Committee Opinion
February 15, 1990

LEGAL ETHICS OPINION 1315

ESTATE ADMINISRATION – CONFLICT OF INTERESTS – WITNESS: ATTORNEY/ADMINISTRATOR DEFENDED BY ANOTHER MEMBER OF HIS FIRM IN AN ACTION FILED BY A POTENTIAL BENEFICIARY OF THE ESTATE.

You have asked the Committee to consider the propriety of an attorney representing another member of his firm who, as duly qualified administrator for the estate of a decedent, is a named defendant in a law suit which has no relation to any of the firm's former or present activities. You have provided the following factual scenario on which the Committee will base its opinion.

A court-appointed guardian had properly consolidated the various bank accounts of his ward into one general account prior to the ward's demise. Three of these accounts, prior to their transfer, were payable on death to a person who normally would not inherit under the laws of intestacy in Virginia. When the decedent died intestate in January, 1989, the general account and contents of a safety deposit box were placed in the possession of the duly qualified administrator attorney. Consequently, the attorney/administrator is being sued by the person who would have received the proceeds of the payable on death accounts had they not been transferred into the general account by the guardian. The same person had jointly leased the safety deposit box with the deceased, and seeks to recover those items claimed as her personal property which were in the safety deposit box and are now in the defendant's possession. In addition, you have further indicated that a nonbeneficiary co-administrator has also been named a defendant in the suit.

If no conflict exists between the attorney/administrator and the co-administrator as to the facts, you wish to know if representation of both named defendants by a member of the attorney/administrator's law firm is proper even if it is likely that the attorney/administrator will have to testify. You have inquired if such representation would be proper if there is a reasonable expectation that the proffered testimony will consist solely of uncontested facts relative to the transfer and status of the accounts and safety deposit box as permitted by DR:5-101(B)(1).

In determining whether representation of both the attorney administrator/firm member and the co-administrator by another attorney in the firm is proper, the attorney must adhere to the mandates of DR:5-105(A) and (C): it must be obvious that he is able to adequately represent the interest of each, and both clients must consent to multiple representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each. The representation by an attorney of another colleague in his firm who is a potential key witness is ethically permissible provided that none of the issues in the matter in question pertain to anything connected with the law firm or legal work handled by the firm and provided that the firm

member/client does not intend to perform any advocacy function with regard to the case in the future. (See DR:5-101(B), DR:5-102(A) and LE Op. 958, LE Op. 1051; See also Battaro v. Hatton Associates, 680 F.2d 895 (Cal. 2 1982))

If the co-administrator and attorney/administrator do not agree as to the issue of ownership of the contents of the safety deposit box or the accounts, DR:5-105(C) will preclude representation of both clients by a single attorney. Obviously, the interests of the clients would then be potentially differing which would adversely affect the attorney's independent judgment on behalf of his client and may dilute his loyalty to the clients. (See EC:5-14, EC:5-16)

Finally, your inquiry as to whether representation of the attorney/administrator by his own law firm would result in a breach of his fiduciary duty to the estate is a legal question beyond the purview of this Committee. However, the Committee directs your attention to LE Op. 1301 which provides that a substitute trustee who had foreclosed on the deed of trust could represent himself pro se in a rescission suit naming the trustee, individually, as defendant. A trustee is precluded from assigning his loyalty exclusively to either the debtor or the creditor. (See Smith v. U.S., No. 5-83-00384, slip op. (Bankr. W.D. Va., March 30, 1989))