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I. INTRODUCTION

Ethical standards are in general rigorously observed by the legal profession when they are known and recognized. In far too many instances, however, attorneys fail to recognize an ethical problem in the midst of the technical legal problems with which they are dealing. Probably in no field of practice are there more everyday problems of ethics than in the field of probate. Since a large percentage of probate matters are thought of as non-adversary proceedings, conflicts of interest many times pass unrecognized. This article is limited to a brief consideration of a few of the ethical problems more frequently encountered in probate matters.

II. ATTORNEY AS EXECUTOR OR AS ATTORNEY FOR THE EXECUTOR.

When preparing wills, attorneys frequently face the problem of designating themselves as executors or as attorney for the executor. This problem was recognized by one well known authority on legal ethics, who stated:

> A question is sometimes raised as to the propriety of a lawyer's inserting in the will a legacy to himself or provision appointing him executor or trustee, or one directing his executors to employ his as counsel for the estate. This, of course, depends on the surrounding circumstances. If they are such that the lawyer might reasonably be accused of using undue influence, he will be wise to have the provision inserted in a codicil drawn by another lawyer. When, however, the testator is entirely competent, and the relation has been a long standing one, and where the suggestion originates with testator, there is no necessity of having another lawyer in the case of a reasonable legacy, or of a provision appointing the draftsman executor, or of a direction that he be retained by the executors. In the case of the latter provision, it should be clearly explained to the testator that it will not be binding on the executor, who will be free to choose his own counsel, since a law-

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> yer has no vested interest in representing the estate of one whose will he has drawn.[1]

Because the testator's lawyer is familiar with the deceased's affairs and property, it is often advantageous to the estate that he represent the executor in the administration. Thus, where the testator himself desires this it is not improper for the lawyer to provide for such representation either in the will or in a supplementary instruction to the executor. The testator should be advised, however, that the provision is not mandatory no matter what its terms because the executor is always free to choose his own counsel.[2] In such cases, as well as in cases where the testator desires to name the lawyer executor or trustee, or to leave him a legacy, the lawyer should consider having the testator secure independent advice from another lawyer prior to executing the will.[3]

Under no circumstances should an attorney suggest to the testator that he be designated executor. This was emphasized by the New York City Ethics Committee when it said,

> . . . It is obviously improper for a lawyer to include such a provision in the client's will of his own motion, or to suggest to the client that such a provision be inserted. There is, however, no essential or inherent impropriety in inserting such a provision in the absence of any undue influence upon the client.[4]

Some lawyers seem to have the opinion that if they are named attorney for the executor in the will, it is unethical for another lawyer to accept employment by the same executor. However, the effect of requesting or designating an attorney for the executor has no binding effect on anyone, since a lawyer has no vested interest in representing the estate of one whose will he has drawn, and executors have the right to choose their own lawyers.[5]

A more complex problem arises when an attorney acts both as executor and as attorney for the estate. Generally in this situation the courts have held that his compensation, as personal representative, is in full for his services, and even though he also performs duties for which he might properly have hired an attorney, he is not entitled to attorney's fees.[6] In Nebraska, however,

[1] DRINKER, LEGAL ETHICS 94 (1953).

[2] *Infra* note 4.

[3] *Id.*, Appendix A, A.B.A. Ops. 263-266 (undated).

[4] N.Y. City Op. 580 (Oct. 15, 1941).

[5] *Supra* note 1, Appendix A, A.B.A. Op. 244 (undated).

[6] For a discussion of the cases under this general rule, see Annot., 36 A.L.R. 748 (1925).

the Supreme Court has held that where an attorney-administrator performs legal services for the estate, the court may, in its discretion, allow reasonable compensation therefor.[7]

Certain preventive methods can be employed to avoid these ethical problems. In Nebraska, where an executor is personally interested in the administration of an estate and in the disposition of property to be distributed under the will and circumstances disclose that the interests of the executor are clearly such as to prevent his performing his duties in an impartial manner, such executor should be removed and another appointed in his stead.[8] Drinker points out that when the lawyer for an administrator receives conflicting instructions from the administrator and the beneficiary, he should consult the court.[9] The New York City Ethics Committee has said that an attorney should inform a widow concerning her rights of election to take or not to take under a will, to rescind a previous election, and the impossibility of his representing her in pressing these rights.[10] When an attorney is asked to draw a will for one whom he suspects is incompetent, he should make as exhaustive an inquiry as possible, and if his suspicions are confirmed he should neither draw the will nor sign it as an attesting witness.[11]

III. ATTORNEY AS A WITNESS

The Nebraska Supreme Court has said that an attorney may testify to factual matters relating to the execution of a will, but that attorney-client communications are privileged and inadmissible unless the privilege is waived.[12] Further, the evidence of all attesting witnesses to a will who are available for testimony is

[7] In re Estate of Wilson, 83 Neb. 252, 119 N.W. 522 (1909).

[8] In re Estate of Marconnit, 119 Neb. 73, 227 N.W. 147 (1929).

