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Ernest W. Stephens, Retired

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Re: Ethics Opinion 86-4

Dear :

You have submitted the following questions to us:

1. Decedent wrote three wills during his lifetime. The first was written by an attorney and contained a charitable bequest with the residuary estate to A, B and C. The second was written by a different attorney and contained a charitable request with the residual estate to A and B. C was disinherited. The third will is olographic and leaves the entire estate to A. In this will, the charity and B were disinherited. The originals of the first and third wills are in the possession of the attorney seeking to probate the estate. A copy of the second will is also in his possession. The attorney petitioning for probate on behalf of A alleges that "no wills are known to exist." Moreover, A, the executor in the second and third wills, does not present them to the court. The petitioning attorney explains that, in his opinion, all wills were revoked. The first will was revoked by the terms and conditions of the second will. The second will may have been revoked by mutilation or orally. The olographic will is believed by him to either be invalid or to have been revoked orally. No one witnessed mutilation of the second will. No search was conducted for a will but, A did not notice one in decedent's belongings. The charity, B and C were not served with notice of the petition for letters of independent administration. The published notice is identical with the petition. It does not state that wills existed which were revoked. The oral revocation, if any, occurred in the lawyer's office. Only the lawyer and decedent were present. Is it appropriate under these facts for the petitioning attorney to plead that no

wills exist and fail to present the wills to the court? If so, why? If not, why not?

2. The decedent was adjudged incompetent. The guardianship of his estate was held by a bank. D was the guardian of the decedent's person. The decedent's affairs were being handled by an attorney. The guardian bank requests of the attorney a copy of the will before decedent's death. The attorney receives the letter making this request. The attorney does not respond. Is it appropriate for an attorney to refuse the request of the financial guardian for a will during testator's lifetime which may or may not affect disposition of the guardianship funds uopn decedent's death?

3. A petition for appointment of guardian is prepared and signed under oath stating that the incompetent has no relatives, has never married and is a single person. One month later, the guardian and the incompetent are married. The attorney for the guardianship is advised. Sometime after he is advised, another petition for guardianship is prepared by the attorney, and signed by the guardian under oath alleging that the incompetent has no relatives, has not been married and is a single person. Is it appropriate for the attorney to permit the guardian to sign the petition for guardianship knowing that the information contained therein is inaccurate?

Concerning the three questions submitted, we respond as follows:

1. It is not appropriate for the petitioning attorney to plead that no Wills exist and fail to present the Wills to the Court. An attorney with a Will in his possession, prepared by a person who has died, is required to submit that Will to the Court or to the Executor or Executrix of the estate. SDCL 30-6-1 and 30-6-4. Any Will not obliterated or destroyed should be presented by the custodian so that the Court might determine with notice to the proper parties, which Will is valid. It is unethical conduct for an attorney to represent a petitioner for Letters of Administration and fail to produce a Will or Wills, which might be determined to be valid or to file papers indicating no Will has been found.

2. Generally, a Will is a confidential communication, and particularly if the same was drawn during the decendent's competency, a release of the Will would constitute a violation of confidential communications. The attorney must act in the interest of the client. EC 7-12. Accordingly, if the attorney has questions concerning releasing the Will, he might petition the Circuit Court for a determination as far as whether it should

be released or not; alternatively, if the guardian felt a need for the Will he could petition the Circuit Court for a copy. The attorney should only release the Will after proper Order of the Court.

3. The Petition for Guardianship prepared by the attorney and signed by his client, which he knows to be false, is a violation of DR 7-102 (a)(5).

Respectfully submitted,

Robert C. Riter, Jr.
Chairman of the Ethics Committee