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ETHICS AND PRACTICE GUIDELINES**

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October 17, 2007

Mr. Dwight Dinkla
Executive Director
Iowa State Bar Association
521 E. Locust
Des Moines, IA 50309

Re: Ethics Opinion 07-07 (Drafting Will & Will Contests)

Dear Mr. Dinkla

The Committee has received several requests for opinion as to whether it is proper for a lawyer to defend an estate in a will contest when the lawyer drafted the will in question.

We view the issue from a litigation standpoint. We see no conflict between in the lawyer's role in drafting the will or in providing estate planning advice and service and subsequently being designated as the attorney for the representative. The difficulty arises when there is a contest which revolves around the lawyer's work product.

Wills are contested for a variety of reasons: lack of testamentary capacity, undue influence, fraud etc. Furthermore certain provisions of a will may be the subject of contest due to ambiguity. In most of these situations the testimony of the lawyer will be necessary if not essential to bring forth the truth regarding the testamentary status of the deceased or the

meaning of terms used. As indicated in Opinion 88-11 a lawyer may be called upon and properly give evidence regarding the testator's intent. Clearly a lawyer cannot be both counsel and witness. I.R. Prof. C. 32:3.7 disposes of the issue:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by rule 32:1.7 or rule 32:1.9.

We conclude that a lawyer who has drafted a Will and is likely to be a necessary witness should not accept employment as advocate in litigation involving the Will. Absent other conflicting situations, the lawyer may, if properly designated, continue to represent the personal representative (executor or administrator) with the administration of the estate. In some instances it may be permissible for another lawyer in the drafting lawyer's firm to act as advocate in litigation involving the Will even if the drafting lawyer is likely to be a necessary witness in the litigation, however counsel is cautioned to be mindful of the potential for conflicts that may arise under Rule 32:1.7 or rule 32:1.9.

For the Committee



Nick Critelli, Chair