

Committee Opinion
October 25, 1989

LEGAL ETHICS OPINION 1296

ATTORNEY-CLIENT RELATIONSHIP –
CONFIDENTIALITY – DISCLOSURE –
WILL CONTRACTS: ATTORNEY
GAINING INFORMATION REGARDING
DESTRUCTION OF WILL BY
SURVIVING SPOUSE.

You have advised that in 1984 you represented a couple who were each married for the second time, and who could not agree as to the disposal of their property, all of which was jointly held with right of survivorship, at the time of their deaths. Will contracts were executed by the parties and you advise that you maintained no continuing relationship with the couple. Upon the death of the husband, you were contacted by the wife who was told she needed other counsel to advise her as to any future willmaking. The wife called again some months later and told you she needed to qualify as executor of her husband's estate in order to receive her husband's asbestosis settlement benefits. At that time, the wife also told you she had lost her husband's will. Subsequently, the woman's daughter told you that her mother had indicated she had burned the will contracts and then had gone to another attorney who drew up a will making the daughter the beneficiary, in defiance of the provisions of the will contract which would have left some property to the deceased husband's children by a prior marriage. You indicate that you have no direct contact with the mother.

You have asked that the Committee opine as to any duty you may have to notify anyone of the destruction of the wills drawn under the will contract, considering that you do not have any direct knowledge of any such action. You have further asked about any duty owed by an attorney who does have such personal knowledge, even if he did not draw the will. Finally, if either attorney has such a duty, you have asked the Committee to opine as to when that notification is required: presently or at the mother's death.

The appropriate and controlling rules applicable to the facts you have presented are DR:7-102(A)(3), which prohibits a lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal; DR:7-102(A)(7), which prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent; and DR:4-101(C)(3), which permits a lawyer to reveal information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation.

Whether a lawyer is required to notify anyone as to the possible destruction of the wills drawn under a will contract is a legal question beyond the purview of this Committee. Should there be a legal duty to make such notification, clearly the lawyer's ethical responsibilities under DR:7-102(A)(3) would not permit the lawyer to withhold the information. The Committee is of the view, however, that the matter is not yet ripe because the mother/wife/testator is still alive, her will has not yet spoken, and any will she has is subject to modification until the time of her death. Thus, the lawyer is subject to no ethical responsibility to make any revelation regarding her actions. The Committee is of the opinion that no lawyer may knowingly assist the mother/wife/testator in either

Committee Opinion

October 25, 1989

breaching the will contract or in destroying any material evidence; such conduct would be improper as proscribed under DR:7-103(A)(7). The Committee is of the further opinion that, absent a legal duty to make disclosure, the permissive rather than mandatory nature of DR:4-101(C)(3) would not require a lawyer to reveal the willful destruction of evidence and any possible fraud on a third party as a result thereof. The Committee directs your attention to the recent decision of the Virginia Supreme Court regarding liability of an attorney, who drafted a will, to beneficiaries of the will. (See *Copenhaver v. Rogers*, No. 880807 (4 VLW 309) (September 22, 1989) Finally, the provisions of DR:4-101(C)(3) may not be applicable in the situation you describe as to your dealings with the mother/wife/testator since that rule requires that any such fraud on a third party have occurred "during the course of the representation" and you have advised the Committee that you have no such ongoing relationship with the individual.

Committee Opinion

October 25, 1989