

ADVISORY ETHICS OPINION 81-11

SYNOPSIS:

An attorney who is Director and Secretary of a corporate group and handled legal matters for the corporations and the now-deceased majority shareholder may not serve as executor and co-trustee of the estate of the majority if he retains the corporate offices and represents the corporate group and there is a dispute between the estate and the corporations on matters substantially related to his former representation of the corporation. Depending on whether disputes arise between the estate and the corporations and the nature of any such disputes, the attorney may serve as executor and co-trustee and retain some role in the corporations.

QUESTION PRESENTED:

May an attorney represent a corporation and serve as an officer in the corporation while serving as executor and trustee of the estate of a deceased majority stockholder when certain conflicts may arise?

FACTS:

Prior to the decease of the majority stockholder, attorney handled legal matters as referred to him by the President or officers of the related corporate group. Attorney's services were for corporate matters on a case by case basis, and he was not on retainer by the related corporate group. Attorney also served as Director and Secretary of the related corporate group. Attorney also had represented the deceased majority shareholder prior to his decease relative to his individual legal matters. After the decease of the majority stockholder, attorney was appointed Executor of his estate and Co-Trustee of a trust established for the corporate stock.

Prior to his decease, the majority stockholder had obtained from the related corporate group loans which were represented by Promissory Notes. The other shareholders were aware of the existence of such loans through financial statements and/or other information. Such loans between the related corporate group and shareholders were not unusual, and no shareholder had raised formal objection thereto prior to the decease of the majority stockholder.

PREMISES:

Certain premises which have relevance to the below questions are assumed. It is assumed that when attorney serves in the capacity of Director he will abstain from any discussions or resolutions dealing with the referral of legal matters to him, discussions or resolutions dealing with payment to the related corporate group of the loans owed by the estate of the deceased majority shareholder, and discussions or resolutions of any other matters which involve dealings between the related corporate group and the estate of the deceased majority stockholder.

It is further assumed that attorney will not serve as attorney for the related corporate group on any matters dealing with payment to the related corporate group of the loans owned by the estate of the deceased majority shareholder and other matters which involve dealings between the related corporate group and the estate of the deceased majority shareholder.

Following the decease of the majority shareholder, the related corporate group (with attorney abstaining from voting) passed the following resolution:

That the President of the corporation be authorized to continue services to the corporation of attorney on matters as selected by the President which are not viewed by the President or attorney as to create a conflict of interest between the corporation and the estate of the deceased majority stockholder and/or the attorney individually.

QUESTIONS:

Based on the foregoing facts and premises, attorney submits these questions:

1. Whether attorney properly may serve as Executor and Co-Trustee of the estate of the deceased majority shareholder as nominated by his Last Will and Testament.
2. Whether attorney properly may serve as Executor and Co-Trustee of the estate of the deceased majority shareholder, and also serve as Director of the related corporate group.

3. Whether attorney properly may serve as Executor and Co-Trustee of the estate of the deceased majority shareholder, and also serve as Director and Secretary of the related corporate group.
4. Whether attorney properly may serve as Executor and Co-Trustee of the estate of the deceased majority shareholder, and as Director of the related corporate group, and as attorney for the related corporate group on matters referred to him by the executive officer and/or Board of Directors of the related corporate group, as restricted by the above premises.
5. Whether attorney properly may serve as Executor and Co-Trustee of the estate of the deceased majority shareholder, and as Director and Secretary of the related corporate group, and as attorney for the related corporate group on matters referred to him by the executive officer and/or Board of Directors of the related corporate group, as restricted by the above premises.

OPINION:

Introduction

The specific questions asked will be addressed separately; however, since the issues presented by each question are similar, and initial general discussion is in order. The ethical issues raised by these questions are contained in two separate Disciplinary Rules. They are DR 4-101(B)(3):

- (B) Lawyers shall not knowingly:
 - (3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

and DR 5-105(A) through (C):

- (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (B) A lawyer shall 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, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
- (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

Each of the foregoing rules has to do with the fiduciary relationship created between an attorney and his client and to the loyalty which an attorney has to his client by virtue of that relationship. In the fact situation as presented, the attorney also has relationships other than that of attorney which give rise to obligations of loyalty.

As to the corporation, for example, the role of director is certainly fiduciary and the role of secretary, in its limited capacity, also creates an obligation of loyalty. The role of attorney as to those matters which have been assigned to his care is fiduciary and the on-going role of majority shareholder (assuming that exists) creates certain obligations to the corporation.

As to the estate on the other hand, the role of executor is fiduciary. The attorney is also serving as a co-trustee of a trust, to which he owes a fiduciary duty.

Assuming that the estate continues to act as majority shareholder of the corporation, the executor's fiduciary role vis a vis the estate is compounded by the obligation to maximize the value of the stock. It is not clear from the facts as presented whether the attorney is acting as attorney for the estate or whether independent counsel is involved.

