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**E-77-5 Propriety of attorney's disclosure of information upon consent of deceased client's personal representative**

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**Facts**

An attorney was contacted by a husband and wife for the purpose of drafting a will for them. Included in the conversation about the will was a discussion of the appointment of a guardian for the minor children. Several names of possible guardians were suggested and their advisability as guardians was discussed. No guardian was agreed upon before the clients died. The will is now in probate. The appointed guardian ad litem has requested the attorney to testify as to the conversation about the appointment of a guardian. It is likely the personal representative is willing to consent to waiver of the attorney-client privilege so that the attorney could reveal the communication in regard to a possible guardian for the children. Such a disclosure would involve revealing the discussion of the suitability and necessarily the personalities of those considered as possible guardians.

**Question**

Is it ethically proper for the attorney to disclose the conversation, conducted by the clients in the expectation of confidentiality, if the personal representative consents to waiver of the attorney-client privilege?

**Answer**

A personal representative may consent to the waiver of the privilege. The attorney has discharged his ethical duty if he complies with a ruling of the court that he must disclose the conversation, after he has raised any objection he has to disclosure.

**Discussion**

The evidentiary rule about the attorney-client privilege is stated in Wis. Stats. secs. 905.03(3) and 905.11 (1974). Sec. 905.03(3) extends the privilege

to the personal representative of a deceased client and sec. 905.11 states whoever has the privilege may waive it.

Under Canon 4 of the Code of Professional Responsibility, which directs attorneys to “preserve the confidences and secrets of a client,” however, it is stated in EC 404 that:

“The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. . . .”

In Formal Opinion 91 (1933) of the ABA Committee on Ethics and Professional Responsibility, the committee set forth the general rule stated above that it is proper for an attorney to:

“. . . testify to or otherwise disclose a privileged communication after the death of the client for the benefit of his estate with the consent of the client’s personal representative or heirs.”

ABA Informal Opinion 1293 (1974) quotes Opinion 91 with approval and restates the general rule. These opinions refer to statutory provisions and case law in their discussion of the ethical question. And Informal Opinion 1293 says the same guidelines used to protect statutorily privileged confidences should be applied to “secrets” divulged by a client. (*See* DR 40101(A).) Thus it seems that although EC 4-4 states the ethics involved in client confidences apply more broadly than the evidentiary rules, for purposes of the question whether it is ethical to disclose confidences upon consent of the personal representative, the evidentiary rule is to be followed.

The opinions cited above and the cases relied on in those opinions explain the rationale for the rule: the assumption that the personal representative’s interest is identical to the deceased client’s as protection of the estate and furtherance of the client’s intent in her/his will. Thus, the personal representative is not consenting to the disclosure of information which would do anything but help shed light on the testator’s intent as expressed in the will in question.

The instant situation differs, however, from the situations presented in the above-cited opinions. The question here is not whether the attorney may disclose a confidence necessarily in the interest of ascertaining the testator’s intent, but whether he must, by the personal representative’s waiver of confidentiality,

reveal the discussion regarding the advisability of various persons as guardians for the children. It could be argued, as a basis for resisting the request to testify, that the purpose for allowing a personal representative to waive is not served by this disclosure and an exception should be made in this situation. The discussion of possible guardians most likely included the reasons why those who were suggested were rejected. Disclosing this conversation would not seem to shed light on the testator's intent as to the will, but would only reveal his/her opinion about the possible guardians discussed. Such opinions arguably are not related to the purpose of allowing the personal representative to waive the attorney-client privilege and would only disclose information of the very type sought to be protected by Canon 4 and the attorney-client privilege in the interests of openness and candidness between attorneys and clients.

Consistently with this argument, Formal Opinion 91 acknowledges that:

“Some authorities recognize an exception to the right of the personal representative or heir to waive the privilege, where to disclose the information would affect the character or reputation of the deceased client. *Appeal of LeProhon*, 102 Me. 455, 67 Atl. 317.”

Formal Opinion 91 also states, as quoted above, that the personal representative's waiver makes disclosure of privileged information for the benefit of the estate ethically proper. In the instant situation, it can be argued disclosure of the information would not be for the benefit of the estate and would be detrimental to “the character or reputation of the deceased client,” as it would reveal the client's personal opinion, stated in the expectation of confidentiality, about specific persons in the community.

There are no cases which state whether Wisconsin recognizes such an exception to the rule allowing the personal representative to waive the attorney-client privilege. However, considering the rationale behind allowing the waiver, and the purpose for Canon 4 and the attorney-client privilege, an argument can be made that in this case the rationale is not applicable since the testimony would not necessarily benefit the estate, and the purpose for the privilege would be ill-served by requiring the disclosure.

If the court should choose to reject the attorney's argument, however, and require him to testify, it appears that he should not be subjected to discipline for violation of the Code if he complies. ABA Informal Opinion 312 (unpublished) does state an attorney should refuse to disclose a privileged communication even

though the court sends him to jail. However, the Wisconsin Supreme Court in *Estate of Hoehl*, 181 Wis. 190, 197, 193 N.W. 514 (1923), stated:

“[The attorney] performed his full duty as attorney to the court and to his client when he raised the objection to testifying before the court and submitted to the court’s decision [that he should testify].”

In that case, the question on appeal was whether a letter from the administrator to the attorney for the estate, listing the contents of the estate, was admissible. If it was, it would be damaging to the administrator, as evidence that he had committed fraud. The court held it was admissible, noting the attorney was not the administrator’s personal attorney but the attorney for the estate with a duty to serve that estate and the court. Obviously, the estate would be served by admitting the letter. The facts of that case and the instant situation are distinguishable in many ways. For one thing, in *Estate of Hoehl*, the administrator refused to waive the privilege to allow the attorney to testify; in the situation here in question, the personal representative is willing to waive the privilege. In *Estate of Hoehl*, the court held the testimony was admissible even over the administrator’s objection and stated the attorney’s duty was discharged by his objecting and then submitting to the court’s decision. Where the personal representative is willing to waive the privilege and the court decides over the attorney’s objection that the information should be disclosed, it seems even more likely the attorney’s duty has been discharged by objecting and complying with the court’s decision. Presumably the court’s decision that the disclosure should be made would be based on its conclusion that the information is necessary in the interest of the estate.

### **Conclusion**

An argument can be made that the attorney should not be required to disclose the conversation with his clients even if the personal representative waives the attorney-client privilege on their behalf. The rationale for allowing the personal representative to waive the privilege is the assumption that he or she is interested in the protection of the estate and would only waive it to further that interest. That, arguably, is not the situation in the instant case. What would be revealed in this case is the clients’ personal opinion on the advisability of specific persons as guardians for their children. Not only would the purpose for allowing the

personal representative to waive the privilege not be served in this case, but neither would the purpose for Canon 4 and the attorney-client privilege be served.

If the court decides, however, that the attorney should testify about the conversation, the attorney should not be disciplined for revealing client confidences if he complies with the court's decision. *Estate of Hoehl, supra*, is authority for the proposition that his duty to his client is discharged by his objecting but complying with the court's final decision.