

Ethics Opinion

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QUESTION PRESENTED: Can a firm or an attorney represent both (1) a wrongful death action for a decedent's survivors; and (2) the decedent's estate?

ANSWER: No.

ANALYSIS: First of all, attorneys in a law firm are a single entity for the purposes of conflicts of interest. Model Rule 1.10(a). Model Rules 1.7 and 1.8(g) govern the question presented. Rule 1.7(b) especially comments 3,6,10,11 and 12 pertain. "An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Obviously, the representation of a personal injury client and an estate by the same attorney or firm may cause impermissible conflicts. Therefore, the attorney who represents a decedent's survivor(s), as a member of a firm representing the decedent's estate and others, has a problem, and the firm has a problem as well.

Comment 12 may also apply. The firm or attorney may have to represent the client as fiduciary or may have to represent the client as an estate and the beneficiaries (es ipso: built in conflict of interest).

The disqualification imposed by the rule may be waived under the conditions stated in Rule 1.7(b)(1) and (2). Therefore, in order for the attorney to proceed under the rule, they must believe that the quality of representation will not be adversely affected by the facts of the situation, and the clients must be consulted and fully informed and their permission obtained.

Rule 1.8(g) also states that an attorney will not participate in the aggregate settlement of a claim where the attorney represents two or more clients without consulting with the clients concerning the problem and obtaining consent from those clients subsequent to that consultation.

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