LEGAL ETHICS OPINION 1515

ATTORNEY DRAFTING INSTRUMENT WHICH NAMES SELF EITHER AS PERSONAL REPRESENTATIVE OR TRUSTEE OR WHICH DIRECTS SUCH OTHER DESIGNEE TO EMPLOY ATTORNEY AS FIDUCIARY ADMINISTRATOR.

Inquiry: An attorney requests the Committee to opine as to the circumstances under which an attorney may draft an instrument in which the client names the attorney either as executor or trustee or which specifically directs that other persons whom the testator/grantor/client designates as executor or trustee consult the attorney/draftsman for legal services. Specifically, the attorney inquires:

(1) whether there must be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to provide legal services;

(2) what disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and if disclosure is required, when must the disclosure be made;

(3) (a) whether an attorney/executor or trustee may retain his law firm as attorney for a trust or estate for which he is serving as fiduciary;

(b) if it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each;

(c) whether the matter must be disclosed to the testator/grantor/client in the course of the preparation of the instrument;

(4) whether the Code of Professional Responsibility imposes a minimum standard of competence upon attorneys serving as fiduciaries; and

(5) whether Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and whether the attorney may suggest his willingness to serve as such.

Opinion: 1. Draftsman as Fiduciary. Must there be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to provide legal services and, if so, what must be the nature and quality of that attorney/client relationship?

Although the committee is of the opinion that a pre-existing attorney/client relationship is not required, it believes that a significant factor concerning the appropriateness of an attorney being named as executor or trustee in a document drafted by the attorney is whether the attorney draftsman took advantage of his role as draftsman to secure such a nomination for the attorney or another member of the attorney's firm. The naming of the executor or trustee must be an informed and fully volitional act of the client.

Although the issue of whether or not undue influence was exerted upon the testator/grantor by the attorney requires a factual determination, on a case-by-case basis, which is beyond the purview of the committee, the committee is of the opinion that the total lack of any pre-existing attorney/client relationship greatly enhances the potential for a finding of undue influence. The existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs. See DR:5-101(A); H. Drinker, Legal Ethics 94 (1979) (cited in ABA Comm. on Ethics and Professional Responsibility, Informal Dec. 602 (1963). See also Estate of Weinstock, 386 N.Y.S.2d 1 (1976) (when evidence also indicates overreaching, attorneys who named themselves as executors and who also were strangers to testator were removed as executors); Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890 (N.J. 1981); Disciplinary Board v. Amundson, 297 N.W.2d 433 (N.D. 1980); and Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981).

Furthermore, while the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) prohibits it under certain circumstances and requires that the attorney take into consideration the "physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, whether or not a pre-existing attorney/client relationship is involved, in order to minimize the appearance of undue influence, the attorney must consider carefully the testator's/grantor's state of mind and health before recommending himself or a member of his firm, for future employment as executor or trustee.

2. Disclosure of Fees. What disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and, if disclosure is required, when must the disclosure be made?

The committee believes that the disciplinary rules applicable to your second question are DR:2-105(A), requiring, in pertinent part, that the attorney's fees be adequately explained to the client; DR:5-101(A) requiring a client's consent, after full and adequate disclosure, to the attorney's financial interest when that interest may affect the exercise of the attorney's professional judgment on behalf of his client; and DR:6-101(C) which requires an attorney to keep a client reasonably informed about matters in which that attorney's services are being rendered.

It is the committee's opinion that full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client, as required by each of the pertinent disciplinary rules, prior to the execution of the instrument. See Estate of Weinstock, 386 N.Y.S.2d 1. The committee believes that the guidance articulated in EC:2-21 is particularly pertinent in these circumstances:

> As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made .... It is usually beneficial to reduce to writing the understanding of the parties regarding the fee ....

The committee is of the further opinion that it is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document.

Furthermore, when the attorney/draftsman or a member of his firm is being named executor or trustee, the committee also believes that the attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. Finally, the committee is of the opinion that an attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

3. Attorney/Fiduciary Retaining Own Law Firm as Attorney For Trust/Estate. May an attorney/executor or trustee retain his law firm as attorney for a trust or estate for which he is serving as fiduciary? If it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each? Should this matter be disclosed to the testator/grantor/client in the course of the preparation of the instrument?

The committee is of the opinion that the attorney named as executor or trustee must disclose and obtain the consent of the testator/grantor prior to the execution of the trust/will when the attorney intends to or is considering retaining his law firm as attorney for the trust or estate. The committee is of the further opinion that the disclosure must include the general compensation to be paid to the law firm. The role of the attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict as described by DR:5-101(A). In such a situation, the attorney's own financial, business, or personal interest may potentially affect the exercise of his professional judgment on behalf of the trust or estate.

The committee has earlier opined that it is not per se improper for an executor or trustee to engage his own law firm to provide representation in legal matters relating to estate administration. LE Op. 1387.

The committee believes that LE Op. 1353 is also relevant to the question you raise.

That opinion found that it would not be improper for a lawyer who is employed both as Assistant General Counsel to a corporation and as "of counsel" to a law firm to retain the outside law firm to provide legal services to the same corporate client. The committee did opine, however, that full disclosure of the conflict must be made, consent from the corporate client must be received, the lawyer must not provide direct representation to the corporate client through the law firm, the lawyer must not share in any of the fees received by the firm from the corporate client, and communication between the outside law firm and the corporation must be maintained with other directors or employees of the corporation.

