NEW YORK STATE BAR ASSOCIATION
Committee on Professional Ethics

Opinion #610- 6/20/90 (2-90)

Topic: Attorney and client; conflicts of interest; wills; executors; beneficiaries

Digest: Only in limited circumstances may an attorney-draftsman prepare a will in which the attorney-draftsman is named both as executor and as a beneficiary

Code: DR 5-101(A); EC 5-5, 5-6

QUESTION

May an attorney draft a client's will naming the attorney as co-executor and also as one of four residuary beneficiaries?

OPINION

The inquiring lawyer wishes to draft a will for an elderly client who was referred to the attorney by another attorney three years ago to provide legal and financial advice for the client's closely held corporation. The inquirer advises that, during the past three years, the client has remained such and has also become a close friend of the inquiring attorney's family. The client's only living relatives are a niece and a nephew with whom the inquirer states the client has very little contact.

The client has requested the inquirer to prepare a will under which the assets of the client's estate will be distributed to her niece, her nephew, her former bookkeeper and various other persons. In addition, the client wishes to appoint her former bookkeeper and the inquiring attorney as co-executors and she wishes the inquirer to be named as one of four residuary beneficiaries. (The residuary estate would consist primarily but not necessarily exclusively of lapsed legacies.) The lawyer inquires whether it is ethically permissible to prepare a will under which the lawyer will receive a bequest and also be named as co-executor.

Lawyer-Draftsman as Beneficiary

Although this Committee has not previously addressed the issue, courts and legislators disfavor bequests to attorney-draftsmen except under extraordinary circumstances. In New York, upon probate, surrogates must investigate any bequest to the attorney who drafted the will. The attorney must submit an affidavit explaining the facts and circumstances of the gift. If the surrogate is not satisfied with the explanation, a hearing is held to determine whether the attorney's bequest was the result of undue influence. See NY. SCPA § 1408(1) (McKinney 1967). See generally Groppe, The "New" Putnam Rule: Problems Facing the Attorney/ Legatee/Fiduciarv, 61 N.YS.B.J. 18 (Jan. 1989); Pace, Problem Areas in Will Drafting Under New York Law, 56 St John's L. Rev. 459,473-79 (1982).

This hearing is often referred to as a "Putnam" hearing, so named because of the leading case of In re Will of Putnam, 257 NY. 140 (1931), in which the New York Court of Appeals suggested that bequests to attorney-draftsmen should be avoided. The Putnam court stated that when an attorney-draftsman of a will is a legatee, an inference arises that the attorney used undue influence to secure the bequest. Id. at 143. The Putnam court therefore advised attorneys to have the will drawn by another attorney if the client intends to leave such a bequest. Id.

EC 5-5 of the Code of Professional Responsibility memorializes the Putnam rule:

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 overreached the client If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, 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. (*1)

We believe that the "exceptional circumstances" referred to in EC 5-5 include situations where there is a close familial relationship between the testator and the attorney-draftsman, or where the gift is relatively small in relation to the size of the estate and the professional relationship between the decedent and the attorney-draftsman is longstanding. Although the determination is fact intensive, the Committee does not believe that the situation posed by the inquirer presents the sort of "exceptional circumstances" contemplated by the Code.

This issue has been the subject of several recent New York cases that follow the Putnam rule and the Code. See, e g, In re Delorey, 141 AD. 2d 540, 529 NYS 2d 153 (2d Dep't 1988) (court denied probate of a will which named attorney-draftsman as sole legatee); In re Tank, 132 Misc. 2d 146, 503 N.Y.S. 2d 495 (Sup. Ct 1986) (court held that attorney-draftsman's acceptance of a $5,000 bequest involved overreaching and a breach of professional responsibility to the testatrix); In re Estate of Cromwell, No. 2241-P-1986 (Sur. Ct Suffolk County, Jan. 27, 1989) (LEXIS, States library, NY File) ($500,000 legacy to attorneydraftsman and appointment of attorney-draftsman's partner as co-executor upheld where record established a "longstanding professional relationship" as well as close personal family ties, but court ordered law firm to pay costs of hearing); Estate of Arnold, 125 Misc. 2d 265, 479 NY.S. 2d 924 (Sur. Ct 1983) ($2,000 bequest to wife of attorney-draftsman upheld as product of friendly social relationship which had endured for several years); In re Annesley, 97 Misc. 2d 1047, 412 NYS. 2d 959 (Sur. Ct 1979) (bequest of small fraction of estate to attorney-draftsman nephew who maintained very close relationship with aunt upheld).

These cases indicate that even though a bequest to an attorney-draftsman may ultimately be upheld upon a strong evidentiary showing, the so-called Putnam hearing can delay and increase the expense of probate to the prejudice of other parties to the will. The attorney-draftsman has an obligation to advise the client of this fact and of all other relevant considerations. If, after being fully informed of these matters, the client nevertheless insists that the lawyer draft the instrument naming the lawyer beneficially, and if the "exceptional circumstances" referred to in EC 5-5 are present, it would not be unethical for the lawyer to draft the will In that situation, the client's wishes and the fact that the client has been advised of the relevant considerations should be documented.

