KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-232
Issued: May 1980

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at http://www.kybar.org), before relying on this opinion.

Question: May a lawyer who drafted a will represent the beneficiaries and executor under the will where the lawyer who drafted the will will be a witness as to the competency of the testator and/or undue influence of the lawyer may be an issue in the lawsuit?

Answer: Yes.

References: DR 5-101(B); ABA Formal Opinion 220; Duncan v. O'Nan, 451 S.W.2d 626 (Ky. 1970); Adams v. Flora, 445 S.W.2d 420 (Ky. 1969); Stegman v. Miller, 515 S.W.2d 244 (Ky. 1974)

Opinion

Disciplinary Rule 5-101(B) provides that a lawyer shall not accept employment in contemplated or pending litigation if he knows or if it is obvious that he or a lawyer in his firm may be called as a witness. There are four exceptions to this rule. The fourth exception provides that he may accept employment and testify if the refusal would work a substantial hardship upon the client.

In 1941 the American Bar Association was called upon to answer a similar Question and stated as follows (ABA Informal Opinion 220):

> It is not necessarily unethical for an attorney to represent a client when his partner will be a material witness in the case. He may not do so if he will be required to attack the testimony of his partner. He should not accept employment if he then knows that his partner will necessarily be a witness as to matters not relating to his professional duties. However, where the attorney's long and intimate familiarity with the matter in litigation makes his withdrawal prejudicial to the client's case, or where his partners testimony relates to matters occurring in the course of his professional duties, he need not necessarily withdraw.

In Adams v. Flora, 445 S.W.2d 420, 422 (Ky. 1969), the highest court in our Commonwealth stated:

> In our opinion the circumstances surrounding the drafting of a will are of such importance in a will contest that it is proper for an attorney who represented the testator to testify concerning this matter even though he represents the testators estate.

In Duncan v. O'Nan, 451 S.W.2d 626 (Ky. 1970), the court stated that it was "proper for an attorney to testify in a will contest case where he is the draftsman of the will under attack even though he represents the testator's estate." In Stegman v. Miller, 515 S.W.2d 244 (Ky. 1974), the court discussed the area in generalities.

The Ethics Committee is not authorized to answer questions of law; therefore, we refuse to comment on KRS 421.210 and its application.

It is the opinion of the Ethics Committee that a lawyer who drafted a will may represent the beneficiaries and executor under the will and testify as a witness as to the testator's competency and/or undue influence. In addition, it is the Ethics Committee's feeling, that where applicable, a partner or associate of the attorney who drafted the will may be the trial attorney in the will contest suit.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.