[9] *Supra* note 1, at 96.

[10] N.Y. City Op. 373 (May 4, 1936). The facts upon which the committee gave this opinion were that the attorney who drafted the will and was executor and trustee advised the widow that her income under the will would be $7,000 annually. After filing her election to take under the will the widow learned her income would be $5,000 annually. Later the attorney learned of a decision which would allow the widow to rescind the election, and elect to a full one half share of the estate absolutely.

[11] N.Y. County Op. 355 (1940). See also N.Y. City Op. 517 (Dec. 6, 1939), and *supra* note 1 at 93.

[12] Nelson v. Glidewell, 155 Neb. 372, 51 N.W.2d 892 (1952).

indispensable to proving a will when contested.[13] These cases are consistent with the theory that the testator, by requesting the drafting attorney to sign as an attesting witness, waives any privileged communication and consents to the attorney's testifying to establish the validity of the will when it is offered for probate.[14] However, where the conversations between testator and attorney are offered as corroborating evidence in an action by the beneficiary to establish an oral contract, after the will has been revoked by testator, then the testimony of the attorney or his partner is inadmissible as privileged.[15]

In the event of a contest, an attorney can not properly be both a witness and the attorney for the proponents. Canon 19 specifically provides:

> 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 on behalf of his client.[16]

As pointed out by Drinker, this Canon does not apply to a mere formal witnessing with no conflict, but where a conflict develops, he must retire as soon as the client's interest permits.[17] However, it has been held that the witness's partner might then carry on the representation as well as another attorney. The New York City Ethics Committee has taken this same position, but has added that the attorney should not be required to disqualify himself, once the will has been admitted to probate, especially where he has been testator's attorney.[18]

A person who is named executor by the terms of a will, is not, by such appointment, rendered incompetent as a subscribing wit-

[13] In re Estate of Coons, 154 Neb. 690, 48 N.W.2d 892 (1952). In this case the attorney who was the prospective witness was not a subscribing witness, but had drafted the will, while in In re Estate of Bayer, 116 Neb. 670, 213 N.W. 746 (1928), on which the court relies as precedent, the attorney had not drafted the will offered for probate. For a discussion of this distinction, see dissenting opinion of Chief Justice Simmons in the *Coons* case at 700.

[14] See Annot., 64 A.L.R. 184 at 192 (1929).

[15] Lennox v. Anderson, 140 Neb. 748, 755, 1 N.W.2d 912, 916 (1942).

[16] A.B.A. Canons of Professional Ethics (1908). Hereinafter referred to as A.B.A. Canons.

[17] *Supra* note 1, at 159.

[18] N.Y. City Op. 559 (Jan. 8, 1941).

ness to the will if he is otherwise competent under the statute.[19] Nor is a trust estate created by a will invalidated merely because the trustee was one of two subscribing witnesses.[20]

The American Bar Ethics Committee, in reviewing three former opinions,[21] reaffirmed its rulings that in general the position of a partner is the same as that of the attorney.[22] The committee felt however, that the words "other counsel" in Canon 19 do not necessarily exclude a partner of the lawyer who must become a witness, but added that each case should depend on its own facts.[23] The Canons of Ethics further warn the attorney to refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.[24] This fiduciary duty also extends to persons not strictly clients who rely on him to advise them.[25]

IV. CONCLUSION

There is some confusion among attorneys as to which client an attorney represents when he represents "the estate". Perhaps this is at the core of the problem. The attorney represents the executor or personal representative. He does not represent the widow, nor the heirs or beneficiaries, although in many instances he may have an obligation to advise them of their rights when he realizes that they are relying on him. However, in the event of a conflict of interest, he may properly represent only the personal representative, and cannot represent the other persons who are involved in "the estate", without full disclosure and consent of all parties. It is particularly difficult to keep in mind the possibility of a conflict of interest when the executor is also the surviving spouse or beneficiary. In the probate field, many persons wear two hats, and the attorney must recognize which hat the client is wearing.

There is a definite need for attorneys to become more fully aware of the ethical problems lurking in probate matters. A

[19] In re Estate of Wiese, 98 Neb. 463, 153 N.W. 556 (1915).

[20] Hayden v. Hayden, 107 Neb. 806, 186 N.W. 972 (1922).

[21] A.B.A. Op. 33 (Mar. 2, 1931), A.B.A. Op. 50 (Dec. 14, 1931), and A.B.A. Op. 185 (July 24, 1938).

[22] A.B.A. Op. 220 (July 12, 1941).

[23] *Ibid.*

[24] A.B.A. Canon 11.

[25] *Supra* note 1, at 92.

periodic review of the Canons of Ethics might be adopted as a standard procedure without hardship on any attorney. The great majority of ethical violations do not occur deliberately, but are rather the unintentional consequences of an unrecognized problem. Thus the attorney should constantly remember that ethical problems may exist in an ordinary probate matter so that they may at once be recognized and solved, with a resulting benefit to the individual attorney as well as the profession as a whole.