LE Op. 1353 dealt with a situation where the consent of the client could be readily obtained. Clearly, if at the time of the preparation of the document, the attorney/draftsman/executor/trustee makes a full and adequate disclosure of the possibility that the trustee/executor may retain his firm as legal counsel and of the general compensation that would be paid, and the testator/grantor/client consents, then the personal conflict is cured. However, if the trustee/executor did not obtain the consent of the now deceased testator/grantor/client, either because it was not disclosed at the time the document was drafted, or because the executor/trustee did not draft the document, then the committee is of the opinion that, after full and adequate disclosure, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all of the income beneficiaries and vested remainder beneficiaries of the trust.

4. Fiduciary Competence. As a matter of ethical consideration, does the Code of Professional Responsibility impose a minimum standard of competence upon attorneys serving as fiduciaries?

Although the committee believes that standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law and thus present a legal question beyond the purview of the committee, the committee does direct your attention to LE Op. 1325 which adopted the conclusions reached in ABA Formal Opinion 336 and found that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the [Virginia] Code of Professional Responsibility.

Further, the committee directs your attention to DR:6-101(A) which in pertinent part mandates that a lawyer should undertake representation only in matters in which the lawyer can act with competence an demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters.

Finally, the committee cautions that DR:6-102(A) precludes a lawyer from limiting his liability to his client for his personal malpractice. See also LE Op. 1452 (an attorney/client relationship arises between the attorney and the personal representative of an estate, albeit for the ultimate benefit of the estate).

5. Suggestions for Fiduciaries. May Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and, further, may the attorney suggest his willingness to serve as such? Are there limitations on an attorney's ability to solicit his designation as a fiduciary or future legal counsel to the estate?

The committee is of the belief that DR:2-103(A), regarding a lawyer's solicitation of professional employment, is applicable to the question you raise. In addition, Ethical Consideration 5-6 [EC:5-6] provides further guidance in that it instructs that

> [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.

The committee is of the opinion that, although conversation with the testator/grantor as to the suitability of specific persons or entities to serve as fiduciaries or legal counsel to the estate, and recommendations that a. professional fiduciary (e.g., a bank, attorney, or accountant) would be preferable to or in addition to a lay person in certain instances, is clearly in the nature of appropriate legal advice to a client, the attorney's suggestion of his own willingness to serve in those capacities would constitute solicitation for future employment. Although the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) does, however, prohibit it if the communication has a substantial potential for or involves the use of overpersuasion or overreaching and requires that the attorney take into consideration the "sophistication regarding legal matters, [and] the physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, the attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate, in order to minimize the appearance of undue influence.

The committee is of the view that the same considerations apply whether the document names the attorney as executor or trustee, on the one hand, or directs that the

executor/trustee whom the client has designated engage the services of the attorney. In addition, the same considerations would also apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee. Advice about the suitability of specific persons or entities to serve as fiduciary should cover, in addition to competence and personal service, matters of financial stability both for the attorney and any agents with whom the attorney is expected to deal.

In addition, it is especially important to review with the client who wishes to avoid probate the availability of alternate fiduciary review procedures. Whether or not the client elects to remain within the probate system, the attorney in all cases should carefully review with the client the potential consequences of an elective waiver of security on the bond of the fiduciary.

Summary: No previous attorney/client relationship is required before an attorney may be named as executor or trustee in an instrument drafted by the attorney or for the instrument to designate that the executor or trustee consult the attorney/draftsman or his firm to provide legal services in the administration of the estate. However, the total lack of a pre-existing attorney/client relationship may enhance the possibility of a finding of undue influence. The attorney/draftsman must consider the testator's/grantor's mental and physical health before soliciting or accepting future employment as executor or trustee.

Full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client prior to the execution of the instrument. It is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document. The attorney/draftsman has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. An attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

An attorney/fiduciary executor or trustee may retain his own law firm as attorney for the trust or estate; however, such employment creates a personal conflict under DR:5-101(A) which may be cured by the client's consent after full disclosure. If consent was not received at the time the document was drafted, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all the income beneficiaries and vested remainder beneficiaries of the trust.

In the event that there are co-fiduciaries, consent must be obtained from all such co-fiduciaries prior to the firm's taking on representation of the estate.

Standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law. However, when an attorney acts as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be disciplined under the Code of Professional Responsibility. LE Op. 1325. A lawyer should undertake representation only in matters in which the lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters. DR:6-101(A). A lawyer may not limit his liability to his client for his personal malpractice. DR:6-102(A).

An attorney's suggestion to a testator/grantor of the attorney's willingness to serve as fiduciary or legal counsel to the estate constitutes solicitation for future employment. The

attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate.

The same considerations apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee.

Advice as to the suitability of specific persons or entities to serve as fiduciary should cover competence, personal service, and matters of financial stability. The attorney should also review probate and the availability of alternate fiduciary review procedures, and the potential consequences of an elective waiver of security on the bond of the fiduciary.

Approved by Supreme Court
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