

Nebraska Ethics Advisory Opinion for Lawyers
No. 74-9

AN ATTORNEY WHO IS REPRESENTING THE EXECUTOR IN THE PROBATE OF AN ESTATE AND WHO DREW AND WITNESSED THE WILL BEING PROBATED NEED NOT WITHDRAW FROM THE PROBATE PROCEEDINGS WHEN IT BECOMES APPARENT THAT HE WILL BE A WITNESS IN AN ACTION TO CONSTRUE THE WILL BROUGHT BY THE EXECUTOR BUT USING OTHER COUNSEL.

FACTS

The question posed states that the attorney will be a witness in will construction case concerning matters which are substantial, which may be contested and which go to the merits of the controversy concerning construction of the will. The attorney properly declined to bring the suit for construction of the will because of DR 5-101 (b) and thus other counsel was engaged to bring this separate action in district court. The Probate proceedings are wholly separate and distinct from the suit for construction of the will. The probate proceedings will merely execute the court's final order in the construction suit.

DISCUSSION

The reasons for DR 5-101 and DR 5-102 (which forbid an attorney from trying a case in which he is to be a material witness) are set forth in the Ethical Considerations: EC 5-9, which states that:

"If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing

his own credibility."

None of these underlying reasons for the Disciplinary Rules will come into play in this case by the mere continued representation of the executor in the probate proceedings.

For the above reasons, we conclude that there is no objection to the lawyer continuing to represent the estate in the probate proceedings.

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