

LEGAL ETHICS OPINION 1547

COMMUNICATION WITH ADVERSE
PARTIES: CONTACT WITH
POTENTIALLY ADVERSE PARTIES
WHO ARE CURRENTLY
UNREPRESENTED.

You have presented a hypothetical situation in which an attorney represents a defendant in a wrongful death action brought under Virginia Code § 8.01-50 to § 8.01-56. The plaintiff/maternal aunt of the decedent, who is represented by counsel, is the administrator of the decedent's estate. If liability is established, the plaintiff may be entitled under § 8.01-52(4) to recover the reasonable funeral expenses of the decedent. However, the judge has already held that because she is not a member of the exclusive classes of beneficiaries listed in § 8.01-53, the plaintiff is not entitled to recover damages under § 8.01-52(1).

You further indicate that, in her answers to defendant's interrogatories, plaintiff has listed only maternal aunts, maternal uncles, and maternal cousins as the statutory beneficiaries. Similarly, the judge has ruled that none of these people are entitled to recover damages under § 8.01-52(1).

Through investigation, the attorney has located persons whom he believes may be the decedent's half-siblings, children of the decedent's father from the father's other marriages. These half-siblings live in Michigan and North Carolina. There is a dispute as to the paternity of the decedent; in response to defendant's request for admissions, the plaintiff has denied that the man listed on the decedent's birth certificate was the biological father. If plaintiff's claim is true, the half-siblings would be unrelated to the decedent.

The defendant's attorney would like to contact the half-siblings to determine whether they are interested in pursuing a claim for wrongful death and to determine if they have any damages that they might be able to recover under § 8.01-52(1). The defendant's attorney believes that the half-siblings had little or no contact with the decedent during his life and the attorney would like to employ local counsel to contact the putative half-siblings. The attorney intends to treat the half-siblings as unrepresented parties in the case.

You indicate that defendant's attorney informed plaintiff's attorney that he planned to contact the half-siblings because (1) no one had entered an appearance on their behalf in this case; (2) they had not been listed as beneficiaries by the plaintiff; and (3) plaintiff's attorney had not stated that he had been retained to represent their interests. Plaintiff has contended in her response to admissions that the half-siblings are unrelated to the decedent. There is no indication that the plaintiff's attorney has ever contacted the half-siblings.

The administrator/plaintiff's attorney has stated that the defendant's attorney may not contact the half-siblings and claims that direct contact with the half-siblings is improper.

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Specifically, the plaintiff's attorney states: "As the attorney for the estate, I will be representing their interests if they wish to assert a claim for solace under the wrongful death statute, and I feel it would be unethical for you or your firm to have any direct contacts with them".

You have asked the committee to opine under the facts of the inquiry, (1) whether the defendant's counsel may contact the half-siblings, and (2) whether the plaintiff's counsel is ethically prohibited from representing the half-siblings on the basis that the interests of the beneficiaries listed by the administrator conflict with those of the half-siblings.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(A) which states that a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR:5-105(C); DR:7-103(A) which provides that a lawyer shall neither communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such party or is authorized to do so, nor give advice to a person who is represented by counsel other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client; and DR:7-103(B) which states that in dealing with a person who is not represented by counsel, a lawyer shall not state or imply that he is disinterested and that he should make reasonable efforts to correct any misunderstanding.

1. As to whether defendant's counsel may contact the half-siblings, the committee is of the opinion that such communication would not be improper under DR:7-103.

You state that no appearance has been entered on behalf of the half-siblings, that they are not listed as beneficiaries, and that there has been no declaration of representation of their interests. The committee believes, thus, that DR:7-103(A)(1) is inapplicable, since the half-siblings are not currently represented by counsel.

Since the half-siblings are unrepresented by counsel, however, defendant's counsel may contact them only according to DRs 7-103(A)(1) and (B). Specifically, defendant's counsel may give no advice other than the advice to secure counsel. Furthermore, counsel may not state or imply that he is disinterested in the matter.

2. The committee is of the opinion that it would be improper, under DR:5-105(A), for plaintiff's counsel to represent both the plaintiff/administrator and the half-siblings. The facts indicate that the plaintiff denies the status of the decedent's biological father. The facts also indicate that the half-siblings, rather than the plaintiff or her listed beneficiaries, may be able to recover damages for wrongful death under Virginia law. The committee believes, therefore, that counsel's independent professional judgment on behalf of the plaintiff is likely to be adversely affected by the acceptance of representation of the half-siblings. The committee also

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believes that the conflict cannot be cured by full disclosure to, and consent by, the plaintiff and the half-siblings.