

LEGAL ETHICS OPINION 1599

CONFLICT OF INTEREST — MULTIPLE
CLIENTS: ATTORNEY REPRESENTING
ESTATE AND PROTECTING
INTERESTS OF ONE BUT NOT BOTH
BENEFICIARIES.

You have presented a hypothetical situation in which A, the executor of decedent's will, employs Attorney to assist him in the administration of decedent's estate. A is also a beneficiary of a substantial specific bequest under the decedent's will. The only other beneficiary of the estate is B, who is, in effect, the sole residuary legatee. The estate has no other beneficiaries. Further, you indicate that all expenses of administration, including Attorney's fees, are paid from B's legacy.

You indicate that, in the course of Attorney's employment, he advises and represents A in several matters involving the beneficial interests of A, which give rise to conflicts between the interests of A and the interests of the other beneficiary, B. For example, Attorney advises A to compensate himself as fiduciary in such a manner that increases the value of A's legacy but also increases the tax liability of the estate and avoids normal judicial approval for fiduciary compensation. You advise that Attorney also files a Bill of Complaint on behalf of the estate concerning a matter that would benefit A's legacy to B's detriment. Attorney then moves for summary judgment against B on that same matter; and later, after losing the summary judgment motion, Attorney threatens appeal on behalf of the executor.

Finally, you indicate that A eventually retains separate counsel; however, Attorney continues to advocate A's personal, beneficial interests to the detriment of B. Attorney also insists that he owes no duty of disclosure to B regarding the matter giving rise to conflicts between A and B.

Under the facts of the inquiry presented, you have asked the committee to opine relative to several issues involving an attorney's representation of an executor/beneficiary.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105, which concerns conflict of interest involving representation of multiple parties; and DR:7-102(A)(7) which prohibits an attorney from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent.

The committee responds to your inquiries relative to the facts presented as follows:

- (a) As to whether there is a potential for conflict of interest when an attorney represents the executor of an estate who is also a beneficiary, the committee believes that a conflict would only arise should the attorney also accept representation of another beneficiary. The committee is of the view that the attorney-client relationship arises only between the attorney and the executor, and not between the attorney and any other beneficiary. Thus, the committee opines that the attorney's representation of the executor/beneficiary in both his fiduciary and individual capacities does not

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constitute a conflict. *See* LE Op. 1452. The committee cautions, however, that since “the attorney-client privilege will provide only limited, if any, protection against disclosure to beneficiaries of communications between a fiduciary and its lawyer about the performance of fiduciary duties,” the attorney should advise the executor/beneficiary that communications with the fiduciary in his capacity as a beneficiary may similarly not be protected under DR:4-101. Alan D. Wingfield, *Fiduciary Attorney-Client Communications: An Illusory Privilege?*, 8 Prob. & Prop. 4 at 61 (July/August 1994).

(b) As to whether the attorney-client relationship is limited where the executor is also a beneficiary, the committee is of the opinion that no such limitation is necessary since the attorney represents only one individual, even though the individual functions in two capacities.

(c) The committee is of the opinion that there would be no impropriety under DR:5-105 for the attorney to represent A's beneficial interests (as opposed to the general interests of the estate's beneficiaries) when those interests conflict with the interests of other beneficiaries, since the committee has previously opined that an attorney engaged to represent an executor of an estate has no attorney-client relationship with beneficiaries of the estate other than the executor. *See* LE Op. 1452.

(d) The committee is of the view that A's fiduciary duty to B and the attorney's fiduciary duty to A does not limit the scope of Attorney's representation. The committee further opines that A's duty to B does not create any derivative duty in the attorney. However, the committee cautions that an attorney representing an executor/beneficiary must be cognizant of the executor's fiduciary duties to other beneficiaries; the committee suggests that the attorney so employed should advise the executor/beneficiary to recommend that the other beneficiary seek independent counsel. *See* LE Op. 260.

(e) As noted above, the committee is of the opinion that the attorney does not owe any ethical or fiduciary duty to B, the other beneficiary. However, the Committee cautions that the attorney must be alert to indications that B does not understand the attorney's role. It is not uncommon for an estate beneficiary to assume that the Executor's attorney is also the beneficiary's attorney. If the attorney should reasonably conclude that the beneficiary does not understand the attorney's role, and the attorney fails to adequately inform the beneficiary of his role, the attorney may incur duties to the beneficiary.” The attorney's duty to communicate with a client includes the duty to communicate to persons who reasonably believe they are clients to the attorney's knowledge at least to the extent of advising them that they are not clients.” *Butler v. State Bar*, 721 P.2d 585, 589 (Cal. 1986).

(f) The committee opines that an attorney who advises or represents A (an executor/beneficiary) in actions that breach A's fiduciary duty, may be in violation of DR:7-102(A)(7), which prohibits an attorney from counseling or assisting his client in conduct that he knows to be illegal or fraudulent.

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(g) The committee is of the opinion that an attorney is not substituted as executor simply by performing tasks at the executor's request and direction. Therefore, the committee is of the further opinion that an attorney does not take on the executor's fiduciary duties to the beneficiaries simply by performing the executor's administrative tasks.

The committee cautions that the attorney may only charge the estate for services rendered to A in his capacity as executor. Any services rendered to A in his capacity as a beneficiary must obviously be charged to A personally.