Conflicts of Interest When an Attorney Drafts a Will Which Names Him as a Beneficiary

Attorneys may at times be asked to draft wills which name the attorney or his family as a beneficiary.[1] Such an instrument may involve serious ethical problems. If the testator is not related to the drafting attorney, a serious conflict of interest problem is practically unavoidable. The rules vary from state to state regarding the treatment of such situations, but the clear trend is to hold such bequests unrecommended or improper.

Canon 5 of the old ABA Code of Professional Responsibility was, and presently still is in most states, the guideline for conflict of interest problems. Disciplinary Rule 5-101(A) prohibits an attorney from accepting employment, except with the fully informed consent of his client, when the lawyer's own financial, business, property, or personal interests will affect his judgment on behalf of the client.[2] A lawyer would certainly have a personal interest in a testamentary instrument naming the lawyer as a beneficiary. The related Ethical Consideration, 5-5, does not flatly prohibit testamentary dispositions from an unrelated client.[3] The rule, however, warns the drafting attorney of his susceptibility to charges of undue influence and advises attorneys to insist that the client desiring such a will have another attorney draft the instrument.

The new Model Rules of Professional Conduct are much clearer in such cases. Adopted August 2, 1983, the new rules flatly prohibit

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1. *See* Schwab, *The Lawyer as Beneficiary*, 45 TEX. B.J. 1422 (1982).

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as MODEL CODE] DR 5-101(A) (1979), "[e]xcept with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest."

3. MODEL CODE, EC 5-5 (1979):

> A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, if the gift has substantial monetary value he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

an attorney from preparing an instrument giving the attorney or his relative any substantial gift except where the client/testator is related to the lawyer.[4] The language is unqualified. The attorney "shall not" prepare such an instrument.[5] The new Model Rules provide a specific rule as opposed to the varying state interpretations and applications of Canon 5 in case law on the subject.

A recent New York case illustrates the strict treatment courts give such bequests to attorneys.[6] In that case, a 103-year-old woman left an estate valued at $150,000.[7] The testatrix left a $20,000 gift to the attorney-draftsman of her will.[8] The attorney was a past friend of the testatrix's deceased son-in-law.[9] The testatrix's only living relatives were two nephews and two nieces.[10] The nephews did not object to probate of the will and one of the nieces could not be found.[11] One niece opposed probate of the will.[12] She had not seen the testatrix in the last fourteen years of her life and had not corresponded with her for 23 years.[13]

The *Lawson* court upheld a jury verdict against the attorney. The niece was not required to show a close relationship with her aunt.[14] Notwithstanding a lack of direct proof, the court stated that such a will benefiting an attorney-draftsman was highly suspicious and, in the absence of a satisfactory explanation, the trier of fact could draw an inference that the will was procured through undue influence.[15]

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4. MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter cited as MODEL RULES] Rule 1.8(c) (1983). "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except when the client is related to the donee." Substantial is defined as: "Substantial when used in reference to degree or extent denotes a material matter of clear and weighty importance." MODEL RULES, Terminology (1983).

5. MODEL RULES, Scope (1983). "Some of the rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion."

6. *In re* Estate of Lawson, 75 A.D.2d 20, 428 N.Y.S.2d 106 (1980). *See generally* Mortland, *Bequest to Attorney made under Undue Influence*, 8 Est. Plan. 57 (1981).

7. 75 A.D.2d at ____, 428 N.Y.S.2d at 108.

8. *Id.*

9. *Id.* at ____, 428 N.Y.S.2d at 111.

10. *Id.* at ____, 428 N.Y.S.2d at 108.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at ____, 428 N.Y.S.2d at 111.

15. *Id.* at ____, 428 N.Y.S.2d at 110.

The New York courts refer to cases similar to *Lawson* as *Putnam* problems.[16] *In re Will of Putnam*[17] is a case in which the New York Court of Appeals dealt with testamentary bequests to an attorney-draftsman. The court, in a unanimous opinion, found no undue influence under the facts, but cautioned attorneys against drafting such instruments.[18] An inference that the attorney used undue influence to secure the gift was recognized.[19]

In *Estate of Younger*,[20] the court gave careful consideration to Canon 5 in a will contest.[21] The testator had executed a series of wills giving different amounts to his nephews, nieces, secretary and attorney.[22] The probate will which was also executed in the attorney-draftsman's office, left the attorney $50,000 and 40 percent of the residue of a $1,100,000 estate.[23] The Superior Court of Pennsylvania held that it was proper for the lower court to consider the Ethical Considerations of the Code in deciding if undue influence was exercised by the attorney.[24] The attorney claimed that he could only be disciplined by bodies with proper authority and only for violation of Disciplinary Rules, not Ethical Considerations.[25] The Superior Court held he had not been disciplined and found a duty extending to both Disciplinary Rules and Ethical Considerations.[26] The Court found a presumption of undue influence in such instruments.[27] The mental condition of the testator was irrelevant.[28] The burden of proof was shifted to the attorney-draftsman to show by clear and convincing evidence that there was no improper influence exerted by him.[29]

In re Vogel,[30] an Illinois disciplinary proceeding, involved an attorney who drafted a will naming himself as a substantial residuary

