

# ADVISORY ETHICS OPINION 93-08

## SYNOPSIS:

An attorney is not required to withdraw from general representation of a client in a complex litigation matter because the attorney may be called as a witness in a related proceeding.

An attorney, who has previously represented all the heirs and the estate of a decedent in a wrongful death action, may not thereafter represent anyone of the heirs in a contested action for distribution of the proceeds of the wrongful death action pursuant to 14 V.S.A. §1492, although the attorney may continue to represent the estate.

## FACTS:

Attorney represents the estate of a deceased minor and the deceased's heirs in a wrongful death action. The father was initially appointed Administrator of the deceased's estate with the mother's consent prior to the commencement of the action. The mother did not participate in the wrongful death action. The couple was estranged and the father had been granted custody of the minor. The father retained Attorney to file the wrongful death action and to obtain advice in other matters. Several defendants in the wrongful death action settled and one contested. A verdict was obtained in favor of the estate in 1988. Prior to the verdict and judgment, the decedent's maternal grandmother was appointed as Administrator to replace the decedent's father. An appeal to the Supreme Court was filed by the one defendant contesting the case. The trial was lengthy and, owing to the illness of the court reporter, the transcript was only recently completed.

The decedent's maternal grandmother, acting as Successor Administrator, brought a petition for distribution of the litigation proceeds pursuant to 14 V.S.A. §1492 (the "Distribution Action"). The mother has obtained separate counsel and seeks to obtain a portion of the assets in the Distribution Action. Her counsel has demanded that Attorney withdraw from representing the estate in the Distribution Action, as well as from the appeal of the jury verdict to the Supreme Court. Attorney has already withdrawn from representation of the father in the Distribution Action and has filed a Motion to Withdraw as counsel to the estate in the Probate Court, where action on that motion has been postponed pending the issuance of this opinion. The mother's counsel claims that Attorney is disqualified from representing both the father and the estate in any action by reason of his earlier representation of the father, maintaining that Attorney now has a conflict of interest, in all such matters. Attorney appears to be the only person fully knowledgeable of the facts and other relevant matters to the prosecution of the wrongful death case by the estate against the various defendants. To further complicate the situation, it appears that Attorney may be called as a witness in the Distribution Action, although Attorney asserts that his testimony would be cumulative only.

## QUESTION 1:

Is Attorney required to withdraw from representation of the estate in the Distribution Action by reason of his earlier representation of the father in the initiation of the wrongful death litigation, since the father no longer administers the son's estate?

## QUESTION 2:

Does the fact that Attorney may be called as a witness in the hearing to distribute the proceeds of the wrongful death action brought by the estate require Attorney's disqualification in the other proceedings, i.e., the still-pending appeal of the wrongful death action?

## DISCUSSION:

Attorney's recitation of the facts reveals that as to the Supreme Court appeal, his duties will be limited to briefing and arguing the estate's and the heirs' position against the one defendant contesting the case based on evidence already adduced. In the Distribution Action, the decedent's mother will be represented by counsel, and the decedent's father will likely obtain separate counsel, as well.

DR 5-101 reads, in part, as follows:

"(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify."

“(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.”

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.

However, at the point where the wrongful death case is still in litigation and no final award has been settled, the Attorney is the best person to pursue the final award. On the basis of Attorney's statement that he is the only person fully knowledgeable of all the facts and other matters relevant to the appeal of the wrongful death case, his failure to continue would appear to work a substantial hardship on his client, the Estate, and the Rule would allow him to continue.

Moreover, on the facts alleged that Attorney is not only the one person thoroughly knowledgeable about the circumstances on which both pending matters are based but once, in addition, his testimony (if any) in the Distribution Action would be merely cumulative, he falls within the exemption set forth in DR 5-101(4), and as further delineated in EC 5-10 which reads in part as follows:

“It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue.”

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“In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship on the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.”

The unstated issue of whether Attorney can represent the father in the Distribution Action is more clear and is not based on the possibility that the Attorney may be called as a witness, although that contributes to the answer. 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. In each case, facts will come to the attention of the attorney which may be used to the gain or detriment of one party. 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. However, since Attorney has already withdrawn from representation of the father, he may represent the estate in the Distribution Action.

The response to both questions presented is “No.”