NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207

# Committee on Professional Ethics


Opinion #340 - 4/25/74 (17-74)

Topic: Dual Practice; Conflict of Interest.

Digest: Lawyer whose spouse is a real estate salesperson working on a commission basis should not accept as client a party to a real estate transaction in which lawyer's spouse has participated as salesperson, but may act as attorney for clients who have used the brokerage agency employing the spouse, provided spouse has not participated in the transaction or benefitted therefrom.

Code: Canons 9,5; EC 9-6; EC 5-2; DR 2-103.

## QUESTION

May a lawyer, whose spouse is a real estate salesperson working on a strictly commission basis, represent a party to a real estate transaction in which the lawyer's spouse has participated as salesperson with full disclosure of the facts to the client and may the lawyer represent a person who has used the brokerage agency employing the spouse provided the spouse has not participated in the transaction or benefitted therefrom?

## OPINION

A lawyer may not act as the lawyer and broker for a client in the same real estate transaction. N.Y. State 208 (1971). His personal interest as broker should not be allowed to dilute his loyality to his client. EC 5-1. The intimate relationship and economic interests of husband and wife are inseparable; the acts of one directly affecting the other. The representation by the attorney of customers of the spouse's brokerage firm has been disapproved. N.Y. State 244 (1972). For the same reasons the representation by the attorney of customers of the spouse salesperson is disapproved.

There would not, however, be any impropriety in the attorney representing customers of the brokerage firm which employs the spouse where the spouse has not participated in and will not benefit from the transaction. Attention is directed to DR 2-103 concerning the recommendation of professional employment.

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Opinion #341 - 5/30/74 (11-74) Topic: Notice to clients whose Wills lawyer holds when he retires

Digest: Neither a lawyer nor his partners need notify a client whose Will the firm holds of the lawyer's retirement, provided the client knows of the partnership.

Code: Canon 4; EC 4-2; EC 4-6.

## QUESTION

Need a law firm that holds original Wills drawn by a lawyer for his clients both before and after the formation of a law partnership of which he is a member notify these clients of the lawyer's retirement?

## OPINION

When a client leaves the original of his Will with his lawyer, the legal services have been completed, and the lawyer becomes a custodian of the document. Provisions of the Code relating to withdrawal from representation are not relevant.

However, legal and ethical obligations remain. EC 4-6. The client has two rights: First, to retake the Will whenever he desires, or direct the ultimate disposition of it, and, second, to have his confidences concerning the Will and information relating to it respected.

The general principles governing the obligation of the lawyer on his retirement are set forth in EC 4-6:

> "A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration".

When a client deals with a lawyer who is a member of a law partnership, the obligations of each partner are also the legal and ethical responsibilities of the firm, N.Y. County 378 (1948), and "unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm". EC 4-2.

At the time the Will is left with the lawyer, any special arrangements or limitations concerning the custody or disposition

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of the document should be discussed. Therefore, unless the client otherwise directs, it can be assumed that the client is aware of and accepts the relationship between the lawyer and his partners and the responsibility of the firm for the custody of the document. Under such circumstances, no notice need be given to the client upon the retirement of the partner.

In respect to Wills drawn prior to the formation of the partnership, the same considerations apply, provided that at some time the client has been made aware of the formation of the partnership and has had the opportunity to retake the Will or consent to its continued custody by the partnership. An attorney who retires from practice may transfer executed Wills and other files to another attorney, but the receiving attorney holds them only as a custodian. It is generally unethical for him to examine the Wills or files without the clients consent. Illinois 180 (1960), Maru, Digest of Ethics Opinions 115 (1970). But if the client has been made aware of the participation of the lawyer in the firm, by notice of the formation of the firm, by continued representation by the lawyer, or perhaps even by common knowledge in a small community, or in any other way, and continues to leave his Will with the lawyer, it may be presumed that he has consented to the continued custody of the Will by the firm, and no notice of the retirement of the attorney is necessary.

If the circumstances are such that it is apparent that the client has not known of the formation of the partnership, then, on retirement of the lawyer, the remaining firm, as the lawyer to whom the Will has been delivered, should notify the client of the retirement and that the Will is in the firm's possession. Particularly is this true where there is a change of name in the firm and the client or his heirs might not know where to look for the Will.

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