

LEGAL ETHICS OPINION 1333

CONFLICT OF INTEREST –
WRONGFUL DEATH ACTION:
REPRESENTATION OF ESTATE OF
MINOR; MOTHER, NAMED
CO-DEFENDANT; AND FATHER CO-
BENEFICIARY IN ACTION ON BEHALF
OF ESTATE.

You have asked the Committee to consider the propriety of counsel representing the estate of a minor who was killed in an automobile accident while riding as a passenger in her mother's vehicle, as well as representing the interests of the mother in a death claim action filed on behalf of the father and mother against the other driver and the mother. You also state that it is unclear as to whether the driver of the other vehicle involved, or the mother, or both may have been negligent in causing the accident. In addition, you indicate that the father is not married to the mother and has a hostile relationship with her. Under the facts as you have stated them in the inquiry, counsel for the estate withdrew and a second attorney was hired, due in part to an ethical problem in representing both the mother and father by refusing to allow the mother to have independent representation of her interests at trial.

You wish to know whether the new attorney may conduct the trial without a co-counsel to represent the mother's interests in light of his ethical obligations to represent the mother's interest when she is also a named co-defendant in the wrongful death action. Also of concern to you is the manner in which counsel would conduct his opening and closing statements to the jury and his examination of the mother in the estate's case in chief. Obviously, in any case, an attorney should proceed in a manner which would further the interests and lawful objectives of his client through reasonably available means permitted by law when such representation is permissible and free of compromising loyalties other than to the client. It is beyond the purview of this Committee to instruct or opine as to the proper course of conducting any segment of a case in litigation.

The appropriate and controlling Disciplinary Rule relative to your inquiry is DR:5-105(C) which provides that in contemplating whether to continue multiple employment, a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect on the exercise of his independent professional judgment on behalf of each. In addition, the Committee believes that an attorney who is engaged in multiple representation of parties to the same matter must be diligent to avoid a violation of DR:4-101(B). An attorney possessing a client's confidences or secrets may not reveal the same nor use the confidence or secret to the disadvantage of that client, to the advantage of another, or for his own advantage.

The Committee directs your attention to LE Op. 1225 which also involves a wrongful death action. The Committee opined that, absent consent from the former client/spouse, Attorney X may not ethically represent the administrator/personal representative in a

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wrongful death action brought by the administrator on behalf of his nephew's estate whose death was a result of a head-on collision when Attorney X was previously approached by the surviving spouse to represent her interests in a similar or the same action. The committee stated that while both the former client and the administrator shared the common interest to recover the maximum amount of damages from the wrongful death action, it was obvious that they had potential differing interests: the administrator was solely concerned with protecting the interests of the child beneficiary to any recovery from the death action which could be misused by the mother/surviving spouse. In addition, the administrator made an allegation of child abuse against the mother/surviving spouse to Attorney X which the committee cautioned might constitute a secret since it is likely that disclosure would be embarrassing and detrimental to the client/spouse.

Thus, the Committee was of the view that, because of the potential differing interests of the parties and the potential for a violation of DR:4-101(B), if the information about the former client/spouse were to be used to her disadvantage, it would be improper for Attorney X to represent the administrator without the informed consent of the former client/spouse. (DR:5-105(D))

Similarly, under the facts as you have presented them in the inquiry, the committee opines that, absent consent from the mother-beneficiary-codefendant, counsel for the minor's estate is likewise precluded from the multiple representation of both beneficiaries, mother and father. Given the additional facts that the beneficiaries are not married and have a hostile relationship, and because counsel has filed suit naming a client as codefendant, the committee is of the opinion that it is not obvious that counsel can adequately represent the interests of both beneficiaries and the estate under the circumstances. (See LE Op. 371, LE Op. 620, LE Op. 975)

Furthermore, the Committee is of the view that denial of independent representation by counsel is an aberration from the professional responsibility of a lawyer to uphold the principle that every individual is entitled to independent legal representation and to be served disinterestedly by a lawyer whose loyalty is not influenced by an allegiance other than to the client. Ethical Consideration 1-1 [EC:1-1] provides in part that a basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.

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