

Advisory Opinion 1986-4

You have asked whether you can continue to represent a client in his personal capacity and also represent him as the executor of his deceased ex-wife's estate. You have also asked whether you should pay back to the estate funds which your client gave you to satisfy a bill, which you later learned were estate funds. Under the facts you present in your letter, the committee has learned that the former wife owned and operated a bar; that she died intestate, leaving a daughter as her only heir; that the daughter is also the daughter of the client; that there are insufficient assets to meet the estate's huge debts; that your client ran the bar as executor pro tempore; that a worker was injured on the job during such time; that the worker has sued both the estate and your client for worker's compensation; and that there is pending a motion for summary judgment on behalf of your client in the compensation case.

Additionally in a telephone conversation we had on November 6, you related facts to me which made us conclude that you are unsure of the accuracy of the accounting your client has provided with regard to the estate. You further told me that you based your opinion, in which you expressed your belief that there was no conflict because no reasonable person could conclude that your client would be individually liable in the compensation case, on the figures provided by your client.

In our discussions, the committee was sensitive to two apparently competing interests. On the one hand, we were sensitive to the inherent conflict in representing two entities that might be potentially liable in the same case under circumstances in which each might try to shift liability to the other. On the other hand, we were sensitive to your client's and the estate's limited funds and to the fact that it might be unduly burdensome to retain separate counsel on behalf of each.

The initial response of most committee members was that, if the client's motion for summary judgment were granted, there would then be no conflict. The committee, however, was also aware that, as a practical matter, the motion for summary judgment might not be dealt with until the time of trial. Indeed, in our conversation, you confirmed that the motion for summary judgment had not been decided and was unlikely to be decided for some time. You stated that the last action in the case was an order continuing discovery so that the worker might discover matters pertinent to his claim that your client is individually liable.

The committee discussed the fact that, if the client in his individual capacity were not dismissed as a party in the worker's compensation case, you would be put in the position of possibly having to compromise one client's interest to the benefit of the interest of the other. This would be unethical because DR 5-105(B) states, "A lawyer should not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Rule 5-105(C)." Rule 5-105(A) states the same principle with regard to preferred employment. Rule 5-105(C) permits multiple representation if it is obvious that you can represent the interests of each client and if each client consents after full disclosure.

You stated your belief that it was obvious that you could adequately represent both the individual and the estate. However, you based your belief on the facts of dubious accuracy. Even if it is obvious that you could represent both clients without conflict, however, there is a problem in obtaining the consent of the estate. In ABA Informal Decision 564 (1962), a similar situation was addressed. A lawyer represented a corporation for twenty years. The corporation president died owning about thirty percent of the stock in that corporation. The lawyer represented the executor. A dispute arose over the stock. The committee believed that the lawyer did not have to withdraw from representing either the corporation or the executor on other matters but felt that he could not deal with any matter involving the stock of this corporation. The majority of the committee believed "that the consent of an executor to his attorneys representing conflicting interests should not be relied upon because the executor is in a quasi official position, or at least a trust capacity." The committee felt that, as to the stock matter, the attorney should withdraw from both sides of the controversy.

Because of the uncertainty surrounding the facts of your case, it is the opinion of this committee that the conclusion of the ABA opinion is well taken in that we do not believe that your client, in his executor capacity, could consent to the possible conflict. However, because the facts of your case do not present such a direct conflict as the facts in the ABA opinion, we do not believe that you need to withdraw from representing the client in his individual capacity. You may continue representing him and you should advise him to get separate counsel to represent the estate in the compensation suit, at least until such time as your motion for summary judgment is granted.

With regard to the funds paid by your client out of estate money for fees incurred on individual work, you stated that you have no objection to reimbursing the estate immediately. Technically, this might not be your obligation; you may only

need to tell your client to reimburse the estate. However, in light of the fact, as you informed me over the phone, that your client has not kept estate funds separate from his own, but rather has paid estate bills out of his own pocket with the expectation of being reimbursed by the estate, and in light of the further fact, as you informed me over the phone, that perhaps you should have known that the funds came from the estate, we believe it would be prudent for you to return the funds to the estate on behalf of your client and then collect the funds from your client personally.

You should be aware that, pursuant to the Advisory Opinions Committee Rules of Procedure, this is the opinion of the District 2 Committee only. There are five other district committees in the state. This letter will now be circulated to them for approval before this opinion becomes an opinion of the state-wide committee. As advisory opinions are advisory only, they are not binding on the disciplinary board or the supreme court in any event. Such opinions, however, provide you with a basis by which to judge what to do. I hope this has been helpful.