Committee Opinion
October 1, 1990

LEGAL ETHICS OPINION 1358

ESTATE ADMINISTRATION – CONFLICT OF INTEREST – FIDUCIARY RELATIONSHIPS – SOLICITATION OF EMPLOYMENT: ATTORNEY DRAFTING AN INSTRUMENT WHICH NAMES HIMSELF EITHER AS PERSONAL REPRESENTATIVE OR TRUSTEE OR WHICH DIRECTS SUCH OTHER DESIGNEE TO EMPLOY ATTORNEY.

You have requested the Committee to opine generally as to the circumstances under which an attorney may draft an instrument which names him either as personal representative or trustee, or which specifically directs that other persons whom the testator/grantor/client designates as personal representative or trustee consult the attorney/scrivener for legal services. The five specific questions you have presented, directly relevant to your general inquiry, will be restated and answered in the order in which you presented them.

1. *Pre-Existing Lawyer/Client Relationship*

Must there be a pre-existing lawyer-client relationship in addition to the relationship arising out of the preparation of the instrument for the attorney to be named (as personal representative or trustee) and, if so, what must be the nature and quality of that relationship?

The Committee believes that a significant concern precluding the attorney's being named as executor, personal representative or trustee in a document drafted by the attorney involves the avoidance of any potential allegation that the attorney exercised undue influence over the testator/grantor to secure such a nomination. Although the issue of whether or not undue influence was exerted upon the testator by the lawyer 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 lawyer/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 since, clearly, a lawyer with knowledge of the testator's affairs, values, and estate would be in a position to best serve the client's needs. See 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 selves 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) does, however, prohibit it under certain

circumstances, and requires that the lawyer 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 lawyer/client relationship is involved, the lawyer must consider carefully the testator's state of mind and body before accepting future employment as personal representative, trustee, or executor, in order to avoid any allegations of undue influence.

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

It is the Committee's opinion that full disclosure of potential fees 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) Furthermore, when the attorney/draftsman is being named executor or trustee, the Committee believes that the lawyer has a duty to provide information to the testator as to potential fees of alternative persons or entities who might otherwise be named executor or trustee. However, the Committee is of the view that, in all cases, the drafting attorney is required to provide only general information about potential compensation methods or commissions rather than specific dollar or percentage figures.

3. *Attorney/Fiduciary Retaining Own Law Firm as Attorney For Trust/Estate*

May an attorney/fiduciary (personal representative 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 fiduciary'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 role of an 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. Clearly, in order to obviate the conflict, full and adequate

disclosure must be made to the testator/grantor/client in the course of the preparation of the instrument and the client must consent in order for the attorney to proceed.

The Committee believes that LE Op. 1353 is dispositive of 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.

4. *Fiduciary Competence*

Do minimum standards of competence apply to Virginia attorneys serving as fiduciaries?

Although the Committee believes that standards for competence of Virginia attorneys serving as fiduciaries are governed by provisions in the Code of Virginia 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 No. 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.

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 estate or trust and, further, may the attorney suggest his/her willingness to serve as such? Are there limitations on an attorney's ability to solicit his/her designation as a fiduciary?

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 is clearly in the nature of appropriate legal advice to a client, the attorney's suggestion of his own

willingness to serve in that capacity may 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 lawyer 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 lawyer must consider carefully the testator's state of mind and body before soliciting future employment as personal representative, trustee, or executor, in order to avoid any improper conduct.