
**E-82-14 C/I: Firm as estate's
attorneys—Disclosure of client's
confidences**

Facts

A husband and wife executed wills disposing of all of their property to the survivor on the death of the first and disposing of the balance of their property on the death of the second of them to their common descendants as well as descendants only of the husband. On the same date the couple executed their wills, they also executed a written contract not to change their wills. The contract clearly expresses the intent that the wills were not to be changed after the death of either of the parties. The husband subsequently died, his will was probated, and his estate was closed. No reference was made in the probate proceedings to an agreement to not change the wills.

Thereafter, the surviving wife had another will drawn for her, disposing of her estate, including the estate inherited from her husband, in a manner different from the disposition of her estate under the will executed on the same date as the contract. All of the preceding work was done by Law Firm A. Law Firm B was subsequently contacted by the wife, and at her request a second will was drafted, disposing of her property in a manner which was likewise different from the manner it was disposed of either under the then current will or under her earlier will.

At the time of the discussion with the wife, it was apparent that she did not appreciate the significance of the contract with her late husband, but a question existed in Law Firm B's mind whether or not the new will would control the ultimate disposition of her property in the event a beneficiary under the first will knew of the collateral contract between wife and husband, and chose to assert a claim against her estate based upon the contract. At this time, it appears that no one is aware of the existence of the contract other than the wife and the attorneys in Law Firms A and B.

In drafting the third will, the attorneys in Law Firm B, as is the custom in the location, named a corporate fiduciary as personal representative of her estate. It is anticipated that the corporate personal representative of the estate will

suggest to the beneficiaries, after the death of the testatrix, that the corporate personal representative employ Law Firm B for purposes of probating the estate.

Questions

1. May Law Firm B advise wife to destroy the original of the contract with her late husband not to revoke her will, without violating the Code of Professional Responsibility?
2. After the death of the wife, and in the likely event that the corporate fiduciary contacts Law Firm B to represent it in probating the estate, may Law Firm B accept employment as attorneys for the corporate fiduciary or would there be a conflict of interest between the firm's duty to preserve the confidences of the deceased client and its duties as attorney for the estate?
3. If Law Firm B does not accept employment as counsel for the corporate fiduciary, does the firm have a positive duty to the corporate fiduciary or the court to reveal any knowledge of the contract?

Opinions

Question 1: For several reasons, it is impermissible for the requesting attorney to advise the wife that she should destroy the contract not to revoke the former will entered into with her deceased husband.

Several Wisconsin Supreme Court Rules state: "An attorney may not suppress evidence he, she, or his or her client has a legal obligation to produce." SCR 20.43(1), 20.34(3)(i), and 20.36(1)(c). Wis. Stats. sec. 856.05(2) and (3) require a person with information regarding the existence of a will not in his or her custody to submit the information to the court and that failure to do so with intent to harm or defraud another will result in a penalty.

Wis. Stats. sec. 856.05(1) makes similar provisions for one with custody of a will. Whether a contract not to revoke a will or information regarding one is required to be produced under those sub-sections, is a question of law. However, since a question does exist in the minds of the committee whether or not such a document would fall within the purview of that statute, the attorney should advise his client not to destroy the contract even though the attorney may not make the existence of the contract known because of the attorney/client privilege. SCR

20.21 and 20.22. Later circumstances (i.e., waiver or consent) may cause a privilege to be inapplicable, in which case the attorney would be required by law to reveal the contract or his knowledge of it. If the contract were destroyed, other parties would be prejudiced by being unable to sufficiently prove its contents so that it may be enforced.

The contract also may not be destroyed if to do so would violate the policy behind the Supreme Court Rules preventing the suppression of evidence which is intended to prevent interference with the administration of justice. Destruction of the contract would appear to cause that interference here. Its destruction may make it impossible for any action in equity to enforce a contract to be brought causing prejudice to the intended beneficiaries and a possibly long and costly court action. Policies of contract law would also indicate the contract should not be destroyed. Whether the contract should be enforced or not, it should be decided by the court with all evidentiary safeguards. The contract may well be a valid and bargained for agreement entered into freely by both parties. Had the deceased husband known it could be so readily rescinded by destruction, it was likely he would have drafted the will differently to insure disposition of his assets would occur as intended. To fulfill his expectations, as well as those of intended beneficiaries sought to be enforced by the contract, it is important that the contract not be destroyed.