Analysis of the DR 4-101 issue is difficult because the facts, as presented, do not disclose whether confidential information has been received as a result of past representation of either client which would be helpful to the representation of the other client's interest. If we assume, for example, that the estate does continue to own the majority of the stock of the corporation and that, by virtue of his prior representation of the corporation, the attorney has obtained information about the corporation which would bear upon the present value of the stock, which information is not generally known, such information could well be of assistance to the estate in negotiations concerning a stock redemption. If litigation were to result between the estate and the corporation over such an issue, the conflict is clear and the attorney would be prohibited from serving as executor or attorney for the estate. In the foregoing situation, whether or not the attorney's ability to serve as co-trustee would be affected is dependent upon the co-trustee's interest in the stock.

Similarly, the issues raised by DR 5-101 are difficult to analyze without additional facts. If the estate hold stock and a stock redemption may be contemplated, numerous potential conflicts exist: Is there a stock redemption agreement? Should the validity of such agreement be challenged? Is there more than one method of valuing the stock and, if so, which method should be selected – the one which favors the estate or the one which favors the corporation? Is there any dispute over the amount of the loans or the interest rate to be paid, if any?

The premise which indicates that the attorney will abstain from discussions or resolutions concerning the payment of loans owed by the estate while serving in his capacity as director does not fully solve the conflict problem. First, it is probably the case that he must not only abstain from such discussions or any vote, but must remove himself from the proceedings altogether.

Secondly, however, when serving the estate as executor, how can he render undivided loyalty to the estate as executor while at the same time owing undivided loyalty to the corporation as director? That conflict exists regardless of abstention.

Once again, if the estate were to litigate against the corporation, the attorney could not possibly direct that litigation and remain director of the corporation.¹

Short of litigation, if any disputes arise between the corporation and the estate, there is a major practical problem since the provisions of DR 5-105(C) cannot very well be resorted to. The attorney would have to consult with himself in order to consent to multiple representation.

It is not clear from the facts as presented whether any such disputes presently exist or have a potential for existence in the foreseeable future and, accordingly, it is impossible to judge with any certainty whether representation can continue. Therefore, this opinion is restricted to a discussion of the issues which may well arise, dependent upon the factual circumstances as they exist.

Discussion

Turning to the specific questions set out in the opinion request:

1. For purposes of this question, it is assumed that the attorney has resigned as director and secretary of the corporation and is not acting in any respect as legal counsel for the corporation. With the foregoing assumptions, the answer is yes, subject to the following:
 - a. If the attorney has previously obtained confidential information from the corporation which he could use beneficially as executor or co-trustee, he must decline, except with consent of the corporation after full disclosure.
 - b. If disputes exist between the corporation and the estate which will be litigated, the attorney's only prohibition from acting as executor or co-trustee exists as to those transactions wherein he either previously received confidential information or was previously employed by the corporation.
 - c. If disputes exist between the estate and the corporation which might affect the exercise of the attorney's independent professional judgment on behalf of the estate, then he must decline since he cannot obtain the consent of the client. The upshot of this is that the only situation in which the attorney can act as executor and co-trustee is if the situation is entirely cut and dried. For example, if the only relationship between the estate and the corporation arises from the outstanding loans owed and there are no disagreements whatever between the two entities concerning those loans (payment schedules, interest rates, maturity dates, etc.), then the attorney may well be able to serve as executor and co-trustee, assuming there is no DR 4-101 problem.
2. The answer is yes, subject to the following conditions:
 - a. Regarding prior confidences of the client, the discussion at 1a is applicable.
 - b. If disputes exist between the corporation and the estate which will be litigated, the attorney is prohibited from acting both as executor of the estate and director of the corporation and possibly as co-trustee, depending upon the co-trustee's relationship to the corporation.
 - c. The discussion at 1c is applicable.
3. The answer to this question is the same as the answer to question 2, having in mind that the additional role as secretary could conceivably create additional conflicts. For example, if the estate, for some reason, desired to have access to the corporate books which were under the control of the secretary, there are conflicting judgments as to the advisability of releasing those records.

¹ *Cinema 5 Ltd. V. Cinerama, Inc.*, 528 F. 2d 1384 (2nd Cir. 1976) (when litigation exists, an attorney has a duty of undivided loyalty to each of his clients and the test of conflict changes from "substantial relationship" to an absolute prohibition).

4.-5. The issues raised by these two questions have been fully discussed above, except as to the corporation on matters “which are not viewed by the president or attorney to create a conflict of interest.” Assuming that the only matters which could be handled by the attorney in this situation would be matters totally unrelated to the estate and further assuming that the representation of the attorney would not be prohibited; however, it must be understood that all of the problems presented in questions 1, 2 and 3 are applicable to questions 4 and 5.

SUMMARY:

Although there are some narrow circumstances under which the attorney could fulfill the fiduciary duties created by the relationships to the estate and the corporate group in the fact situation presented, those circumstances are very limited and the attorney must proceed with the utmost caution if he is to attempt to serve in the multiple capacities outlined herein.