



Committee on Professional Ethics

Opinion #477 - 12/29/77 (129-77)

Topic: Advice by lawyer to secure legal services; communications with one of adverse interests; estates; right of election against will.

Digest: Executor's lawyer may advise surviving spouse to obtain independent counsel concerning his right of election against will.

Code: EC 5-1, 7-18;
DR 4-101(A), 7-101(A),
7-104(A)(2).

QUESTION

The testatrix bequeathed one-third of her estate to her surviving husband. The husband is apparently entitled to elect a one-half share against the will and has expressed dissatisfaction with the amount bequeathed.

Under the circumstances stated, may the executor's lawyer advise the surviving husband to obtain independent counsel with respect to his right of election against the will?

OPINION

Heirs at law and beneficiaries frequently inquire of the executor's lawyer concerning their rights in the estate. While he is generally not required to answer these inquiries, it is usually not improper for him to provide routine information relating to the estate's content or administration. Indeed, to avoid generating unwarranted hostility or suspicion, it is often advisable for him to answer such questions. This kind of activity is viewed as a matter of professional privilege, or personal courtesy, which he may properly undertake in the exercise of his sound discretion.

Where the information sought is purely a matter of fact and non-privileged, the lawyer ordinarily is at liberty to divulge it. Cf., DR 4-101(A). Where the information sought would require a statement of the law or the giving of legal advice, however, different considerations apply. In this latter connection, both the lawyer's duty to represent the executor with undivided loyalty and his professional obligation to refrain from giving advice to potentially adverse parties may serve to prevent him from furnishing the requested information. See DR 7-101(A) and DR 7-104(A)(2); see also EC 5-1 and EC 7-18.

It is in the context of the foregoing practices and principles that we consider the question posed.

The Code clearly requires the executor's lawyer to avoid taking

any position antagonistic to the estate or inconsistent with the executor's duty to carry out the testatrix' will. It would therefore be improper to advise the surviving spouse that he is entitled to exercise a right of election. Whether the surviving spouse can exercise a right of election is a conclusion of law that does not necessarily follow, ipso facto, from the marital status. Indeed, it is a conclusion of law that the executor's lawyer may foreseeably be called upon to contest.

Nevertheless, to remain silent in the face of the surviving spouse's expressed dissatisfaction with his testamentary share might seem somewhat unfair and could, under certain circumstances, tend to mislead. Thus, where it appeared that a widow had failed to seek more than her testamentary share because of advice previously given by the executor's lawyer, it was held "the professional privilege and duty of the lawyer to inform the widow with respect to her probable power of election." N.Y. City 373 (1936); see also N.Y. City 191 (1931).

A balance must be struck. The executor's lawyer cannot advise the surviving spouse to exercise a right of election, but he can advise him to seek independent counsel. Cf. DR 7-101(A) with DR 7-104(A)(2). And, to make certain that the surviving spouse understands the need for independent counsel, as a matter of professional privilege the executor's lawyer may inform him of the possible existence of a right to elect a statutory share against the will.

For the reasons stated, the question posed is answered in the affirmative.
