Committee Opinion
February 17, 1995

LEGAL ETHICS OPINION 1617 — ATTORNEY AS FIDUCIARY; ACCOUNTING FOR FUNDS AND PROPERTY.

You have presented a hypothetical situation in which an attorney serves as an executor, trustee, guardian, attorney-in-fact, or other fiduciary.

You have asked the committee to. opine under the facts of the inquiry, (1) whether DR:9-102(B)(3) imposes a duty of accounting on an attorney serving as executor, trustee, guardian, attorney-in-fact, or other fiduciary; (2) if there is a duty to account imposed by DR:9-102(B)(3), how an attorney satisfies his obligation to render "appropriate accounts"; (3) to whom an attorney should render any such accounts; and (4) whether the duty of accounting may be waived.

As you have indicated, the appropriate and controlling Disciplinary Rule related to your inquiry is DR:9-102(B)(3), which provides that an attorney shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

The committee responds to your inquiries relative to the facts presented as follows:

1. The committee is of the opinion that DR:9-102(B)(3) does not distinguish between an attorney rendering legal services to a client and an attorney serving as an executor, trustee, guardian, attorney in fact, or other fiduciary, and therefore an attorney serving in any of the stated fiduciary capacities has a duty to render appropriate accounts. See LE Op. 1515. The Committee notes that there is significant case authority supporting the imposition of this duty." Because the professional fiduciary rules apply generally, most courts have not been impressed with arguments that the requirements of the professional rules should be narrowly applied to client-lawyer relationships and have applied the rules even if the lawyer was technically functioning as a trustee, guardian, ...or was holding funds of a third party who was not the lawyer's client." See e.g., C.W. Wolfram, Modern Legal Ethics at 178; In re Burton, 472 A.2d 831 (D.C.App. 1984), cert. denied __ U.S. __, 105 S.Ct. 563 (1984); State v. Freeman, 629 P.2d 716 (1981); In re Gallop, 426 S.2d 509 (1981); In re Cary, 585 P.2d 1161 (1978); Kentucky Bar Association v. Ricketts, 599 S.W.2d 454 (1980); Clark v. State Bar, 246 P.2d 1 (1952); In re Draper, 317 A.2d 106 (Del. 1974); Oklahoma ex rel. Oklahoma Bar Association v. Steger, 433 P.2d 225 (1966). Indeed, the committee has repeatedly and consistently opined that if an attorney acting in a fiduciary capacity violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney-client, the attorney may be properly disciplined pursuant to the Code of Professional Responsibility. See LE Op. 1325, LE Op. 1442, LE Op. 1487.

Further, it should be noted that the definition of "attorney trust account" under DR:9-103 includes accounts in which are deposited funds received or held by an attorney or law firm for an estate or ward.

2. The committee recognizes that there are two general types of fiduciary relationships in which attorneys serve: those governed by the accounting rules of Title 26 of the Code of Virginia, related to fiduciaries, and those for which there is no statutorily required accounting. How an attorney satisfies his duty of accounting, therefore, depends upon the type of fiduciary relationship.

To the extent that an attorney is serving as a fiduciary in a situation subject to the accounting provisions of Code of Virginia §§ 26-8 et seq., the committee is of the view that compliance with those requirements satisfies the requirements of DR:9-102(B)(3) for the attorney to render appropriate accounts.

As to fiduciary relationships which are not subject to Title 26, the committee opines that DR:9-102(B)(3) requires at least an annual accounting of funds and property under the attorney's control until the attorney no longer has the funds or property under his control.

In those cases not subject to Title 26, the substance of an appropriate accounting may vary significantly depending on the circumstances. For example, in cases where, as a result of the duties imposed on the attorney or the amount of funds and property under his or her control, an attorney has little or no discretion in the use or application of those funds and property, a simple receipt and disbursement summary (similar to that described in Code of Virginia § 26-17.8) will be satisfactory. In other cases, however, where the attorney has significant discretionary power, the accounting should be of sufficient detail to allow persons receiving it to determine if the attorney has properly exercised that discretion. Thus, in a case of trust arrangements which will last for a long period of time and which involve a substantial amount of money and property, the committee suggests the preparation of an accounting similar to that contemplated by Code of Virginia § 26-17.6.

Special circumstances exist where the attorney is the attorney-in-fact. He may well have authority to take control of his client's money or property, but he may not have done so, either because his client is still capable or there is no need at the time to take control of certain assets. In that case, the attorney need only account when he has taken control of specific assets, and then he need account only for those specific assets and not for all of the assets which the power of attorney authorizes him to control.

3. The committee opines that determination of to whom the accounting should be rendered again depends upon the type of fiduciary relationship. The committee believes that, to the extent that the attorney's client is also the primary beneficiary of the fiduciary relationship, as might be the case involving an attorney-in-fact or a trust

of which the client is a beneficiary, the duty of accounting should lie to the attorney's client unless directed otherwise by the terms of the trust. The committee further believes that, in the case of a trust, the attorney should account to at least the income beneficiaries.

The committee is of the view that, in the event the person to whom an accounting should be rendered is under a disability or incapacity, the appropriate person to receive the accounting would be the guardian/committee of the property of the person under an incapacity. If the attorney is also the guardian or the committee, or if no such individual has been appointed, the appropriate person to receive the accounting would be an adult member of the family of the individual under a disability or incapacity.

4. Finally, the committee is of the opinion that the duty of accounting may not be waived. The plain language of Disciplinary Rule 9-102 does not provide for waiver of the duties therein imposed. As an advisory body, the committee is charged with interpretation of the Code of Professional Responsibility and is not authorized to unilaterally modify or amend the Disciplinary Rules. See Rules of the Supreme Court, Part Six, § IV, Para. 10 (k) (i-ii).