

You have indicated that Lawyer A's client's divorced spouse was killed in an automobile accident and an eight-year-old son of the client and deceased spouse is the sole beneficiary under Virginia's wrongful death statute. You further indicate that the client applied to the appropriate Circuit Court Clerk to qualify as administrator of the ex-spouse's estate for suit purposes; however, the client's ex-sister-in-law had already qualified as administratrix and obtained counsel, Lawyer B, who had filed a wrongful death action in behalf of the estate. Subsequently, the ex-sister-in-law petitioned the Juvenile and Domestic Relations Court for custody of the child, but the Lawyer A's client prevailed in that matter.

You advise that the client filed an appeal of the Clerk's appointment of the ex-sister-in-law as administratrix and that appeal is pending. The client also filed a special appearance to object to the wrongful death case proceeding until the question of the administrator is resolved. You indicate that the client specifically objects to the estate's attorney, Lawyer B, representing the interest of the sole beneficiary [eight year old son] because the client lacks confidence in the Lawyer B's protection of the beneficiary's best interest and has had personal and legal difficulties with that particular Lawyer B. Lawyer B is also representing the administratrix against the client's appeal of the appointment.

Finally, you indicate that due to a potential conflict on the part of Lawyer A, he will not represent the estate in the wrongful death case but would proceed with the appeal of the appointment and the custody matter if necessary.

You have asked the Committee to opine as to several questions concerning possible ethical improprieties related to the facts you have presented.

(1) Can the natural parent and custodian of a sole beneficiary legitimately object to the services of the estate attorney in regard to a wrongful death claim?

The Committee believes that the question you have raised falls outside the scope of the Code of Professional Responsibility since it is entirely a legal question of who can qualify as the administrator of the estate. Such a determination is beyond the purview of the Committee's authority.

(2) Is it unethical for the estate attorney to ignore the father's objections and proceed in behalf of the estate in the wrongful death action when the sole beneficiary is the child of the father?

Since no attorney/client relationship exists between the estate attorney and the father, and despite the fact that the sole beneficiary is the child of the father, the Committee is of the opinion that it is not improper for the estate attorney to ignore objections of the father and to proceed in behalf of the estate in the wrongful death action.

Committee Opinion
August 24, 1992

(3) If the father succeeds in his appeal, becomes the estate administrator for suit purposes, discharges the estate attorney, and employs the attorney of his choice, can the discharged attorney ethically refuse to withdraw as counsel for the estate in the wrongful death action?

The appropriate and controlling Disciplinary Rules relative to this question are DR:2-108(A)(3) which requires that a lawyer shall withdraw from representing a client if the lawyer is discharged by the client; and DR:2-108(C) which requires that counsel of record in a court proceeding shall not withdraw except by leave of court. The Committee has consistently opined that the plain language of these Rules mandate the lawyer's withdrawal following discharge by the client, but requires that, if a suit has been instituted, such withdrawal only be taken after appropriate judicial steps are taken. See LE Op. 317, LE Op. 1174. Thus, should the father become the estate administrator for suit purposes and discharge the attorney, the Committee opines that it would be improper for the discharged attorney to refuse to withdraw as counsel for the estate in the wrongful death action. See also LE Op. 1452.

(4) If the father qualifies as administrator and discharges the estate attorney, can the estate attorney ethically assert a lien for his services rendered after the date he was notified of the father's objection to his employment?

The Committee believes that the question you have raised falls outside the scope of the Code of Professional Responsibility since it is a legal question dealing with a statutory attorney's lien. Such a determination is beyond the purview of the Committee's authority.