

WHEN A BENEFICIARY ASKS YOU TO DRAFT A WILL

BY KENNETH L. JORGENSEN

Today's elderly population and its unprecedented wealth have heightened the need for lawyers to sharpen their focus on the legal ethics of estate planning and specifically on ethical issues linked to undue influence, which is often the source of will contests or other instrument challenges.

Much has been written about the legal ethics of drafting instruments naming the lawyer or a member of the lawyer's family as beneficiary. Minnesota courts have condemned this practice for almost a century.¹ Legal ethics prohibitions have existed for over 20 years and lawyers who run afoul of these provisions have been publicly disciplined.²

Far less has been mentioned about conflicts associated with drafting instruments at the request of an intended beneficiary.³ Last year the ABA Committee on Professional Ethics outlined the ethical concerns associated with a request by a client to draft a testamentary instrument which names the client as a beneficiary.⁴ The opinion concludes that it is ethically permissible to draft instruments on the request of a beneficiary who is also a client. Nonetheless, it cautions lawyers about conflicts between multiple clients (beneficiary and testator or donor and donee) and conflicts stemming from the client/beneficiary recommending the lawyer's services or paying the lawyer's fee.

CONFLICTS BETWEEN MULTIPLE CLIENTS

Where the beneficiary is already a client, Rule 1.7(b), Minnesota Rules of Professional Conduct (MRPC), prohibits representing the testator if the representation will be materially impaired by the lawyer's duties to the beneficiary as a client. Multiple client conflicts come about under two different scenarios: (1) the lawyer jointly represents the beneficiary and the testator in preparing the testator's estate plan; or (2) the lawyer already represents the beneficiary in another matter when he or she undertakes to represent the testator. In either situation, Rule 1.7(b) requires the lawyer to determine whether obligations owed to the beneficiary (e.g., confidentiality) will substantially interfere with the ability to competently advise the testator.

Although beneficiaries, especially children, often participate in the estate-planning process, lawyers less frequently undertake to jointly represent both the testator and the beneficiaries. In fact, joint representation of a beneficiary and the testator in drafting an estate plan is likely improvident unless the beneficiary will receive no more than he or she is entitled to under intestacy laws. Even then joint representation is sometimes ill-advised.

If Junior's lawyer jointly represents Junior and his mother in amending Mom's will, Mom's decision to change her will and leave Junior's sister's share to the church could be attacked due to Junior's participation. Likewise, joint representation of Junior and Mom in devising Mom's estate equally to Junior and his siblings may create a legal presumption of undue influence if Junior had been disinherited under his mother's prior wills.⁵

Ordinarily, a lawyer's concurrent representation of the testator in estate planning, and the beneficiary in an unrelated matter(s), will not materially impair the lawyer's estate planning advice. Yet under the right circumstances it can. Assume Junior brings Mom to his lawyer because he has convinced Mom to begin gifting her stock portfolio to Junior. Mom is inclined to make the gifts but tells the lawyer she is concerned about Junior's financial irresponsibility due to a failed real estate project several years ago. Unbeknownst to Mom, Junior's lawyer is currently representing him in another failing real estate development that Junior hopes to rescue with the stock gifts. Unless Junior consents to disclosure of the failing real estate project and his intended use of the stocks, the lawyer's confidentiality duty will materially impair her ability to competently advise Mom about the gifts. Conversely, if the lawyer and Junior have already discussed using Mom's stocks to salvage the project, any advice to Mom about restrictions on the stock transfers or placing them in trust will materially impede the lawyer's representation of Junior in the real estate matter.

PAYING THE LAWYER'S FEE

With client consent, persons other than a client can pay the lawyer's fee pro-

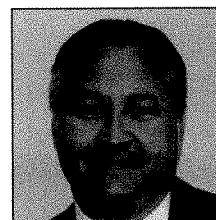
vided they do not interfere with the lawyer's professional judgment and client confidentiality is maintained.⁶ Similar conditions are attached to employment that results when a client/beneficiary recommends the lawyer's services. The ethics rules permit the lawyer to assist the testator with his or her estate as long as the client/beneficiary referral does not interfere with the exercise of the lawyer's professional judgment.⁷

As the ABA opinion indicates, none of these obstacles are insurmountable, nor do they stand for the proposition that a lawyer can never draft a will for a beneficiary who is a current client, recommended the lawyer, or paid the lawyer's fee. The caveats within the ethics rules to ignore the desires of persons other than the client appear simple enough. At the same time, thwarting the intermeddling attempts of a son or daughter who tries to direct, control, influence, or manipulate a parent's estate plan is, at a minimum, an uncomfortable task when the son or daughter has generated the legal business. This delicate situation becomes even less palatable if he or she is paying the lawyer's fee. These situations are fruitful grounds for undue influence claims if they are not adequately addressed.

