

Committee Opinion  
December 2, 1998

LEGAL ETHICS OPINION 1720

CONFLICTS OF INTEREST; ESTATES,  
BENEFICIARIES, BENEFICIARIES'  
ESTATES.

You have presented a hypothetical situation in which Alice died intestate owning personal property and real estate. Alice was survived by her sister, Bernice, and her nephew, Carl, as her heirs and distributees.

Alice was a party to several joint bank accounts with survivorship at the time of her death. Alice had created a substantial number of those joint bank accounts in the name of herself and/or Bernice and in the name of herself and/or her niece, Dottie, who was Bernice's daughter. The value of Alice's gross estate is substantial, and estate taxes will be due, including estate taxes that are apportioned pro rata to the survivors on the joint bank accounts.

Bernice retains Lawyer One; Carl retains Lawyer Two. Lawyer One and Lawyer Two qualify as co-administrators of Alice's estate by agreement of Bernice and Carl. During the course of administration, Carl discharges Lawyer Two and asks him to resign as co-administrator. Both Lawyer One and Lawyer Two move the Court for leave to resign as co-administrators of Alice's estate. The Court grants them leave to resign and appoints Lawyer Three as successor administrator of Alice's estate.

Between the date of the hearing at which Lawyer One and Lawyer Two were granted leave to resign and the date the Court entered its order memorializing its ruling, Carl and his new lawyer give a notice to Lawyer One and Lawyer Two directing them to take legal action for a determination of whether Alice's joint bank accounts with Bernice and Dottie, respectively, were owned with survivorship. Bernice then dies, and Dottie qualifies as executrix of her estate.

Based on the hypothetical facts presented, you have asked the committee to opine whether it is ethically permissible for Lawyer One to represent Dottie as executrix of Bernice's estate and individually in litigation over Alice's joint bank accounts when Lawyer One had been a co-administrator of Alice's estate. You have also asked whether Lawyer One is permitted to represent Bernice's estate in litigation over a partition of real estate that Alice owned at her death.

The appropriate and controlling Disciplinary Rule relative to your questions presented is DR:5-105(D) as follows:

A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure.

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On the facts presented, Carl is not a former client of Lawyer One since Carl had retained Lawyer Two to represent him and serve as co-administrator of Alice's estate with Lawyer One. Moreover, the committee has previously opined that the client of a lawyer who represents an estate is the executor/administrator and not the beneficiaries. See LE Op. 1452. The committee has observed, however, that a lawyer representing an estate must make appropriate disclosure of his role if he/she has reason to believe that the beneficiaries look on him as "their lawyer." LE Op. 1599.

Since Lawyer One was co-administrator of Alice's estate, he was his own client for practical purposes. Viewed in that posture, his representation of Dottie, as executrix of Bernice's estate and individually, in litigation over survivorship of Alice's joint bank accounts turns on whether the matter is, under DR:5-105(D), substantially related to his former representation as co-administrator of Alice's estate and is adverse to Alice's estate.

Adversity seems to be apparent. If Lawyer One's representation of Dottie is successful, Alice's estate will not receive the funds on deposit in the joint bank accounts: Instead, they will pass by survivorship to Dottie, as executrix of Bernice's estate and to Dottie individually.

Substantial relatedness between the matters in a former representation and a current representation is a fact-specific inquiry from case to case. LE Op. 1652. In previous opinions, substantial relatedness depended upon whether the same parties, the same subject matter, or the same issues were present. The committee referred to cases defining substantial relatedness in terms of the matters or the issues being essentially the same, arising from substantially the same facts, being byproducts of the same transaction, or entailing a virtual congruence of issues or patently clear relationships in subject matter. *Id.*

Applying those principles of substantial relatedness, the committee concludes that Lawyer One's representation of Dottie, individually and as executrix of Bernice's estate, in litigation over survivorship of Alice's joint bank accounts would be substantially related to Lawyer One's former representation as co-administrator of Alice's estate. The committee's understanding is that Lawyer One as co-administrator of Alice's estate may have been required to report Alice's interest in multiple party accounts on the inventory of her estate. *See* Va. Code § 26-12. The committee understands, too, that Lawyer One as co-administrator had a right and upon appropriate request, a duty to assert a claim to the joint bank accounts. Va. Code §§ 64.1-140 and 6.1-125.8. In fact, Carl had given notice to Alice's co-administrators to take action establishing whether survivorship existed. In short, the joint bank accounts, which are the subject of Lawyer One's representation of Dottie, as Bernice's executrix and individually, were implicated in his representation as co-administrator of Alice's estate in significant respects.

The committee is of the opinion, therefore, that under DR:5-105(D) it is not ethically permissible for Lawyer One, without consent from Alice's successor administrator, to represent Dottie as Bernice's executrix and individually in litigation that contests the interest of Alice's estate in the joint bank accounts.

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Whether Lawyer One may represent Bernice's executrix in litigation over partition of Alice's real estate is a distinct issue. Alice died intestate. If title to her intestate real estate vested in her heirs upon her death, and if her co-administrators did not obtain a court-awarded power of sale over the real estate, then the real estate was never an asset of her probate estate for administration by or subject to the control of Lawyer One and Lawyer Two as co-administrators. *See Yamada v. McLeod*, 243 Va. 426 (1992); *Stark v. City of Norfolk*, 183 Va. 282 (1944); *Epps v. Demoville*, 6 Va. (2 Call.) 22 (1799).

Under those circumstances, Alice's intestate real estate was not implicated in Lawyer One's representation as co-administrator. The committee is of the opinion, therefore, that it is ethically permissible for Lawyer One to represent Bernice's executrix in litigation over the partition of Alice's intestate real estate.

The opinions expressed are limited to the application of DR:5-105(D). The committee notes that as co-administrator of Alice's estate, Lawyer One was a fiduciary. Va. Code § 8.01-2. The content and scope of common law duties owed by a fiduciary to the estate and its beneficiaries, and the effect of such duties on the questions presented, are legal issues beyond the purview of the committee.

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