

Nebraska Ethics Advisory Opinion for Lawyers
No. 74-10

A LAWYER MAY NOT REPRESENT CONFLICTING INTERESTS WHERE SUCH REPRESENTATION INTERFERES WITH THE EXERCISE OF INDEPENDENT PROFESSIONAL JUDGMENT AND WHERE ADEQUATE REPRESENTATION OF ALL PARTIES WILL NOT RESULT FROM SUCH MULTIPLE REPRESENTATION.

FACTUAL SITUATION

A mother and her son and daughter-in-law executed a note and mortgage and thereafter the mother placed a deed of the premises in escrow under which the son would acquire title to the real estate at the mother's death. The daughter-in-law later secured a divorce decree against the son and this again happened to a second marriage of the son. The mortgagee foreclosed the mortgage and the son's whereabouts being unknown, service upon him was had by publication.

In the foreclosure the mother cross petitions against the mortgagee for an accounting of rents and cross petitions against the son claiming the escrow deed is an invalid testamentary disposition.

Both former wives seek to have their divorce judgments satisfied out of the interest of the son in the property, since the mother has died prior to the trial. The devisees in the mother's will are four grandchildren and the son is excluded.

The attorney for the mother by agreement of the two former wives has represented these three parties.

QUESTIONS PRESENTED

(1) Can the attorney for the Executor who will handle the cross petition litigation represent the devisees under the will in the foreclosure and cross-

claim matters?

(2) Can the attorney for the Executor continue to represent the divorced wives?

DISCUSSION

The position of the Executor in this litigation will necessarily be to represent the interests and claims of the deceased mother. If successful, he will prevent a foreclosure and/or obtain a decree that the real estate has not validly been deeded to the son.

The interests of the devisees under the will appear to be consistent, if not identical, with the position that the Executor will assume. Therefore, there appears to be no conflict in the attorney for the Executor representing the devisees in the foreclosure and cross petition litigation and he may do so.

In the case of the divorced wives, the situation is entirely different. They can make no recovery against the mother or her estate. Their claim is against the son and will be good only if the escrow deed is valid and gives the son title to the real estate.

Previous to the adoption of the Code of Professional Responsibility, the pertinent Canon was No. 6 provided:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."

Under the foregoing canon the required showing and consent permitted representation of conflicting interests in certain cases. Opinion 247.

But as stated in Opinion 224, it was the duty of counsel to advise the second party that the latter should have separate counsel and a question existed as to whether in case of a conflict, the counsel could actually give advice to both parties.

The new Code strengthens the limitations and requirements in this area. DR 5-105 provides:

"DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(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, 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, 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."

In the instant situation, it is quite apparent that the attorney for the Executor could not represent both the Executor and the wives and give each the "independent professional judgment" required. Moreover, it is clear that the attorney could not "adequately represent" the interests of each of the parties and such representation is forbidden by the Code.

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