

Opinion 55
September 1952
18 Baylor L. Rev. 220 (1966)

CONFIDENCES OF A CLIENT - WILL

An attorney who writes a will for a client and acts as one of the witnesses to it, which client executes a second will by another and is subsequently declared non compos mentis, may not disclose to the client's son and guardian the circumstances of the execution of the first will, its contents and the attorney's opinion of the client's mental condition at the time of its execution. The attorney could not be compelled by the court to make the disclosures.

Canon 34.

QUESTION

Several years ago an attorney wrote a will for a client and acted as one of the witnesses to the will. Recently, this client executed another will prepared by another and shortly after the execution of the second will was, due to mental condition, given a ninety-day commitment to a hospital for the insane and a son appointed guardian. The son and guardian, anticipating an attempt to probate the second will upon the death of this client, is bringing a procedure to perpetuate testimony and contemplates the taking of the deposition of the attorney who prepared the first will concerning the circumstances of its execution, its contents and the attorney's opinion of the client's mental condition at the time of the execution of the first will.

Should the attorney who prepared the first will disclose to the parties involved the contents of such will, the circumstances of its execution and his opinion of the testator's mental condition?

OPINION

This question has given the committee a great deal of trouble because of the many factors involved. It is generally agreed that the information sought from the attorney is information received by him as a confidential communication and that the privilege of non-disclosure is the privilege of the testator during testator's lifetime to be waived or asserted by the client rather than the attorney. It is generally agreed that it is the duty of the lawyer under 34 to preserve his client's confidence, which duty outlasts the lawyer's employment and that in this situation, because the client is non compos mentis and cannot give the consent the lawyer would need to make such disclosures, the lawyer should refuse to do so.

The next question presented is whether or not he should refuse to divulge same if so directed by the court. This is a matter for decision by the courts, but it is the opinion of the majority of the committee that the attorney could not be compelled by the court to make such disclosures. (8-1)