Committee Opinion
November 30, 1990

LEGAL ETHICS OPINION 1387

ESTATE LANNING/ADMINISTRATION – CONFLICT OF INTERESTS – ATTORNEY AS WITNESS: ATTORNEY/CO-EXECUTOR REPRESENTING THE ESTATE WHILE SERVING AS CO-TRUSTEE OF THE RESIDUARY TRUST.

You have indicated that the co-executor of an estate is a partner in a law firm and is also one of several co-trustees of a trust created by the residuary clause of the same will. The testator also provided in his will that the co-executor's law firm represent the estate.

You have requested that the Committee consider the propriety of the firm's undertaking the representation as to matters of estate administration.

The appropriate and controlling disciplinary rule applicable to the circumstances you describe is 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 interest except with the consent of his client after full and adequate disclosure under the circumstances.

The Committee has earlier opined that:

> "an attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict as described by DR:5-101(A). In such a situation, the attorney's own financial, business, or personal interest may potentially affect the exercise of his professional judgment on behalf of the trust or estate."

(See LE Op. 1358.) Furthermore, in rendering LE Op. 1358, the Committee analogized the dual roles of fiduciary and lawyer administering the estate to earlier conclusions reached wherein LE Op. 1353 found no impropriety in a corporate assistant general counsel referring his corporate client to an outside law firm with which he was affiliated as "of counsel," provided that the outside law firm maintain direct communication with individuals within the corporation other than the assistant general counsel/outside law firm "of counsel." Thus, it is not per se improper for an executor or trustee ("fiduciary/partner") to engage his own law firm to represent matters of estate administration. Since the facts you present indicate that the individual in question is both a co-trustee and co executor, it is the committee's opinion that the consent of the co-fiduciaries must be obtained prior to the firm's taking on representation of the estate. In addition, the committee urges that the co-fiduciaries, rather than the fiduciary/partner maintain the necessary communication with the firm throughout the administration of the estate. (See also LE Op. 257, LE Op. 370; N.H. Ethics Op. 1987-8/9 (Sept. 23, 1988), ABA/BNA Lawyer's Man. on Prof. Conduct 901:5701.)

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Finally, the Committee cautions that DR:5-101(B) and DR:5-102(A) preclude a lawyer from accepting or continuing employment if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness [in any contemplated or pending litigation] except in very limited circumstances. Therefore, should it become necessary for the fiduciary/partner to testify at either a probate hearing or at any ensuing litigation, it would be necessary for the firm to withdraw from representation unless such testimony would relate solely to an uncontested matter or to a matter of formality and then only if there were no reason to believe that substantial evidence would be offered in opposition to the testimony.

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Legal Ethics Committee Notes. – See Rule 3.7(c) stating that there is no longer disqualification of the entire firm when a lawyer must testify, unless representation would create a conflict under Rule 1.7 or Rule 1.9. Under Rule 3.7(c), this disqualification is not imputed to the lawyer's firm unless there is an actual conflict of interest.