



Committee on Professional Ethics

Opinion #481 - 3/28/78 (139-77) Topic: Wills; draftsman as executor for estate.

Digest: Under certain circumstances lawyer may offer his services as executor in the course of drafting will.

Code: EC 5-6

QUESTION

May a lawyer, in the course of drafting his client's will, offer to serve as executor?

OPINION

The provisions of the Code of Professional Responsibility most relevant to the present inquiry are set forth in EC 5-6, which states:

"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."

Recognizing that the draftsman of a will is uniquely situated to secure additional employment for himself, the Code thus seeks to prevent both the foisting of unsolicited services as well as the appearance of such conduct. 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", 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.

Whether a lawyer may offer his services as executor is an issue which has been somewhat confused in the past by authorities that have primarily addressed the "customary and regular" inclusion of various will provisions favoring lawyer draftsmen. See, e.g., N.Y. State 140 (1970), ABA Inf. 602 (1963); Cf., Drinker, Legal Ethics 94 (1953). Herein we note that these authorities have uniformly condemned the routine insertion of

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provisions appointing lawyer draftsmen as executors. See, 57 ALR 3d 703 (Annotation, "Attorneys at Law: Disciplinary Proceeding Based upon Attorney's Naming of Himself or Associate as Executor or Attorney for Executor in Will Drafted by Him"). By distinguishing this species of misconduct from situations where the client has himself initiated the lawyer's designation as executor, however, the authorities should not be understood to require that the suggestion for the lawyer to serve as executor originate with the client in all instances.

The identity of the person who first advances the suggestion is not the gravamen of ethical propriety. While it is unquestionably more appropriate for the suggestion to originate with the client, the fact that it is the client who speaks first will not, in all instances, relieve the lawyer from claims of consciously influencing his designation or the appearance of impropriety in causing the client to make the request. And, similarly, the fact that the lawyer may be moved to speak first does not, ipso facto, render the suggestion improper.

There may be circumstances which can justify a lawyer's conduct in offering his services as executor. Principally, those circumstances must be such as support a firm conviction that the client would request his lawyer to serve in that capacity if he were aware of the lawyer's willingness to accept the responsibility. 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.

Where the client's disposition is uncertain or he indicates even the slightest hesitancy to designate the lawyer as executor, the lawyer should immediately desist and expressly withdraw his suggestion. Under no circumstances, should the lawyer attempt to convince his client that he is well suited to perform the office of executor.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.
