

ADVISORY ETHICS OPINION 90-04

SYNOPSIS:

An attorney's services as an executor of an estate, although not giving rise to an attorney/client relationship, still may be governed by the Vermont Code of Professional Responsibility. Where an attorney's decisions as executor have the potential to benefit existing clients, precautions should be taken to avoid an appearance of impropriety.

FACTS:

The inquiring attorney has been named as executor of the estate of a friend, under a will that requires the executor to distribute; the residuary estate among certain types of public service organizations to be selected by the executor.

The inquiring attorney is attorney for and close friends with the principals of one such prospective beneficiary organization (the "prospective beneficiary"). In the exercise of his independent judgment and discretion as executor, he wishes to distribute; some money to the prospective beneficiary.

Due to the nature of his relationship with the principals of the prospective beneficiary, the inquiring attorney is concerned that any distribution would give rise to a conflict of interest or appearance of impropriety. The executor has advised the beneficiaries named in the will of his association with the principals of the prospective beneficiary and likewise has advised the probate; court of the same.

ANALYSIS:

On its face, the conduct proposed here does not involve an attorney/client relationship. The fact that an attorney happens to be named as an executor of an estate does not of itself set up an attorney/client relationship between the executor and the estate's beneficiaries. Nor does the role of an executor necessarily involve the practice of law, which EC 3-5 describes as "the rendition of services for others that call for the professional judgment of a lawyer."

Nonetheless, the Code of Professional Responsibility does set forth general caveats that extend beyond the direct confines of the attorney/client relationship and provision of legal services. DR 1-102(A)(7), for instance, prohibits attorneys from engaging in "any other conduct that adversely reflects on the lawyer's fitness to practice law." Likewise, DR 8-101 prohibits lawyers from using public positions to the benefit of clients. Finally, Canon 9 generally encourages attorneys to act in a manner that "promotes public confidence in the integrity and efficiency of the legal system and the legal profession."¹

While we are not persuaded that the conduct proposed would constitute a conflict of interest, the prior relationship between the attorney and the principals of the prospective beneficiary has some potential to raise an appearance of impropriety. Still, the attorney, acting as executor, has the fiduciary obligation to exercise his independent judgment in determining appropriate beneficiaries for the residuary estate consistent with the provisions of the will. Furthermore, it appears under the circumstances that automatically disqualifying the prospective beneficiary from consideration simply because of the existing friendship and attorney/client relationship would not necessarily further the intentions of the testator, and might even frustrate those intentions.

We are of the opinion that the executor's actions in informing the probate court and all named beneficiaries of his prior involvement with the principals of the prospective beneficiary is consistent with the approach of the Code of Professional Responsibility and constitutes a reasonable means of minimizing any appearance of impropriety.

Thus, we conclude that the proposed conduct does not run afoul of the provisions of the Code of Professional Responsibility and that the precautions taken by the inquiring attorney are consistent with the spirit of the Code.

¹ EC 9-2.