

Nebraska Ethics Advisory Opinion for Lawyers
No. 69-2

ALTHOUGH IT IS PROPER FOR A LAWYER WHEN REQUESTED TO DO SO BY THE TESTATOR, TO WITNESS HIS WILL OR, AFTER HIS DEATH, TO TESTIFY AS A SUBSCRIBING WITNESS THERETO, IT IS ETHICALLY IMPROPER FOR HIM, HOWEVER, TO REPRESENT, IN LITIGATION, A PARTY EITHER AS A PROPONENT OF SUCH WILL OR IN A CONTEST INVOLVING THIS OR ANY OTHER WILL PURPORTEDLY EXECUTED BY THE IDENTICAL TESTATOR.

CANONS INTERPRETED (Professional Ethics)

Canon 19: When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client.

A lawyer, who witnessed a will and codicil for a testatrix, seeks an opinion from the Advisory Committee of the Nebraska State Bar Association as to the ethical propriety of his representing the executrix and legatee named therein, who has filed objections to the probate of a later will.

The Advisory Committee is of the opinion that it would be ethically improper for him to do so.

Canon 19 provides that "when a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in Court in behalf of his client".

Informal Opinion No. 738 of the Standing Committee on Professional Ethics of the American Bar Association, issued on December 27, 1963, states, in effect, that an attorney may, with propriety, act as an attesting witness to the execution of a will he has drawn. when requested

to do so by the client. Our Court has held that an attorney who has drafted a will, and was present at the time of its execution, is competent to testify as to factual matters concerning its execution, such matters not being privileged communications. In *re Coons' Estate*, 154 Neb. 690, 48 N.W. (2nd) 778. Therefore, this attorney properly witnessed the will which he had prepared and further, he is a competent witness to testify regarding its execution and the circumstances attendant thereto. In fact, he would become a necessary witness for this purpose in this particular situation.

Since the subsequently drawn will is being contested, this inevitably draws into litigation the will which this attorney witnessed. Where there is a contest, all available subscribing witnesses must be made available to testify, if possible. Only where there is no contest, may the will be probated on the basis of the testimony of but one of the subscribing witnesses thereto. Section 30-218 of the Revised Statutes of Nebraska. Therefore, it is evident that the testimony of the attorney, who witnessed this will and codicil, will be required in this litigation.

Canon 19 was adopted in 1908 and has never been amended. Formal Opinion No. 50, which was the first to interpret it, stated, in effect, that an attorney may not represent a party in a case when he knows that he or his partner will be called to testify as a material witness in the case. Informal Opinion No. 396, issued August 2, 1961, states that it would be improper for a law firm, whose partners drafted and witnessed a will, to represent the proponent in a will contest, if the firm knows, or has reason to believe from the nature of the contest, that the testimony of any of the partners will be of a material nature in sustaining the will; but it would not be improper if the testimony related simply to formal matters or to matters, not involved in the contest. The concluding language of this Opinion is as follows: "The Canon itself is merely crystallization of recognized views of the bar prevailing for many years". Certainly, what holds true for a law partnership would, a fortiori, be even more true as to an individual practitioner. who had witnessed the will. Drinker. in his

Legal Ethics, stated that "Canon 19 does not apply to a mere formal witnessing of a will, with no conflict. If the latter develops, he must retire as soon as his client's interest permits".

The contestant here is a woman, named as an executrix and as a specific and residuary legatee under the will, witnessed by this attorney. She, therefore, derives all of her right and authority to contest the subsequently drawn will, from the will witnessed by this attorney and, as to the probate of which, he becomes an indispensable witness under our practice, where a contest in connection therewith has arisen.

Accordingly, it is readily apparent that it would be ethically improper for this attorney, in this set of circumstances, to represent, in litigation, this party, either as a proponent of this will or in a will contest involving this or any other will purportedly executed by the identical testator.

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