NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 14-02

QUESTIONS PRESENTED

I. What must an attorney do, as a fiduciary to persons entitled to share in the estate of the deceased, to ensure that the cestui que (properly pronounced "ses-tee kay", but lawyers popularly pronounce it "setty kay") trust has the information necessary to enable it to protect its interests.

II. Is there an attorney-client privilege owed by the attorney that represented a decedent for estate planning purposes and now represents the personal representative of an estate, which would be violated by making a disclosure to the cestui que trust of the information the attorney believes it must know for the protection of its interests.

FACTS

An attorney began representing a client in October, 1999, for the purpose of making changes to her existing Will and Powers of Attorney. Her existing Will gave her Minnesota house to her living brother and sister, or to the survivor of them, and $1,000.00 to each of her nieces and nephews. The residuary was to pass 10% to her brother and 10% to her sister, with the remaining 80% passing to two named charitable beneficiaries, both of which had a connection with her longtime employer, a University that she was very fond of. She made it very clear that if she were predeceased by either her brother or her sister, the devises to each sibling were to lapse, and she did not intend to alternately benefit her nieces and nephews by a deceased sibling.

In the first Will drafted by this attorney, which was executed in April of 2000, the changes from the previous Will included that his client wanted to provide some income for her brother and sister before everything went to the charities, so she set up a testamentary credit shelter trust for federal estate tax purposes in the 2000 Will. Everything over and above the then applicable $600,000.00 credit shelter amount passed to four different charities, which were all connected to her employer, the University. The $600,000.00 credit shelter amount went into a family trust for the benefit of her brother and sister. The nieces and nephews were devised all of the client's tangible personal property, to be shared by them, as well as $2,000.00 each. All devises to the nieces and nephews and the devise of the Minnesota home to the brother and sister would lapse, should any of the immediate family members predecease the client. The family trust in

the 2000 Will terminated with the death of the survivor of the brother and sister, and then all trust corpus passed to the four charities named in the Will. Nothing from the family trust was to be distributed to any of the eleven nieces and nephews. At the same time, the client executed new general and medical powers of attorney in favor of her brother and then sister, in that order, and the financial power of attorney was effective upon disability or incapacity.

In early 2005, the client again requested changes to her estate planning, and the major change in her new planning was to delete the credit shelter family trust. The client created and substituted an unfunded charitable remainder unitrust, which was done with the help of the Development and Planned Giving Department at the University, where she had been employed. Her attorney was involved in the process of the creation of her new Will and the charitable remainder unitrust. In August, 2005, the client signed the new Will and the charitable remainder unitrust. Her attorney was present and signed the Will as an attesting witness. He also was present for and witnessed the execution of the CRUT. The 2005 CRUT provided that if on the death of the client, the trustee of the CRUT received more than $100,000.00 from the client's estate, and/or as the beneficiary of the client's retirement accounts or qualified plans, the CRUT trust would upon funding be administered for the benefit of the brother and sister. If less than $100,000.00 were received, or both siblings were already dead, the trust would be distributed immediately to the client's four designated charities, which remained unchanged from the 2000 Will. The brother and sister, or the survivor of them, were required to be paid 5% of the value of the trust assets each year. Upon the death of the surviving sibling, the CRUT would terminate, and all assets of the CRUT would be distributed to the four charities. The 2005 Will eliminated the $2,000.00 bequest to the nieces and nephews, and the tangible personal property was devised to the brother and sister, which were also devised the Minnesota home, or its sale value if sold prior to the client's death. The entire residuary estate was devised to the trustee of the CRUT.

The revised 2005 Will and CRUT trust were the client's last documents and comprised her estate plan when she died in August of 2013. The client had specifically asked for extra copies of the Will for her siblings, and the attorney was certain she gave copies of the 2005 Will to her brother and sister.

In September, 2006, the client had the attorney make changes to her Financial Power of Attorney. She changed her agent to her sister-in-law (by her brother), named her brother second, and her sister in Wisconsin was named third. The powers were effective immediately.

