

You have presented a hypothetical situation in which Lawyer A is the executor of an estate. A suit is filed by the widow of the testator, who is also a beneficiary, claiming that other individuals, not including Lawyer A, subjected the testator to undue influence and that the testator lacked testamentary capacity. As the executor, however, Lawyer A is a named defendant in the devisavit vel non suit. At no time has Lawyer A ever had an attorney-client relationship with the widow.

You further indicate that the lawsuit is later settled, and Lawyer A seeks to obtain a release from the widow, releasing him from any and all claims that she may have had against him, including but not limited to "any claims connected with or related in any way to (i) the performance of his duties as executor, (ii) the will [which is the subject of the suit], or (iii) any preceding will." Finally, you indicate that Lawyer A paid nothing in connection with the settlement of the suit, as payment was made by other defendants.

You have asked the Committee to opine whether, under the facts of the inquiry, the executor of an estate, who is also an attorney, is precluded from obtaining a general release from a beneficiary in connection with the settlement of a suit brought by the beneficiary when the executor has never had an attorney-client relationship with the beneficiary.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:6-102(A) which provides that a lawyer shall not limit his liability to his client for his personal malpractice.

The question of whether an attorney-client relationship existed between the attorney/executor and the beneficiary requires a factual determination beyond the purview of the Committee. However, should a determination be made that such a relationship did exist, the Committee is of the opinion that a general release from liability such as you have described would be per se improper under the mandate of DR:6-102(A). In other circumstances, the Committee is of the view that nothing in the Code of Professional Responsibility prohibits the executor from securing such a general release, although the questions of the beneficiary's refusal to execute the release or the enforceability of such a release raise legal questions which the Committee is unable to address. In any case, however, the Committee is of the opinion that such a general release is not good practice and does not follow the spirit of the relevant Disciplinary Rule.

In addition, the Committee cautions that it has previously opined that when an attorney assumes the responsibility of acting as a fiduciary and 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.

Committee Opinion
November 16, 1992