LEGAL ETHICS OPINON 1778

REPRESENTING ADMINISTRATOR WHO IS TAKING HIS ELECTIVE SHARE AS SPOUSE OF THE DECEDENT.

You have presented a hypothetical situation in which an attorney represents the administrator of an estate. That administrator is the husband of the deceased. He presented to the attorney that there was no will. However, other family members locate a will, which is then admitted to probate. The will did not specify an executor, and the husband remains administrator of the estate. The will leaves nothing to the husband. He chooses to take his statutory elective share of the estate. Litigation ensues between the husband and the beneficiaries regarding whether certain real estate belongs in the augmented estate.

Under the facts you have presented, you have asked the committee to opine as to whether the attorney has an impermissible conflict of interest in representing a party as administrator and in his individual capacity in claiming the elective share of the estate.

Specifically, your request expresses concern as to whether Rule 1.7, which governs current conflicts of interest, prohibits this representation. Paragraph (a) of that rule outlines conflicts involving adversity between two clients and paragraph (b) of that rule outlines conflicts involving the competing duties between representation of a client and an attorney's "responsibilities to another client or to a third person, or by the lawyer's own interests."

This committee has established in prior opinions that the client of a lawyer who represents an estate is the executor/administrator and not the beneficiaries. *See*, LEOs 1452, 1599 (approved by Bar Council 1995), 1720. Similarly, the ABA has opined that "the fact that the fiduciary client has obligations toward the beneficiaries does not impose parallel obligations on the lawyer, or otherwise expand or supersede the lawyer's [ethical] responsibilities." ABA Formal Op. 94-380. *See also*, Kentucky Eth. Op. 401 (1997) (concluding that a lawyer's representation of a fiduciary imposes no special duties to the beneficiaries of the trust or estate). Furthermore, this committee has explained that it is not a conflict to represent the individual serving as executor/administrator both in that role and individually. See LEO 1599 (approved by Bar Council 1995).

This committee considered whether Rule 1.7's provisions regarding conflicts of interest among clients has any application to the present situation. This committee concludes that the Oregon Bar's analysis on this point is persuasive. The Oregon Bar opined:

> An attorney for a personal representative represents the personal representative and not the estate or the beneficiaries as such. It follows that when Attorney A represents Widow as an individual and Widow in her capacity as personal representative, Attorney A has only one client. Alternatively stated, the fact that Widow may have personal interests that may conflict with her fiduciary obligations does not mean that Attorney A has more than one client. For purposes of the rules regarding multiple client conflicts of interest, representing one individual in several different capacities is not the same thing as representing different individuals.

Oregon Formal Ethics Op. 1991-119. Similarly, in denying a motion to disqualify an attorney from representing an individual both in her capacity as executor and as an individual, a New York court notes that, "it would be unnecessary and wasteful to require yet another firm be hired to represent her in her individual capacity." Matter of Birnbaum, 118 Misc.2d 267, 460 N.Y.S.2d 706, 709 (N.Y. Sur. Ct. 1983). Agreeing with those opinions, this committee concludes that the attorney in the present hypothetical has only one client: the deceased's

husband. While that client may have two legal needs, his role as administrator and his choice to elect against the will, he remains only one client. Therefore, representation of this husband on these matters cannot trigger the prohibition of Rule 1.7(a)'s provisions regarding adversity between two or more clients.

Paragraph (b) of Rule 1.7 similarly is not triggered by this attorney's representation of the husband. That provision would only be triggered if the attorney had some additional, competing duty to another client or a third person or a competing personal interest of his own. No such personal interest has been suggested. As for a competing duty to anyone else, this attorney's duty in representing this estate is solely that of representing the husband individually in his role as executor, with no concomitant duties to the beneficiaries. That representation itself creates no competing duties. Rule 1.7(b) does not prohibit this representation. This committee does not find a conflict of interest for this attorney under Rule 1.7 as he has only one client.

In opining that there is no conflict of interest in representing the husband in his various legal needs, this committee cautions the attorney, nonetheless, to be mindful of the client's fiduciary duty to the beneficiaries. Were the attorney to advise or assist his client in actions that breach the husband's fiduciary duty, he could be in violation of Rule 1.2's prohibition against assisting a client in criminal activity or fraud. Whether the administrator in this hypothetical has in any way breached his fiduciary duty is a legal question outside the purview of this committee.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
May 19, 2003