Her last Power of Attorney documents were prepared in November, 2009, after the client's brother died. The attorney received a call from the sister-in-law to inform him that her husband (the client's brother) had died. New Power of Attorney documents were prepared naming the sister-in-law as agent first, with the sister in Wisconsin as the alternate power of attorney.

Future communication with the client was limited. The attorney's records reflect that they spoke in July and September, 2010. After the second call, at the client's request, the attorney spoke to her sister on September 22, 2010, to explain to the sister how the Will and CRUT operated and how the sister was benefitted by the client's planning. (The brother was already deceased).

In August, 2013, the sister-in-law advised the attorney that the client had passed away. He contacted the sister in Wisconsin, who was the named personal representative, and it was decided that the estate proceedings would be filed in Nebraska. He sent communication to the holder of the client's retirement accounts, and received information regarding the date of death values. The sister (personal representative) provided him with papers she received from the annuity carrier, to get assistance in filling them out. When he received the claim forms, he saw the sister was the direct beneficiary of the annuity proceeds in the sum of $365,000.00. He was shocked. He had the sister request a copy of the carrier's beneficiary records. The sister advised him that the beneficiary designation was made to her in 2010. After weeks passed and a couple of requests were made by the attorney, the sister sent a copy of it to the attorney. The beneficiary creation, or change, was signed on June 28, 2010, and was received by the carrier on July 1, 2010. The sister (personal representative) was designated as the primary beneficiary. No secondary or contingent beneficiary was named. The client did <u>not</u> sign the form's signature page. It was signed by the sister-in-law, on behalf of the client, as the client's power of attorney agent. The client had never mentioned the change to the attorney, or that she was considering making a beneficiary designation in favor of her sister, any other entity, or that she had made a beneficiary designation. The attorney had spoken with the client on July 13, 2010, within 15 days of the sister-in-law creating or changing the retirement account beneficiary designation in favor of the sister. Had the client discussed a change in designation with the attorney, he indicated he would have sent out a letter to the client pointing out that if she did this it would effectively disinherit the charitable beneficiaries she had always wanted before, for fourteen years, to receive the bulk of her estate.

As of the date of the letter requesting an advisory opinion, the attorney had not advised the CRUT that the sister was the named beneficiary of the retirement accounts or that the bulk of the client's wealth is in her retirement assets.

The attorney set forth that there was nothing in the current or past Nebraska conservator or trustee power statutes that authorizes a conservator or a trustee to allow the client's sister-in-law (power of attorney), to create or change a beneficiary designation. This conduct of the sister-in-law is the basis of the attorney's question regarding what he, as attorney for the personal representative and as a fiduciary, must do or disclose to insure that the CRUT has the information to enable it to protect its own rights.

APPLICABLE CASE LAW, RULES, AND COMMENTS

I.

A. The administrator and his attorneys are officers of the court and both are fiduciaries in their relation to the heirs. An administrator is a trustee and property of the estate in his hands is trust property. He is both the personal representative of the deceased person and the trustee for the heirs and creditors. *In Re Rhea's Estate*, 126 Neb. 571, 253 N.W.2d 876 (1934).

B. In *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952), appellants, decedent's only heirs at law, had no knowledge of the date of hearing for the probate of the will of the deceased or of any date fixed for any hearing or proceedings in regard to the estate of the deceased until shortly before the filing of their petition in this case. A letter sent to them by the attorney that prepared the will and had been the attorney for the decedent for many years, was silent as to matters related to hearing dates. Appellants, upon receipt of the letter, mailed the attorney a request for information as to the date of the hearing on the probate of the will. The attorney did not answer the request, but remained silent and gave them no further information. The attorney was the principal beneficiary of the will and was named and designated as the executor. He prepared, executed, and filed the petition for the probate of the will. He knew the date of the hearing to be had thereon, but refrained from informing the appellants of the facts in reference thereto, and did not at any time advise them of the date of the hearing.

