FORMAL OPINION NO. 75*

The opinion of the Professional Ethics Committee has been requested concerning the propriety of the disclosure of a contract to will after the death of both of the parties to the contract.

An attorney represented both husband and wife many years ago and drew a contract for the couple wherein the husband promised to execute a will in favor of the wife if the wife, in turn, would devise certain properties to a charitable organization upon her death. Both parties to this agreement have died and the attorney has learned that the wife, recently deceased, did not fulfill the agreement. The attorney is thus faced with the question of whether the disclosure of the terms of the agreement to the charitable institution or to some other responsible person would be a violation of the Code of Professional Responsibility.

Canon IV of the Code of Professional Responsibility dictates that a lawyer should preserve the confidences and secrets of a client.

DR 4-101 goes on to define "confidence" as "information protected by the attorney-client privilege under applicable law."

Section 9-203(2), Idaho Code, states that:

> "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. The word client used herein shall be deemed to include a person, a corporation or an association." (Emphasis ours.)

While the specific point does not appear to have been construed in Idaho, we note that it is stated in 97 C.J.S. Witnesses, § 288:

> "Confidential communications made by a client to his attorney with respect to

> the preparation and execution of a will are privileged and cannot be disclosed during the lifetime of the client, but the attorney-client privilege does not survive the client's death, with respect to such communications, in litigation between a testator's heirs, legatees, devisees, or other parties who all claim under him."

It is also stated at 97 C.J.S., § 292, that:

> "It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client. . . ."

See also, In re Goan's Estate, 83 Idaho 568; In re Marek, 94 Idaho 15; and 66 A.L.R.2d 1302 and cases cited therein.

Presumptively, then, there has been a breach of contract to will and, presumptively, the party wronged by the breach is a third-party beneficiary, i.e, a religious society. Under these circumstances, the Committee does not feel that it would be a violation of DR 4-101 for the attorney to present his information to the Court probating the will of his former client and, upon order of the court, divulge the information within his disposal to the religious society and to the executor of the estate of the wife.

Even to state that the privilege attaching to communication with the client descends to the client's heirs simply begs the question as to who the legal heirs of the client are under these circumstances. This is not for the lawyer to decide, but for the Court, and accordingly, the court could be apprised of the information at the attorney's disposal without any violation of the Code of Professional Responsibility.

DATED this 8th day of May, 1974.

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*There are two related bodies of law which give effect to the principle of confidentiality: the attorney-client privilege in the law of evidence and the rule of

confidentiality established in the law of professional ethics. This opinion analyzes the problem primarily by reference to the attorney-client privilege incorporated within the law of evidence. Reference should also be had to the independent, and perhaps broader, rule of confidentiality established in the law of professional ethics.