

**NEW YORK STATE BAR ASSOCIATION**  
**Professional Ethics Committee Opinion**

Digest: Attorney may accept professional employment in litigation in which a defendant is a former client where such employment does not require disclosure of confidential information obtained in course of former employment

Code\*: Canon 4  
EC 4-5  
EC 4-6

QUESTION

An attorney had represented three brothers in a litigation involving title to a piece of realty owned by the brothers as tenants in common. The subject of the controversy was a net lease on the premises, an action to bar claims by possible distributees in the chain of title, the clearing of numerous objections to title and eventual sale of the premises. Upon completion of his services, the attorney made full and complete accounting to the brothers.

Four years later, one of the brothers died owning other parcels of real estate in common with his brothers unrelated to the former litigation. The estate of the decedent now wishes to retain the attorney to institute proceedings against the other brothers with regard to the other real estate held in common by them. May the attorney represent the estate in such proceeding?

OPINION

The Committee is of the opinion that it is proper for the attorney to represent the estate provided: (i) the subject matter of the prior litigation is totally unrelated to the proposed litigation; (ii) the new employment will not require the attorney to use confidential information obtained in his former litigation (ABA 165 (1936); EC 4-5, 4-6; also DRINKER, Legal Ethics, p. 109 and cases therein set forth); and (iii) the attorney's prior relationship with the brothers who are to be defendants in the proposed litigation was not such as to create an impression of professional disloyalty.

Opinion #140 - 5/28/70 (18-70)

Topic: Wills;  
Draftsman as attorney for estate

Digest: Care should be taken to avoid appearance of impropriety in providing that draftsman be employed as attorney for estate

Code\*: EC 5-6

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QUESTION

May a lawyer insert a provision in a will that the executor employ the lawyer as attorney for the estate?

OPINION

EC 5-6 provides:

"A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

The answer to the question depends on the surrounding circumstances. If they are such that the lawyer might reasonably be accused of using undue influence, the provision should be avoided.

Where there is no indication of overreaching and the suggestion originates with the testator, there is no objection to such provision provided it be clearly explained to the testator that the provision will not be binding upon the executor who will be free to choose his own attorney since a lawyer has no vested interest in representing the estate of one whose will he has drawn. A testator may reasonably believe that it is to the distinct advantage of his estate to have the benefits of his attorney's intimate knowledge of his affairs. It would seem more appropriate to have the will contain a recommendation to the executors with the testator's reasons therefor, rather than a direction.

The lawyer, however, may not properly have the executors named in the will execute a retainer agreement with him prior to the testator's death. Drinker, Legal Ethics 94 (1953); N.Y. City 580 (1941).

In cases where there is a possible appearance of impropriety, the lawyer should consider having the testator submit the will to another lawyer for review prior to its execution. See Drinker, Legal Ethics 94 (1953).

In the opinion of the Committee, the customary and regular inclusion of provisions in wills providing for retention of the services of the attorney drawing the will, without the specific request or suggestion of the client, is improper. ABA Inf. 602 (1963).

Opinion #141 - 5/28/70 (19-70)

Topic: Conflict of Interest of  
Attorney - Legislator

Digest: Not proper for attorney  
who is county legislator  
to represent plaintiff  
whose cause of action  
against a township is based  
upon regulations of county  
legislature's agency

Code\*: EC 8-8  
DR 8-101