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16. *See* Blank, *Problem Areas in Will Drafting Under New York Law*, 56 ST. JOHN'S L. REV. 459, 473 (1982).
17. 257 N.Y. 143, 177 N.E. 400 (1931).
18. *Id.* at 143, 177 N.E. at 400.
19. *Id.*
20. ____ Pa. Super. ____, 461 A.2d 259 (1983).
21. *Id.*
22. *Id.* at ____, 461 A.2d at 261.
23. *Id.*
24. *Id.* at ____, 461 A.2d at 264.
25. *Id.*
26. *Id.*
27. *Id.* at ____, 461 A.2d at 266.
28. *Id.*
29. *Id.*
30. 92 Ill. 2d 55, 440 N.E.2d 885 (1982).

beneficiary. In previous will-drafting situations, the attorney had insisted on independent counsel from a lawyer who shared an office with him and eventually became his law partner.[31] However, in this particular instance, he did not request an independent opinion.[32] The testator was 84 years old and in bad physical condition.[33] The Supreme Court found that the attorney had violated the Disciplinary Rules of Canon 5.[34] The court considered that on the last occasion not only did the attorney fail to advise his client of possible conflicts and suggest use of independent counsel,[35] but used his own acquainances as witnesses.[36] The court found mitigating circumstances and only censured the attorney.[37] He was said to be a personal friend of the testator and concerned with his welfare.[38] The testator was not on friendly terms with his sons and none attended his funeral, so the attorney was not an unusual or unnatural beneficiary under the circumstances.[39] Other evidence indicated the attorney did not intend to abuse his client's confidence.[40]

Other courts have not been as strict in their application of the Code. The Supreme Court of Oregon in *In re Tonkon*[41] dismissed a disciplinary action against an attorney-draftsman who wrote a bequest of $75,000 to himself in a will of an estate valued at $6,000,000.[42] The testator, at the time of execution, was physically unable to sign the will and had a diminished mental capacity.[43] The attorney was a close personal friend of the testator and had a power of attorney to manage his personal finances.[44] The court found the Ethical Considera-

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31. *Id.* at ____, 440 N.E.2d at 887.
32. *Id.*
33. *Id.*
34. *Id.* at ____, 440 N.E.2d at 889.
35. *Id.*
36. *Id.* at ____, 440 N.E.2d at 890.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id. See* Franciscon Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 448 N.E.2d 872 (1982) (discussing presumptions raised and burden of proof in attorney-draftsman beneficiary wills in Illinois). *See generally* Mortland, *Undue Influence and Confidential Relationships, Rebuttable Presumptions, Burdens of Evidence and Standards of Proof*, 10 EST. PLAN. 312 (1983).
41. 292 Or. 660, ____, 642 P.2d 660, 660 (1982).
42. *Id.*
43. *Id.*
44. *Id.*

tions to have no official status as grounds for disciplinary action.[45] The court stated that although advice to seek independent counsel would have been an "idle gesture" in this case, the advice should have been offered.[46]

A disciplinary proceeding from Wisconsin took a stricter view more in line with the new Model Rules of Professional Conduct.[47] In *State v. Collentine*,[48] an attorney-draftsman made himself sole residuary beneficiary of an estate.[49] At the time of execution, the attorney knew the estate was insolvent and he stood to receive nothing.[50] He also had advised the client to seek independent counsel.[51] The Supreme Court of Wisconsin held that a lawyer may be the drafter of a will in which he benefits only where he is the natural object of the testator's bounty and receives no more than he would had the testator died intestate.[52] Such instruments were invitations to possibly unnecessary will contests.[53]

The *Collentine* case followed an earlier disciplinary proceeding in which the court listed the dangers of such wills.[54] The court mentioned conflict of interests, incompetency of an attorney-draftsman to testify about transactions with the deceased, possible jeopardy of the entire will in a probate contest, harm to other beneficiaries, and the undermining of public trust in the integrity of the legal profession as possible harms resulting from drafting such wills.[55]

Conclusion

Wills drawn by an attorney which name him as a beneficiary place the lawyer in a precarious position. The new Model Rules of Professional Conduct totally ban such a disposition.[56] With the exception

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45. *Id.* at ____, 642 P.2d at 662.
46. *Id.* at ____, 642 P.2d at 663.
47. State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).
48. *Id.*
49. *Id.* at ____, 159 N.W.2d at 52.
50. *Id.*
51. *Id.*
52. *Id.* at ____, 159 N.W.2d at 53.
53. *Id.* at ____, 159 N.W.2d at 54.
54. State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963). *See* R. Wellman, C. Waggoner, O. Browder, Jr., PALMER'S TRUSTS AND SUCCESSION 190 (4th ed. 1982), for the difference between the two cases. *See also* Schwab, *The Lawyer as Beneficiary*, 45 Tex. B.J. 1422, 1424 (1982).
55. *Id.* at ____, 123 N.W.2d at 490.
56. MODEL RULES Rule 1.8(c) (1983).

of the case where the attorney receives no more under the will than had his client died intestate, for example, the family situation, such wills inevitably cause probate contests and raise the possibility of disciplinary proceedings. If a client insists on having such an instrument drawn, he should be sent to independent counsel.[57] If the lawyer loses the bequest because the client retained independent counsel, he probably was headed for trouble had he drawn the will himself.

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57. *See* Schwab, *The Lawyer as Beneficiary*, 45 Tex. B.J. 1422, 1423 (1982) (discussing the same warning along with factors considered in determining undue influence in testamentary gifts to attorneys and actions attorney-draftsman may take to avoid later difficulties if they draw such instruments).