



How to Comply with the Rules of Professional Conduct While Probating Estates

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An attorney who acts as a personal representative (formerly “executor” or “administrator”) or other fiduciary (for example, guardian, conservator, trustee) of an estate, or who represents the fiduciary, is subject to the Massachusetts Rules of Professional Conduct. Here are seven ways to remain in compliance with the rules of professional conduct when you are probating an estate:

1. Open a separate, interest-bearing bank account for the estate.

As soon as you are in possession of any estate funds, open a separate, interest-bearing bank account for the estate. Mass. R. Prof. C. 1.15 (e) (6) provides that trust funds, “other than those that are nominal in amount or to be held for a short period of time, must be held in an individual account with the interest payable as directed by the client or third person on whose behalf the trust property is held.” You can apply for a tax identification number in the name of the estate online or by filing Form SS-4.

Estates of decedents usually must be kept open for at least a year. See G.L., c. 179, sec. 9, barring creditor claims against the estate if not filed within one year of death. A year, however, is not a “short period of time” and is too long to maintain funds in an IOLTA account. If you do keep estate funds in an IOLTA account, you may be liable to the estate for the amount of interest that would have been earned had

the funds been in an interest-bearing account. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S. Ct. 1406 (2003) (lawyer who mistakenly uses an IOLTA account as a depository for money that could earn interest for the client will be liable to the client for any lost interest...”) In addition, whether you hold estate funds in a bank or at another type of financial institution, you must comply with the record-keeping provisions of Mass. R. Prof. C. 1.15(f), including, where applicable, maintaining a compliant check register and reconciling the account as required not less than every 60 days.

2. Have a written fee agreement and do not pay yourself fees before creating an itemized bill.

If you are the attorney for an estate, Mass. R. Prof. C. 1.5(b)(1) requires that your fee arrangement with your client (the personal representative or other fiduciary) be in writing and that the writing, at a minimum, communicate the scope of the representation and the basis or rate of the fee. In addition, Mass. R. Prof. C. 1.15(d)(2) provides that “on or before the date on which a withdrawal from a trust account is made for the purpose of paying fees due to a lawyer, the lawyer shall deliver to the client in writing (i) an itemized bill or other accounting showing the services rendered, (ii) written notice of amount and date of the withdrawal, and (iii) a statement of the balance of the client’s funds in the trust account after the withdrawal.”

If you are not the personal representative but represent that fiduciary and have signatory power for the estate account, you **must** deliver an itemized bill and other required information to the personal representative when you withdraw any attorney’s fees from the account. Pursuant to Mass. R. Prof. C. 1.15(b)(2)(ii), any fees that are

disputed by the fiduciary must be restored to the estate account until the dispute is resolved.

If you represent yourself as a fiduciary, you still must create and preserve a contemporaneous bill or other accounting when paying yourself from estate funds.

New comment 6A to rule 1.15 clarifies this requirement:

...lawyers who represent themselves as fiduciaries (such as personal representatives, executors, conservators, guardians or trustees) must comply with paragraph (d)(2) by creating, prior to or contemporaneous with any withdrawal of fees, the bills or accountings required by the rule to justify payment. Such accounting may consist of itemized written time records, formal written bills, or other contemporaneous written accountings that show the services rendered and the method for calculating the fees. The lawyer is also required to maintain all trust account records specified in paragraphs (e) and (f) of this rule.

3. Bill reasonably and distinguish legal work from non-legal work.

Whether you are serving as a fiduciary or as attorney for a client who is the fiduciary, you cannot charge legal rates for purely administrative work or for other non-legal services you provide to the estate. Charging \$250 per hour to write checks or meet a plumbing contractor at the home of the deceased may be deemed clearly excessive, and therefore in violation of Mass. R. Prof. C. 1.5(a) and (b). *Matter of Chignola*, 25 Mass. Att’y Disc. R. 112 (2009) (lawyer received public reprimand for, *inter alia*, charging legal rates for non-legal services performed in fiduciary capacity); *Matter of Harbeck*, 23 Mass. Att’y Disc. R. 262 (2007) (lawyer acting under power of attorney for elderly sisters violated Rule 1.5(a) by charging same rate for legal services and for non-legal services such as paying bills, arranging for health and personal care, organizing repair and cleaning of sisters’ home, moving and disposing of household items). Your fees for non-legal work should reflect the market rate for non-lawyer providers for the type of service you are rendering.

Take care, also, not to charge for the same services twice; i.e., both as fiduciary and as attorney. When you are acting both as fiduciary and as the attorney for yourself as the fiduciary, your fees may be scrutinized very closely. *Grimes v. Perkins School for the Blind*, 22 Mass. App. Ct. 439 (1986).

Finally, the number of hours you bill as a fiduciary must be generally reasonable and in proportion to the value of the services you have provided. An attorney received an admonition from the single justice of the SJC when she, inter alia, charged more than thirty hours to prepare and file a first and final account and twenty-one hours to prepare state tax returns. *Matter of An Attorney*, 29 Mass. Att’y Disc. R. 727 (2013). This case also confirms that a probate court’s acceptance of an attorney’s fiduciary account does not preclude a later finding in a disciplinary proceeding that the attorney’s fees violated Mass. R Prof. C. 1.5(a) because they were clearly excessive.