In its analysis, the Nebraska Supreme Court recognized that Richard was then executor, the attorney for the estate, and principal legatee and devisee of the deceased. There was a fiduciary relationship between him and the estate of the deceased, her heirs and beneficiaries, and all persons interested therein. The Court set forth that "[t]he personal representative of an estate and his attorney are officers of the court and both are fiduciaries in their relation to persons entitled to share in the estate of the deceased." (Emphasis added).

The findings of the Court were that "[t]he status of [the attorney] as a trustee required him to make a full disclosure of all facts within his knowledge which were material for appellants to know for the protection of their interest, if they desired to contest the will of the deceased and acted timely after receipt of the information from the trustee.... It is the duty of a trustee to fully inform the cestui que trust of all facts relating to the subject-matter of the trust which come to the knowledge of the trustee and which are material for the cestui que trust to know for the protection of his interests." *Id.;* See *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). The attorney was obligated, when he became the executor and was the attorney for the estate, "to advise appellants, at least, of the fact and the date of the probate of the will of the deceased, the time allowed for and the manner of taking an appeal to the district court from the decree of probate of the county court, that a new and complete trial in reference to the validity of the will of the deceased could be had in the district court, and that he had prepared the will and the facts concerning the making and execution thereof as he claimed them to be. He was also duty bound to correctly give any information he had concerning the will and the estate of the deceased on request of appellants. His default in these respects constituted a breach of his trust and a fraud on appellants." *Id.* "Every violation by a trustee of a duty required of it by law, whether willful and fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust." *Id.;* See *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944).

C. In *Nebraska State Bar Association v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957), disciplinary proceedings were brought against attorney Richards, in part based upon the circumstances set forth above. The Supreme Court, in the disciplinary proceedings, set forth language from the *Johnson v. Richards* case above, that had application in relation to respondent's duties and responsibilities to the heirs at law of decedent as follows:

> It is unnecessary in this case to consider what the duty of Richards was, if any, in reference to appellants before he volunteered to give partial information to them by his letter of October 27, 1950. But when he broke his silence he became obligated to truthfully and completely state the facts within the limits of his information and knowledge in regard to the subjects referred to by his letter and enclosure transmitted with it, and not to withhold or distort anything that would tend to cause appellants to remain inactive.
>
> Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths

> calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.

Id. See *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952).

The Supreme Court, through the disciplinary proceedings, made the finding that the status of the respondent required him to make a full disclosure of all facts within his knowledge which were material for the appellants to know for the protection of their interests. His failure to do so constituted a breach of his trust as an attorney. "It is apparent he was more concerned in making secure his rights under the will than he was of performing his duty as an attorney." *Id.*

D. In *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984), the dissenting opinion set forth various findings regarding fiduciaries and trustees charged with honesty and fidelity in the execution of their duties:

> Although the general rule is that one party to a transaction has no duty to disclose material facts to the other, an exception to this rule is made when the parties are in a fiduciary relationship with each other. When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud." *Midland National Bank, etc. v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980); 37 C.J.S. Fraud §16d (1943).
>
> It is the duty of the trustee to fully inform the cestui que a trust [beneficiary] of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests. *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952).
>
> Where one has a duty to speak but deliberately remains silent, his silence is equivalent to a false representation. One standing in the relationship of a trustee to another owes to that other the duty of making a full disclosure of all matters appertaining to the trust, and neglect to do so, when the trustee knows or has good reason to believe that silence will result, is a fraudulent act. See *Anderson v. Anderson*, 620 S.W.2d 815 (Tex.Civ.App. 1981), *Kauffman v. McLaughlin*, 189 Okl. 194, 114 P.2d 929 (1941).
>
> Suppression of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation.... Fraud may arise not only from misrepresentation but from concealment as well. For concealment to

> constitute fraud, there must be suppression of facts which one party has a legal or equitable obligation to communicate to another. One who stands in a confidential or fiduciary relationship to another party must disclose material facts and must reveal enough information to prevent misleading the other party. See *Krueger v. Saint Joseph's Hospital*, 305 N.W.2d 18 (N.D. 1981).

