

You have presented a hypothetical situation in which a decedent, a nineteen year old single male ["Decedent"], resided with his father and siblings after Decedent's mother, divorced from Decedent's father, had moved out of state several years earlier.

Decedent was killed in an automobile accident in Virginia. Several days after his death, his mother, in town for the funeral, qualified before the clerk of the circuit court as administrator of his estate for the purpose of bringing a wrongful death action. Since the mother was no longer a Virginia resident, her resident attorney qualified as co-administrator ["Attorney B"]. The father arrived at the clerk's office a day later and was not allowed to qualify.

You state that the remainder of the statutory beneficiaries, the father and siblings of the decedent, retained the services of Attorney A who has spoken with the other counsel who indicated that the administrator can settle the wrongful death action without the consent of the other statutory beneficiaries.

Attorney B subsequently requested to be removed as co-administrator and, instead of requesting that the father be allowed to serve as co-administrator, requested that the court appoint another attorney in that capacity. You further indicate that the court entered such an order and that neither Attorney A, representing the statutory beneficiaries, nor the father received any notice of the Attorney B's request.

Attorney B then filed a wrongful death suit in the circuit court in the name of the mother only as administrator of decedent's estate.

You have asked the committee to opine under the facts of the inquiry:

1. whether Attorney B, if he were to continue to serve as co-administrator of the estate, has a conflict of interest which would prevent him from filing and prosecuting a wrongful death action as attorney for the mother/beneficiary;
2. whether, if there is a conflict, the conflict is cured by the removal of Attorney B as co-administrator and the substitution of a third party co-administrator;
3. whether the administrators of an estate, as fiduciaries, are required to give the father and/or the other statutory beneficiaries notice of the hearing for withdrawing and appointing a substitute co-administrator; and
4. whether Attorney A, retained by four of the five statutory beneficiaries of a wrongful death estate, may properly contact the insurance adjuster and/or other attorneys on behalf of his clients where he does not also represent the administrator of the estate.

The appropriate and controlling Disciplinary Rules related to your inquiry are DRs 5-105(A), (B) and (C) [DR:5-105] which provide that a lawyer shall not accept or continue

multiple employment if the exercise of his professional judgment in behalf of his client will be or is likely to be adversely affected, except if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full and adequate disclosure; DR:5-101(A) which precludes a lawyer from accepting employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; and DR:7-103(A)(1) which prohibits a lawyer from communicating on the subject of the representation with a party he knows to be represented by a lawyer in that matter without the prior consent of the lawyer.

As to your first question regarding whether Attorney B has a conflict of interest in representing the mother/beneficiary in the wrongful death action, the committee is of the opinion that the attorney's status as co-administrator of the estate constitutes a personal interest, creating a requirement that it be disclosed and consent to such employment received prior to the attorney/co-administrator representing the mother/beneficiary. Since the other statutory beneficiaries have not consented, indeed even been consulted, as to the attorney/co-administrator's employment, it would be improper for him to represent the mother/beneficiary in the wrongful death action.

Regarding your second question, the committee is of the opinion that the conflict in representing the mother/beneficiary in the wrongful death action, as described above, is curable only by consent of all the statutory beneficiaries. Thus, the committee is of the view that the conflict is not cured by the removal of Attorney B as co-administrator and the substitution of a third party co-administrator.

As to your question of whether the administrators of an estate, as fiduciaries, are required to give the statutory beneficiaries notice of the hearing for withdrawing and appointing a substitute co-administrator, the committee believes that this issue raises a legal question the determination of which is beyond the purview of the committee.

Finally, as to your inquiry regarding whether Attorney A, retained by four of the five statutory beneficiaries of a wrongful death estate, may properly contact the insurance adjuster and/or other attorneys on behalf of his clients where he does not also represent the administrator of the estate, the committee directs your attention to prior LE Op. 1169, LE Op. 687 which the committee believes are dispositive of the issues raised. Thus, in the facts you present, the committee is of the opinion that it would be improper for Attorney A to contact the insurance adjuster if the defendant insured is represented by counsel; although it would not be improper for Attorney A to contact the attorney on behalf of A's clients.

Committee Opinion
May 11, 1993