

ADVISORY ETHICS OPINION 96-01

SYNOPSIS:

An attorney who represents adult children who have been appointed as co-administrators of their parent's estate and has brought a wrongful death action should not represent any of the heirs of the decedent in a distribution action pursuant to 14 V.S.A. § 1492, unless all the heirs are in agreement as to the distribution and give consent to the representation.

FACTS:

Requesting attorney represents the two adult children of a decedent and has obtained their appointment by the probate court as co-administrators of the decedent's estate. Attorney also represents the estate. Attorney has brought a wrongful death action on behalf of the estate in the name of the co-administrators. The surviving spouse of the decedent, who is not the parent of the decedent's two adult children, has retained separate counsel who has brought a separate action against the wrongdoer on behalf of the surviving spouse. That action has been consolidated with the estate's wrongful death action. Attorney has never had any contact or communication with the surviving spouse. Attorney has requested the Committee's opinion on whether the Attorney can represent the co-administrators, individually, in their personal capacity as beneficiaries, in the distribution action required by 14 V.S.A. § 1492(c) after the conclusion of the wrongful death case.

QUESTION:

Is the Attorney permitted to represent the co-administrators of a decedent's estate in a distribution action pursuant to 14 V.S.A. § 1492, where the Attorney has represented the plaintiff in a wrongful death action and the only other heir of the decedent has retained counsel individually and contests the distribution action?

DISCUSSION:

Attorney's recitation of the facts indicates that Attorney has never had any direct contact with the surviving spouse and does not anticipate any, since the surviving spouse has an attorney and the Attorney anticipates working through the surviving spouse's attorney. However, in seeking to put on the strongest possible case for damages, the Attorney may learn some confidences and secrets of the heir that the Attorney does not represent. If the Attorney represents one or more of the heirs, the Attorney will be in the position of having to advance the interests of one or more heirs after possibly having learned the confidences and secrets of another heir who objects to the distribution the Attorney's client is seeking. This clearly would run afoul of DR 4-101.

14 V.S.A. § 1492(c) states that the amount recovered in a wrongful death action shall be for the benefit of the surviving spouse and next of kin and shall be distributed by the personal representative of the deceased "in proportion to the pecuniary injuries suffered, the proportions to be determined [by the superior court]."

This Committee, in Opinion 93-8, discussed a similar question, complicated by the fact that the Attorney in that matter was the subject of a motion to withdraw and expected to be called as a witness in the distribution action. In Opinion 93-8, the Committee said,

The nature and role of the plaintiffs in a wrongful death action, as distinguished from the "survival" action, is unusual. All of the deceased's heirs at law constitute "the Plaintiff." The attorney representing the plaintiff must prove damages on behalf of all of them, and the Probate Court is then charged with an equitable distribution, to each of them.

The Committee went on to say:

No single attorney should represent all the heirs of a deceased person in the action brought under 14 V.S.A. § 1492 to distribute the proceeds of the wrongful death action, nor should the attorney who files the wrongful death case represent one of the heirs in the distribution of the proceeds.

The Committee noted that the Opinion did not address the situation where the "distribution action" was uncontested and proceeded on the basis of written and informal consent from all of the interested parties. It appears that the facts presented to the Committee here do not compel a different conclusion than the fact situation in Opinion 93-8, prohibiting the attorney filing the wrongful death action from representing any of the heirs in the distribution action. Here, the Attorney has indicated that the

only contact with the only heir that the Attorney does not represent will be through that heir's attorney. In Opinion 93-8, the Committee said:

If the attorney represents multiple parties or has gained information in the prosecution of the wrongful death case, such information may constitute secrets or confidences which the attorney may not reveal. In addition, there is an intrinsic conflict to the extent each of the heirs seeks to maximize his or her share of the damages recovered.

CONCLUSION:

The Question presented is answered "No."