

LEGAL ETHICS OPINION 1449

PERSONAL INTEREST AFFECTING
REPRESENTATION – MULTIPLE
REPRESENTATION: ESTATE
EXECUTOR ENGAGING LAW
PARTNER TO REPRESENT ESTATE IN
WRONGFUL DEATH ACTION.

You have presented a hypothetical situation in which the sole executor of an estate is a partner in a law firm. The executor is required to file a death by wrongful act action for the benefit of the statutory beneficiaries. You indicate that, since the statutory beneficiaries may be somewhat antagonistic towards each other and because some of the statutory beneficiaries under the death by wrongful act statute are not testamentary beneficiaries, the executor advised each beneficiary to seek the advice of his/her own attorney. Furthermore, you indicate that each of the several groups of beneficiaries now want their various attorneys to represent the executor in the death by wrongful act claim, however Executor wishes to employ his law partner for that purpose. Finally, you advise that Executor does not anticipate testifying since his qualification may be demonstrated at trial by his certificate of qualification.

You have asked the Committee to opine whether, under the facts of the inquiry, it would be proper for Executor to employ one of his law partners to represent him as plaintiff in the death by wrongful act action. The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(A), (B) and (C), 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; and 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.

In the facts you present, assuming that either the testator's will specifically granted the Executor the authority to bring suit or that the Executor is proceeding under the authority granted by Virginia Code § 8.01-50(B), which directs that a wrongful death action shall be brought by and in the name of the personal representative of the decedent, the committee is of the opinion that the Executor is thereby empowered to employ counsel to bring such an action.

However, the Committee believes that should the Executor wish to engage his own partner or firm to bring the action, a personal financial interest inures to the Executor, creating a requirement that it be disclosed and consent to such employment received prior to the Executor engaging his own law firm to serve as counsel to the estate. The Committee also directs your attention to the conclusions of LE Op. 1325 which in pertinent part found that "when an attorney assumes the responsibility of acting as a

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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 also ABA Formal Op. 336. Thus, the Committee is of the view that, even though the Executor is not acting in an attorney/client relationship, he must secure the consent of the beneficiaries as required by the Disciplinary Rules. Finally, therefore, since the beneficiaries have not consented to the law partner's employment, it would be improper for the Executor to so employ his partner.