The contract should also not be destroyed as its destruction may be considered a fraud on the court. Though the attorney need not disclose such a fraud once committed by a client because of the attorney/client privilege (SCR 20.22 and ABA Formal Opinion 341), he may not counsel to commit such an action. SCR 20.36(2)(a) and (b).

Therefore, it appears that the attorney is prohibited from advising his client to destroy the contract under the above circumstances and should at least discourage said client from doing so. If the attorney/client privilege is waived or if a court orders production of the document, the contract would be required by law to be revealed. Destruction is also impermissible as it could be considered a fraud upon the court as it may also possibly interfere with the administration of justice.

Question 2: After the death of the wife, neither Law Firm B nor any of its members may accept employment as attorneys for the estate of the deceased client at the request of the corporate fiduciary-personal representative. The

employment would be prohibited because of the possible conflict of interest, and the likelihood that members of Law Firm B may be called as witnesses should an issue arise on the terms and content of the contract.

The duty of an attorney to his or her client to preserve secrets and confidences does not end with the client's death, but continues indefinitely unless disclosure is consented to, ordered by the court, or the attorney/client privilege is waived. SCR 20.21(6), SCR 20.22, and ABA Informal Opinion 1293. The privilege also extends to other members and employees of the attorney's firm. SCR 20.22(3). Therefore, after the death of the widow, the requesting attorney and his firm will have a continuing duty to preserve their deceased client's confidences.

Wis. Stats. sec. 856.31 provides that when a corporate fiduciary is appointed as the sole personal representative, the persons with the majority interest in the estate may select an attorney to represent the personal representative in all proceedings. As stated in the facts presented, it is a common practice in the requesting attorney's area for a corporate fiduciary to suggest the firm of the drafting attorney be selected as attorneys for the estate. Wis. Stats. sec. 857.03 defines the powers and duties of the personal representative. Under this statute, as attorneys for the estate, the firm's duties would include contesting all claims except those which the personal representative believes are valid. In doing so, the firm's duties as estate attorneys directly conflict with their duty to preserve the secrets of the deceased client. This may cause the firm to contest claims the attorneys know to be valid under the contract. This would be prohibited under SCR 20.36(a) and (c) which proscribe the making of false statements of law or fact and asserting claims not supported by the law.

The attorney or his firm's duty to preserve client confidences may also conflict with their duty to represent the corporate fiduciary because they must be certain all documents are filed, or actions taken within the allotted time under Wis. Stats. sec. 856.09. However, they would be unable to do so because of their duty to keep secret the existence of the contract.

Should the existence of the contract or its contents become known, it is quite likely the attorney(s) may be called as a witness if an attempt is made to prove its validity, especially if the original contract was destroyed. Both the attorney and his associates would be barred from accepting the employment as attorneys for the estate if it is likely they will become witnesses on a material issue as here,

under SCR 20.24(2) and Wisconsin State Bar Memo Opinion 5/16/68. It is almost certain the attorney or his associates would be called as a witness if the personal representative seeks to waive the attorney/client privilege as is permitted under Wisconsin State Bar Ethics Opinion E-77-5, ABA Formal Opinion 91, and ABA Informal Opinion 1293.

Question 3: If the attorney or his firm are not permitted to represent the corporate fiduciary, they have no affirmative duty to the fiduciary or the court to reveal any knowledge of the contract. The attorney's only loyalty under these circumstances is to his client, and no confidences or secrets of a client may knowingly be revealed unless they fall within the exceptions listed in SCR 20.22, none of which are applicable here. As stated above, the duty to preserve the confidences of the client would continue after the client's death and would be applicable to the attorney's associates and employees as well. ABA Informal Opinion 1293.

Conclusion

Under the circumstances presented the requesting attorney should not counsel his client to destroy the contract. As it may be required by law to be revealed, its destruction would interfere with the proper administration of justice. The contract destruction also may be considered a fraud on the court.

The attorney and members of his firm would be prohibited from accepting employment as attorneys for the deceased client because of a possible conflict of interest, or because of the likelihood they will be called as witnesses. Should the above employment be refused, the attorney has no duty to the court or the corporate fiduciary to reveal any knowledge of the contract.