Super. 258 (Law Div. 1995)
- ▶ Held: executor's attorney owed no duty to the beneficiaries of the estate that they had a right to disclaim their share of the estate, which allegedly would have resulted in tax savings.
- ▶ Attorney prepared the estate plan and was subsequently retained by the executor, the decedent's spouse, to represent her in the administration.
- ▶ The attorney represented the executor and did not owe a duty to the beneficiaries.

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