Lawyer-Draftsman as Co-Executor

In the question presented, the lawyer-draftsman who will receive the bequest under the will also proposes to serve as co-executor of the estate. This issue is specifically addressed by EC 5-6 of the Code of Professional Responsibility:

A lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety. (*2)

Thus, it is not improper under the Code for a lawyer-draftsman to serve as executor of a will so long as the decision to nominate the attorney is the product of the client's own free will. The Code provision is primarily concerned with the foisting of unsolicited services by the lawyer-draftsman, who is uniquely situated to secure additional employment Accord, In re Weinstock, 40 NY. 2d 1

(1976). As stated by this Committee in NY. State 481 (1978):

In effect, the lawyer is enjoined to refrain from making a calculated effort to cause his designation as executor and to avoid conduct which is suggestive of that design. The term "consciously influence" [in EC 5-6], which contemplates substantially less psychological pressure than "undue influence," is meant to describe the act of overreaching for employment of a kind for which the lawyer has not been retained and could not otherwise reasonably expect to obtain.

It is not improper for a lawyer-draftsman to offer his services as executor in certain limited circumstances, such as where the lawyer is convinced that the client would request the lawyer to serve in that capacity if the client was aware of the lawyer's willingness to accept the designation. "Not only should the lawyer have enjoyed a long-standing relationship with the client, but it must also appear that the client is experiencing difficulty in selecting other persons qualified and competent to serve as executor. " ld.

In the instant inquiry, it appears that the client herself initiated the lawyer's designation as executor. So long as the inquirer did not consciously influence his designation as executor-- such as by suggesting his suitability to perform the office -- there is nothing ethically improper about accepting the appointment as executor.

Lawyer-Draftsman as Beneficiary and Executor

Although no per se rule prohibits an attorney from either receiving a gift or serving as executor under a will the lawyer has drafted, only very unusual circumstances could justify an attorney preparing a will naming the lawyer as both executor and as a residuary beneficiary. Where the lawyer serves as draftsman, executor and beneficiary, the potential conflicts of interest are heightened, as is the possible appearance of impropriety. The personal interests of a lawyer-draftsman who will receive a gift and serve as executor reasonably may affect the exercise of the lawyer's independent professional judgment on behalf of the client within the meaning of DR 5-101(A) both in the drafting of the will and in the administration of the estate.

DR 5-101(A) permits employment even where the personal or financial interests of the lawyer may impair his independent professional judgment, however, provided that the client consents after full disclosure. In order for client consent to be effective under DR 5-101(A), it must be obvious that, despite the conflict, the lawyer can adequately represent the interests of the client in the situation. See N.Y. State 595 (1988); N.Y. State 516 (1980). Where a lawyer proposes to serve the multiple roles of draftsman, executor and beneficiary, the "obviousness" test can be met only in limited circumstances. Such circumstances might exist, for example, where there is a close familial relationship between lawyer and testator, or where the bequest is small or in lieu of legal fees and fiduciary commissions. Because none of these unique circumstances appears to be present in the inquiry presented, it would be improper for the attorney to prepare the client's will giving the lawyer a substantial residuary interest and naming the inquirer as a co-executor.

CONCLUSION

For the reasons stated, except in limited and extraordinary circumstances, an attorney should not serve as draftsman of a will that names the lawyer as an executor and as a legatee.

NOTES

(*1) Although the American Bar Association’s Model Rules of Professional Conduct have not been adopted in New York, it is worth noting that Model Rule 1 8 (c) is stricter than EC 5-5. Unlike EC 5-5, which is merely precatory, Rule 1.8 (c) states that:

A lawyer <u>shall not</u> 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 where the client is related to that donee (Emphasis added)

(*2) The Surrogate's Court in Suffolk County, for example, has enacted a local rule relating to an attorney as a fiduciary applicable to wills executed after September 1, 1988:

In all probate proceedings, where the purported will and/or codicil of the deceased nominates an attorney as a fiduciary, or co-fiduciary, there shall be annexed to the probate petition an affidavit of the testator setting forth the following:

(1) that the testator was advised that the nominated attorney may be entitled to a legal fee, as well as to the fiduciary commissions authorized by statute;

(2) where the attorney is nominated to serve as a co-fiduciary, that the testator was apprised of the fact that multiple commissions may be due and payable out of the funds of the estate; and

(3) the testator's reason for nominating the attorney to serve as fiduciary

Failure to submit an affidavit of this nature may warrant the scheduling of a hearing in order to determine whether the appointment of the attorney as fiduciary was procured by the exercise of fraud and/or undue influence upon the decedent

See generally, In re Estate of Cromwell, No. 2241-P-1986 (Sur. Ct Suffolk County, Jan. 27, 1989) (LEXIS, States library, NY File).