

# ADVISORY ETHICS OPINION 88-08

## SYNOPSIS:

An executor of an estate who is also an attorney may, under strictly limited circumstances, convey estate property to an associate in the executor/attorney's law firm.

## FACTS:

An executor of an estate who is also an attorney, proposes to sell property from the estate to an associate in his law firm. The executor/attorney has asked a third attorney to render a legal opinion as to the ethical propriety of the proposed sale. The third attorney has requested our opinion. We are informed that the proposed sale price is the fair market value as set by a real estate appraisal conducted on behalf of the estate. The sale is contingent upon the approval of all parties interested in the estate proceedings and the presiding probate judge.

## OPINION:

Ordinarily this Committee does not respond to requests for advice pertaining to the conduct of an attorney other than the requesting attorney. We make an exception to that rule where, as here, the request pertains to the conduct of an attorney who is represented by the requesting attorney in an attorney-client relationship. We agree, therefore, to address the precise issue of whether an attorney/executor may convey estate property to an associate in his own law firm and conclude that such conduct, under strictly limited circumstances, does not violate the provisions of our Code of Professional Responsibility.

DR 5-101(A) recognizes that an attorney's professional judgment can reasonably be affected by his or her own financial business property or personal interest. Under such circumstances DR 5-101(A) prohibits acceptance or continuance of the representation except with client consent after full disclosure. DR 5-104(A) imposes the same limitation on acceptance or continuance of representation when an attorney enters into a business transaction with a client and the attorney's interest in the transaction differs from his client's interest. This requirement of consent after full disclosure must be adhered to whether the interested attorney is the attorney dealing with the client or another attorney in the same law firm.

The facts, as presented to us, reveal that full disclosure of the associate's interest has indeed been made by the executor/attorney to the probate court as well as to all parties interested in the estate. Moreover, the purchase price has been based upon fair market value as set by an independent appraisal. Under these circumstances, we are unable to conclude that the transaction violates our Code of Professional Responsibility.

Nonetheless, the fact that the property will not be offered for sale to the general public and that it will be purchased promptly by the executor/attorney's associate may well give rise to speculation among members of the lay public as to the propriety of the transaction. This concern has generated lengthy and heated discussion among the members of this Committee. We are troubled by the likelihood that the transaction will create the very "appearance of impropriety" which Canon 9 seeks to avoid. The appearance of impropriety, even where no actual impropriety exists, can do as much damage to the perception of our profession as a true transgression. Our concern in this regard is supported by ABA Informal Opinion 677 (1963), ABA Informal Decision C-804 (1964), and EC 9-2<sup>1</sup>.

In the past, we have expressed our reluctance to disapprove conduct solely on the basis of Canon 9 and we adhere to that practice in this matter. The Canons themselves do not permit or prohibit conduct. Only the Disciplinary Rules do so and the Disciplinary Rules subsumed under Canon 9 are inapposite.

In the absence of a specific Disciplinary Rule prohibiting the proposed conduct, we must conclude that the transaction is not barred by the Code.

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<sup>1</sup> EC 9-2 provides that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his [or her] conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."