NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #512 - 7/11/79 (12-79) Topic: Conflicting interests; appearance of impropriety; withdrawal from employment; lawyer for coexecutors

Digest: Lawyer for two coexecutors may not institute a proceeding to compel an accounting or otherwise represent one executor against the other.

Code: Canons 5, 7 and 9;
EC5-14, 5-15, 5-16, 5-17 5-18, 5-19, 7-4, 7-5, 7-8, 7-9, 9-1, 9-2 and 9-6;
DR2-110(B)(2), 4-101(A) and (B), 5-105, 5-107(A), 7-102(A) and (B)(1).

QUESTION

A lawyer represents two coexecutors, one is a bank and the other is the principal beneficiary of the estate. The bank has allegedly extended the administration of the estate long past the period within which it should have been settled and has failed to account. Under the circumstances:

(1) May the lawyer institute a proceeding on behalf of the executor-beneficiary to compel the bank to perform its duties?

(2) If the executor-beneficiary retains other counsel to institute such a proceeding, may the lawyer represent the bank in connection therewith?

(3) May the lawyer continue to represent the executors in connection with any matters relating to the estate?

OPINION

The lawyer's ethical dilemma derives from the apparently conflicting loyalties owed to each executor, as well as to the estate itself.

OVER ---

There appears to be no direct authority in this State which would serve to answer the question posed. Whatever pertinent authorities exist must be gleaned from the broadly stated standards of our Code of Professional Responsibility, judicial decisions relating to seemingly analogous situations and the opinions of ethics committees in other jurisdictions.

The applicable provisions of the Code may be briefly summarized.

Initially, we note various principles concerning the representation of multiple clients which are articulated under Canon 5 of the Code. Thus, for example, DR5-105 provides that a lawyer should not accept or continue multiple employment if the interests of one client may impair the exercise of his independent professional judgment on behalf of another. Similarly, DR5-107(A) requires that a lawyer represent his client with undivided loyalty. Paralleling the Disciplinary Rules' mandate, EC5-15 cautions a lawyer to weigh carefully the possibility that his representation of multiple clients having potentially differing interests may impair his judgment or divide his loyalty and that the lawyer should resolve all doubts against the propriety of the multiple representation. EC5-15 also explains that while there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation, there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests; and, that a lawyer should never represent in litigation multiple clients with differing interests. See also, EC5-14, EC5-16, EC5-17 and EC5-19.

Complementing the principles of Canon 5 are certain Ethical Considerations set forth under Canon 7 which generally relate to the lawyer's obligation to uphold our system of justice. Specifically germane to the matter at hand are EC7-4, 7-5, 7-8 and 7-9 which together serve to distinguish the lawyer's professional responsibilities _qua_ advocate from those of the lawyer _qua_ adviser. Throughout, these Ethical Considerations remind the lawyer that he is bound to provide counsel which is morally just and that in a "non-adjudicatory matter" he need not continue to represent a client who ignores his advice. _Cf._, DR7-102(A) and (B)(1).

Apart from the Ethical Considerations of Canon 7, three additional concepts operate to qualify and complement the provisions of Canon 5. For one, DR2-110(B)(2) implicitly requires a lawyer to withdraw from employment where it appears that he can no longer serve a client with the undivided loyalty mandated by DR5-107(A). Another relevant concept is that contained in DR4-101(B)

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which prevents him from speaking against that client's interests even after he has left his employ. Finally, Canon 9 serves to admonish lawyers to avoid the appearance of impropriety. In the context of the question posed, even where there may be no misuse of confidential information (cf., DR4-101[A] and [B]), we see that Canon 9 effectively condemns any species of turncoat representation. See, e.g., N.Y. State 436 (1976), N.Y. State 329 (1974) and N.Y. State 303 (1973); see also, EC9-1, EC9-2 and EC9-6.

The aforementioned provisions of the Code have been variously applied by the courts and ethics committees in other jurisdictions to preclude a lawyer from representing both an estate and persons having claims against the estate. See, e.g., Ill. Op. 412 (1974) and N.C. Op. 1 (1974), respectively indexed at 8331 and 9607, O. Maru, Digest of Bar Association Ethics Opinions (1975 Supp.). Analogous provisions of the former Canons of Professional Ethics have also been applied to forbid a lawyer from attempting to remove an executor he had once represented. See, Mich. Op. 75 (1942) and L.A. Co. Op. 72 (1934), respectively indexed in Maru's Digest (1970) at 1249 and 6138; see also, Matter of Howard, 80 Misc. 2d 754 (Surr. Ct., Bronx Co. 1975) (executor's former counsel, then acting on behalf of two legatees, could not seek executor's removal since it would raise "serious ethical questions").

It is clear that the lawyer, although retained by the executors, has a duty not only to represent them individually, but also to serve the best interests of the estate to which they, in turn, owe their fiduciary responsibilities. As we observed in N.Y. State 477 (1977), "[t]he Code clearly requires the executor's lawyer to avoid taking any position antagonistic to the estate or inconsistent with the executor's duty to carry out the ... will." Cf., N.Y. State 496 (1978).

Applying the foregoing principles and authorities to a resolution of the question posed, we believe that the lawyer is duty bound to call upon the bank to do that which the lawyer deems necessary to the proper administration of the estate and, further, to refrain from counseling or assisting the bank in conduct which he deems to be inconsistent with the best interests of the estate. If the bank fails or refuses to follow his advice, he may withdraw from its employ. The lawyer may not, however, institute a proceeding to compel an accounting or otherwise represent one executor against the other. The retention of other counsel by the executor-beneficiary would not, in our opinion, relieve the lawyer from his ethical obligation to avoid representing either of the executors with respect to litigation inter sese.

OVER ---

We do not hereby mean to suggest that a lawyer must always withdraw from his representation of an estate when there is a falling out, or even litigation, between coexecutors. The situation is an extremely delicate one, but not incapable of some satisfactory resolution short of complete withdrawal. Indeed, under the circumstances presented, we believe at least one appropriate course for the lawyer to follow would consist of recommending that the executor-beneficiary retain his own independent counsel to advise him on ways of closing the estate or, if necessary, to institute proceedings. If such counsel is retained, we would have no objection to the lawyer continuing to handle other matters relating to the administration of the estate as to which there is no conflict between the executors.

For the reasons stated, the first two subparts of the question posed are answered in the negative and the third, subject to the qualifications hereinabove set forth, is answered in the affirmative.