E. Rule 1.2(f) of the Nebraska Rules of Professional Conduct sets forth that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment 9 to Rule 1.2 provides that:

> When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation, or the like. See Rule 4.1.

Comment 10 to Rule 1.2 provides that "[w]here the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."

F. Rule 1.7 of the Nebraska Rules of Professional Conduct provides that "(a) [e]xcept 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: (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." (Emphasis added).

Comment 4 to Rule 1.7 states "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph

(b)." See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9.

Comment 9 to Rule 1.7 addresses a lawyer's responsibilities to former clients and other third persons and states "[i]n addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director."

G. Rule 1.9 of the Nebraska Rules of Professional Conduct sets forth that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Comment 1 to Rule 1.9 provides that "[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule."

II.

Neb. Rev. Stat. §27-503 addresses the lawyer-client privilege and states:

> (3) The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. His authority to do so is presumed in the absence of evidence to the contrary.
>
> (4) There is no privilege under this rule:
>
> (b) As to a communication relevant to an issue between parties who claim through the same deceased client,

regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(d) As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness...

DISCUSSION AND CONCLUSION

I.

The attorney is in a position, as attorney for the personal representative of the estate, of a fiduciary to persons entitled to share in the estate of the deceased. As such, pursuant to the Supreme Court's findings in the case law set forth above, the Committee believes the attorney is required to make a full disclosure of all facts within his knowledge that are material for the CRUT to protect its interest, including any information that may be or has been requested by the beneficiary. The findings of the Supreme Court that require full disclosure of all facts within the attorney's knowledge that are material for beneficiaries to protect their interests would include, under the current circumstances, the information that the retirement accounts were subject to a beneficiary designation which was changed recently through the utilization of the power of attorney. The CRUT would be entitled to information as well regarding the facts concerning the making and execution of the Will of the decedent. Additionally, the case law further sets forth an obligation to advise the beneficiary of the legal, procedural steps that may be taken with respect to the decedent's Will, Power of Attorney and trust.

The attorney has advised that he is unaware of the sister-in-law's (POA's) position as to how the beneficiary change came about, nor is he aware of the sister's (personal representative's) involvement in the beneficiary change, if any. Depending upon those positions, the Committee believes that the attorney may be in a position if the sister wants to keep the money that he would be required to withdraw from the representation of the personal representative to avoid the potential for furtherance of conduct that the lawyer knows is fraudulent pursuant to Rule 1.2 of the Nebraska Rules of Professional Conduct. Furthermore, the potential for a conflict of interest between the representation of the personal representative and the attorney's former client, the decedent, may prompt the necessity of withdrawal as well pursuant to Rule 1.7 and Rule 1.9 of the Nebraska Rules of Professional Conduct.

II.

Neb. Rev. Stat. §27-503 specifically addresses the lawyer-client privilege in the situation at hand where there is communication relevant to an issue between parties who claim through the same deceased client, i.e. the CRUT and the sister, with regard to the beneficiary designation made by the deceased client which was then subsequently changed by the sister-in-law, POA. The statute provides that there would be no lawyer-client privilege.

Furthermore, the findings of the Nebraska Supreme Court set forth above do not appear to consider or have concern regarding any privilege issues when setting forth the requirement of full disclosure by the attorney fiduciary of all facts within his knowledge material for the beneficiary to know for the protection of its interest.

The attorney was also an attesting witness of the relevant documents, and 27-503(d) provides there is no lawyer-client privilege for communication related thereto.

The Committee believes that there would be no lawyer-client privilege prohibiting the attorney from providing the information to the CRUT or from potentially testifying as a material witness.