

Informal Opinion 11-02
December 7, 2011

Question:

The question that has been posed to the Ethics Advisory Committee is whether a judge may “act as the representative of his father’s heirs in advising, negotiating, resolving or retaining counsel to litigate in defense of a claim” that may be made against a relative’s estate.

Answer:

The judge may privately advise family members but may not negotiate on their behalf. The judge may retain an attorney or recommend an attorney to the judge’s siblings.

Discussion:

The judge was the personal representative of his father’s estate prior to the judge’s appointment to the bench. A creditor of the estate failed to timely file a claim and now the creditor seeks to file the claim against the judge’s stepmother’s estate. The judge’s siblings would like the judge to advise them on their legal rights and obligations. The judge asks whether the judge may advise the judge’s siblings and negotiate and resolve issues involving the estate. The judge also asks whether the judge may personally select an attorney to defend the siblings or the estate. The judge asks whether the judge may continue to provide assistance if adversary proceedings involving the estate occur before another judge in the state, but not before a judge in the judge’s district.

The rules implicated in this request are Rule 3.10, addressing the practice of law, and Rule 3.8, dealing with appointments to fiduciary positions. Rule 3.10 prohibits a judge from engaging in the practice of law, except a judge may “give legal advice and draft or review documents for a member of the judge’s family, but is otherwise prohibited from serving as the family member’s lawyer in any forum.” The terminology section of the Code defines a “member of the judge’s family” as “a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.” The definition does not include siblings. However, if the judge has a close relationship with the judge’s siblings then the judge may provide legal advice within the parameters of Rule 3.10. The Code does not define “close familial relationship.” The committee determines that an appropriate guideline for a close familial relationship would be contact between the judge and the judge’s siblings on average at least once a month. However, ultimately a judge has a significant amount of discretion in determining whether the judge has a close relationship with a family member. The committee believes that in most circumstances an individual has a close relationship with his or her siblings.

Assuming the judge has a close relationship with the judge’s siblings, the judge may

advise siblings on whether they have any legal responsibilities concerning the creditor's claim.¹ The rule essentially allows a judge to privately assist family members. This would prohibit the judge from negotiating on behalf of the siblings or the estate, but the judge could advise the siblings on the negotiations that they may undertake. The judge could, for example, provide legal analysis, discuss relative strengths and weaknesses of the respective positions, and prepare documents for the siblings.

The Code does not contain any limitations on a judge's behind-the-scenes legal advice for siblings on issues that might come within the jurisdiction that the judge serves. The judge may therefore privately assist the siblings no matter where controversies might occur.² The answer to this question would be different if the judge were acting as personal representative for the estate, as permitted under Rule 3.8. The judge would not be able to serve as personal representative under certain circumstances, such as if the estate were involved in adversary proceedings in the judge's court. However, it does not appear from the opinion request that the judge will be serving as an official fiduciary for the stepmother's estate.

The question of whether a judge may select an attorney to represent the siblings or the estate is a little more difficult. The judge clearly could hire any attorney the judge chooses if the attorney were personally representing the judge. The committee determines that the judge could also select the attorney if the judge's interests are implicated in the creditor's claim. If the attorney will only be assisting the siblings or the estate, then the question is whether the judge would be making a prohibited recommendation of an attorney.

This committee has never addressed whether a judge may recommend attorneys to others. In looking at opinions from throughout the country on this issue, the committee finds the determinations of the Colorado Judicial Ethics Advisory Board, in Advisory Opinion 2006-01, to be reasonable. The advisory board stated:

[J]udges do not relinquish their friends or family members upon taking the bench, and requiring them to refrain from providing advice to such close friends and relatives about whom to retain would be unrealistic. Thus, it is the opinion of the Board that the Code does not extend this far. Accordingly, the Board concludes that where the family members or friends enjoy a sufficiently close relationship with the judge that the judge would automatically recuse from the case under Canon 3C, irrespective of whether he was asked to recommend a lawyer, the judge may share with those family members or friends the names of as many or as

¹ If the judge has a close relationship with some but not all of the siblings, the judge may nevertheless advise all of the siblings on any joint interests. If there are separate interests, the judge may only advise those with whom the judge has a close relationship.

² The committee notes that any litigation involving the judge's family may require recusal of judges in the district based on the conclusions made by the committee in Informal Opinions 96-2 and 98-14. These conflicts are created whether or not the judge provides legal assistance and therefore does not affect this discussion.

few lawyers as the judge wishes to recommend.

The committee thus determines that the judge may recommend a particular attorney to his siblings or to the estate.

Although not specifically covered by the opinion request, the committee believes that the issue of the judge's disqualification in cases involving the recommended attorney should be addressed. In Informal Opinion 00-4, the committee stated that when a judge retains an attorney to defend the judge in a Judicial Conduct Commission proceeding, the judge must enter disqualification in court proceedings involving the attorney while the Judicial Conduct Commission proceeding is pending and for a period of six months after the proceeding has ended. This standard is helpful in this circumstance.

If the judge specifically retains the services of the attorney because the judge's interest are involved, then the situation would be similar to Informal Opinion 00-4. The judge would enter disqualification in proceedings involving the attorney until six months after the representation ends. If the judge does not retain the services of the attorney or the judge does not have any interest in the proceedings, but simply recommends the services of an attorney to the judge's siblings or the estate, then disqualification is not automatically required. However, if the attorney representing the siblings or the estate appears before the judge during the period of representation, the judge should disclose the fact that the attorney is presently representing the judge's siblings or the estate. The judge need not disclose the fact that the judge referred the attorney to the siblings, but only that representation is being provided.

In conclusion, the judge may privately provide legal advice to the siblings if the judge maintains a close relationship with the siblings. The judge may not conduct negotiations on behalf of the siblings or the estate, but may advise the siblings on the negotiations. The judge may hire an attorney on behalf of the siblings, or the judge may recommend the hiring of a particular attorney. If the judge has a personal interest in the matter for which the attorney is providing representation, the judge must enter disqualification in proceedings involving the attorney during the period of representation and for six months after the representation has ended. If the judge does not have a personal interest in the matter for which representation is provided, then the judge must simply disclose that the attorney is providing representation to the judge's siblings or the estate.