4. Act diligently.

Mass. R. Prof. C. 1.3 requires diligent representation.¹ Have the will allowed, obtain the appointment of the fiduciary (whether yourself or another), and get the inventory filed, the assets marshaled, the estate bills paid, the accounts (to the extent required by the Massachusetts Uniform Probate Code) and tax returns filed, the distributions made to heirs and the estate closed, all in a timely fashion. In the absence of extenuating circumstances such as real estate that is difficult to sell, estates can usually be completed shortly after the expiration of the one-year statute of

¹ While there have been differences of opinion about whether rules 1.1, 1.3 and others apply to fiduciaries when they technically have no “client”, Mass. R. Prof. C. 5.7, subjects lawyers to the rules, including the requirements of competence and diligence, when providing “law-related services” (within which definition fiduciary services would likely fall), in circumstances not distinct from the lawyer’s provision of legal services.

limitations for claims against the estate. Neglect of estates continues to be a common cause of discipline. See, e.g., *Matter of Harvey*, 31 Mass. Att’y Disc. R. ___ (2015) (public reprimand of attorney who, inter alia, failed to timely divide and distribute personal property of the deceased and, as a result, incurred unnecessary legal fees and expenses on estate’s behalf); *Matter of Kasilowski*, 31 Mass. Att’y Disc. R. ___ (2015) (three-month suspension where attorney failed over many years to file income tax returns in one estate, neglected an additional assessment of interest and penalties due by a second estate, and failed to notify the clients of the assessment); *Matter of Kydd*, 25 Mass. Att’y Disc. R. 341 (2009) (three month suspension stayed for a year where lawyer accepted estate matter with which he had no expertise, failed to learn the applicable law, delayed taking various actions, and failed to file income tax returns for the estate.)

You may also be held civilly liable if your delay in filing tax returns and paying taxes results in an assessment against the estate for penalties and interest, or if unnecessary premiums on surety bonds are incurred as a result of your delays in closing the estate. If you have liability insurance, make sure that you are covered for any work that you do as a fiduciary.

5. Act competently.

Mass. R. Prof. C. 1.1 requires competent representation. Even relatively simple estates may present some complicated issues: e.g., selecting a valuation date for assets, determining when to make distributions so as to minimize the tax liability of beneficiaries, or selling real estate with title problems. Attorneys have been disciplined for inappropriate investments of estate funds. See, e.g., *Matter of*

Nelligan, 27 Mass. Att’y Disc. R. 648(2011) (lawyer suspended for one year for investing over \$4,400,000 of fiduciary funds for wards and trust beneficiaries in unsafe, unsuitable investments in a hedge fund and failing adequately to investigate or monitor the investments, resulting in the loss of 63% to 97% of the capital investments.) If you are not experienced with those issues, consult with or engage an attorney who is.

6. Be aware of potential conflicts of interest

An attorney to a fiduciary represents the fiduciary, not the beneficiaries. *Spinner v. Nutt*, 417 Mass. 549, 553 (1994). Make sure that the beneficiaries understand that you are not their lawyer (see Mass. R. Prof. C. 4.3, prohibiting a lawyer for a party from advising an unrepresented party in the same matter), and that a beneficiary who disagrees with the fiduciary’s decisions involving the handling or distribution of an estate should seek separate representation. On the other hand, bar counsel receives frequent complaints and inquiries from beneficiaries who are unable to obtain any information from the lawyer who is or represents a personal representation or other fiduciary of an estate. Even where you do not represent the beneficiaries, it is probably good practice as well as your fiduciary duty to keep them reasonably informed of the progress in finalizing an estate and the approximate dates on which they can expect distributions of estate assets.

Conflicts may arise where an attorney engages in a business transaction with the estate (e.g., acting as a broker for real estate or purchasing an asset of the estate), favors a beneficiary with whom he or she has had prior dealings, or accepts any kind of payment or favor from a person engaged to provide a service to the estate.

Attorneys have been disciplined for engaging in such conflicts. See, e.g., *Matter of Lansky*, 22 Mass. Att’y Disc. R. 443 (2006) (six-month suspension of attorney who neglected estate and engaged in a conflict of interest by favoring one beneficiary over the others in a business transaction with the estate); *Matter of Lake*, 13 Mass. Att’y Disc. R. 397 (1997) (lawyer received admonition for acting as counsel to co-executors and broker for the sale of the estate’s property without the consent of the clients). These are just a few of the potential conflicts. See Mass. R. Prof. C. 1.7 and 1.8.

A recent decision also reaffirms that an attorney who drafts a will, and whose actions in doing so are at issue in a case challenging the will, has a conflict of interest that prevents him from representing other parties in that case. *Matter of Zinni*, 31 Mass. R. Prof. C. ____ (2015) (attorney publicly reprimanded who drafted will of woman whose competence was doubtful, and then sought to represent himself, the testator and her daughter/beneficiary in action by other daughters challenging the validity of that will.)

7. Maintain Boundaries When Holding Family Trust Funds.

Remember that the rules of professional conduct apply to you even when you are administering an estate or trust whose donors and beneficiaries are all members of your family. Attorneys acting as trustees for family matters are no less accountable as fiduciaries in those situations and must comply with the terms of the applicable instrument. Thus, in *Matter of Long*, 29 Mass. Att’y Disc. R. 401 (2013), an attorney was suspended for nine months when, acting as a trustee for his late brother’s residual

trust, he engaged in unauthorized transfers of the trust's funds to another family trust and to himself.

Resources

Attorneys who either act as or represent fiduciaries may find guidance as to their ethical obligations in the manual entitled Ethical Lawyering in Massachusetts (MCLE, Inc. 2d ed. 2000 & Supp. 2002, 2007), particularly Chapter 16. The American College of Trust and Estate Counsel provides extensive annotated commentary to the ABA Model Rules as it pertains to trust and estate attorneys in the resources section of its Web site (<http://www.actec.org>).

Bar counsel offers a one-hour class on the trust account record-keeping rules on the first Thursday of each month, at 8:00 a.m., from October through June at the office of the Boston Bar Association at 16 Beacon St., in Boston. The class is free, but call the Office of Bar Counsel at 617-728-8750 to register.