CONFLICTS AND UNDUE INFLUENCE

Compliance with professional ethics rules is an obvious starting point since a lawyer's unprofessional conduct by itself can create a presumption of undue influence.⁸ If the beneficiary will pay the lawyer's fee, consent must be obtained from the testator and the lawyer should advise the beneficiary that fee payment does not confer client status to the benefi-

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PROFESSIONAL RESPONSIBILITY

ciary. Similar disclosures are appropriate for beneficiaries who recommend the lawyer's services or otherwise are responsible for the retention of the lawyer.

Where the beneficiary is a client, the lawyer must analyze the potential for conflict of interest and determine if the representation is in the testator's best interests. Waivers of confidentiality should be obtained where it is likely information will need to be shared between the representations to avoid conflicts.

Competent estate planning representation necessitates limiting the opportunity for successful undue influence claims. Factors which contribute to judicial inference of undue influence include: (1) the existence of a confidential relationship between the testator and a beneficiary who receives a disproportionate benefit under the will; (2) whether the testator was dependent upon this beneficiary; and (3) whether the will was prepared and executed under circumstances in which the beneficiary was instrumental or had substantial participation.⁹

Lawyers can control neither of the first two factors. The existence of a confidential relationship and a disproportionate benefit are simply facts of the representation that must be considered in anticipating undue influence claims. Lawyers can, however, dictate the degree to which beneficiaries take part in the preparation and execution of estate planning instruments, and thereby reduce the client's exposure to undue influence attacks.

Many of these ethical quandaries evolve from failure to establish or clarify the client's identity at the outset of the relationship. More importantly, many are likely avoidable if the client's identity is clarified and conveyed to those involved in the representation.

Where a beneficiary is an existing client, it is vital that the testator be regarded or identified as the client, and that the lawyer maintain as normal an attorney-client relationship with the testator as is possible. Before executing any instruments, the lawyer should meet individually with the testator to confirm testamentary intent. When deciding undue influence claims, courts often look at the degree to which a beneficiary participates in the estate planning process,¹⁰ especially if there is a preexisting attorney-client relationship with the scrivener and the beneficiary stands to increase his or her share under the new or amended instrument.¹¹ A lawyer's disproportionate reliance upon a beneficiary for testamentary instructions begs conflict of interest

claims and expands the opportunity for undue influence challenges.¹²

Lawyers dealing with worrisome beneficiaries who persist in being involved in preparation and execution of testamentary instruments should educate them about the consequences of their involvement. Those who mistakenly believe the lawyer is protecting or safeguarding their interests in the estate plan should be promptly disabused of the notion. Rule 4.3, MRPC, entitled "Dealing with Unrepresented Person," requires lawyers to make reasonable efforts to correct such misunderstandings.

A necessary component of estate planning is forecasting perils and advising clients how to avoid these disasters. While not every undue influence claim can be predicted, many are clearly foreseeable. Where they are, lawyers must closely scrutinize their own involvement, as well as that of others, to limit the opportunity for successful undue influence challenges. □

NOTES

1. *In re Estate of Keeley*, 167 Minn. 120, 208 N.W. 537 (1926).
2. See e.g., *In re Smith*, 654 N.W.2d 659 (Minn. 2002); *In re Astleford*, 404 N.W.2d 798 (Minn. 1987); *In re Pruetter*, 359 N.W.2d 613 (Minn. 1984).
3. The term "beneficiary" is used in this article to denote a potential or intended beneficiary, since until a will or other instrument is drafted, there technically is no beneficiary. The most common example is a son or daughter who refers or brings a parent to his or her lawyer for estate planning representation. Much of the analysis herein is equally applicable to inter vivos gifts between donor and donee.
4. See Formal Opinion 02-428 (August 9, 2002) entitled "Drafting Will on Recommendation of Potential Beneficiary Who Also is Client."
5. *In re Olson's Estate*, 227 Minn. 289, 35 N.W.2d 439 (1948).
6. See Rule 1.8(f), MRPC.
7. See Rule 5.4(c), MRPC.
8. See e.g. *In re Estate of Reiland*, 292 Minn. 460, 462, 194 N.W.2d 289, 290 (1972).
9. See *In re Olson's Estate*, *supra* n. 4, 35 N.W.2d at 445.
10. *In re Estate of Holden*, 261 Minn. 527, 113 N.W.2d 87 (1962).
11. See e.g. *In re Estate of Koch*, 849 P.2d 977 (Kan. Ct. App. 1993).
12. See e.g. *Haynes v. First National State Bank*, 432 A.2d 890 (N.J. 1981). See also *In re Estate of Jessman*, 197 Ill. App.3d 414, 554 N.E.2d 718 (1990).