THANKS, BUT NO THANKS: THE ETHICS OF CLIENT GIFTS

By

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Thanks, But No Thanks!: The Ethics of Client Gifts

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I. Introduction

You have spent your entire career striving to make the "right" choices and decisions--doing your best to practice with professionalism and integrity. You know better than to prepare a will for a client making a gift to you or your family. However, in this instance, with this particular client, you think, "what's the harm?"

You are now faced with a real mess. Your integrity is being questioned. The other beneficiaries under the will are claiming that you procured the gift through undue influence or by breaching your fiduciary duties. Your ticket to practice law is on the line, and all you have left is a litany of excuses.

"She insisted! I knew her for over 30 years! She had no children of her own. Her spouse passed away almost 20 years ago. She was like family! She spent holidays at my home. She loved my wife and kids! It's just a small gift really--- a token in such a large estate! I told her to get separate counsel to prepare the document; but she wouldn't listen!"

You disclaim the gift thinking that will stop the undeserved attacks on your character. Unfortunately, the family still questions the validity of the document you prepared and your motives. You are defending a bar grievance. Your thoughts of ***"what's the harm?"*** seem like a distant memory. Your mind is now filled with ***"what did I get myself into? It wasn't worth it! I should have just said no. If only I had thought about the consequences!"***

The reality is that once you prepare a testamentary instrument for a client making a gift to you, it may be impossible to pretend like it never happened. Like Pandora's Box or the Trojan Horse, it may impossible to keep the potential trouble lurking inside from wreaking havoc.

I am certain that most of you would never solicit a substantial gift from an unrelated client or consider preparing an instrument making a substantial gift to the lawyer or the lawyer's family because of the obvious ethical implications. However, over the past two years, I have had the pleasure of serving as Chair of the Ad Hoc Estate Planning Conflicts Committee for the Real Property Probate and Trust Law Section of the Florida. During this time, our committee met with counsel for The Florida Bar to discuss the issue of lawyers receiving gifts under documents

which they prepare. We were surprised to learn that this is indeed a problem and that lawyers every year are subject to disciplinary proceedings for violating the ethical rules relating to gifts to lawyers**.**

In most instances, the lawyers feel like they have done nothing wrong. They raise the defenses and excuses alluded to above. In many instances, the gift to the lawyer is not unnatural given the length and depth of the relationship between the attorney and the client. The key problem for the lawyer is that the transaction is potentially tainted by a conflict of interest.

II. Gifts to Drafting Lawyers

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. As explained by Honorable Judge Lauren C. Laughlin in the Estate of Virginia Murphy, Case 06-6744ES-4 (Fla. Cir. Ct. August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law. Murphy, at 7 (*citing* Dig. 48.15 supplement to the *lex cornelia* ordered in edict by Emperor Claudius).

In Florida, the Rules Regulating the Florida Bar have followed this historic proscription:

> **A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to client.**

Rule 4-1.8(c) of the Rules Regulating the Florida Bar.

On its face, Rule 4-1.8 prohibits a lawyer from preparing a will, trust, or other written instrument making a substantial testamentary or inter vivos gift to the lawyer or the lawyer's family except in the limited circumstance when the recipient of the gift is related to the client.[1] Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument making the gift.[2]

The violation of this Rule, however, does not render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule and, under certain circumstances, still be entitled to retain the gift or bequest from his or her client even though the lawyer is subject to discipline. Courts in Florida have refused to declare a gift in violation of the ethical rule void as a matter of law. In Agee v. Brown, 73 So. 3d 882 (Fla. 4th DCA 2011), the 4th DCA reversed the trial court which had found that a gift to a drafting lawyer under a will was

[1] Rule 4-1.8 does not attempt to define related other than to say the lawyer and client must be related "by blood or marriage". See R. Regulating Fla. Bar 4.1-8(c), comment "Gifts to Lawyers".

[2] There have been a number of reported decisions wherein lawyers have been sanctioned for violating this Rule. *See, e.g.*, The Florida Bar v. Poe, 786 So. 2d 1164 (Fla. 2001)(wherein a lawyer was disbarred for preparing a will that included a $15,000 bequest to the lawyer and named the lawyer as personal representative of the estate); The Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994)(wherein an attorney with a perfect disciplinary record received a 91 day suspension for drafting numerous wills for the same client over a period of years which contained bequests for the attorney or his wife).

void as a matter of law because it violated Rule 4-1.8 and public policy. The Agee court held that the trial court had improperly "incorporated Rule 4–1.8(c) of the Rules Regulating The Florida Bar into the statutory framework of the probate code." Id. at 886. The court found that this interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature." Id. The court noted that the "best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature." Id. at 887.[3]

The end result is that the allure of a potential gift for a client places the lawyer in an ethical dilemma. A dilemma that one court has referred to as the South Indian Monkey Trap. Murphy, at 22. As explained in Murphy:

> The "South Indian Monkey Trap" was developed by villagers to catch the ever-present and numerous small monkeys in that part of the world. It involves a hollowed-out coconut chained to a stake. The coconut has some rice inside which can be seen through the small hole. The hole is just big enough so that the monkey can put his hand in, but too small for his fist to come out after he has grabbed the rice. Tempted by the rice, the monkey reached in and is suddenly trapped. He is not able to see that it his own fist that traps him, his own desire for the rice. He rigidly holds on to the rice, because he values it."

Murphy, at 22, fn 2 (citing Robert M. Pirsig, ZEN AND THE ART OF MOTORCYCLE MAINTENANCE: AN INQUIRY INTO VALUES Ch. 26 (William Morrow & Co., ed. 1974).

Tempted by the value of the bequest, the lawyer is placed in the position of potentially violating the ethical rule or ultimately letting go of the bequest. *See* Murphy at 22. The lawyer's dilemma is further complicated by the fact that Rule 4-1.8 only prohibits the lawyer from preparing a document which makes a "substantial" gift. Does "substantial" depend on the net worth of the individual making the gift, the size of the gift to the lawyer in relation to other gifts in the plan, whether it is substantial to the lawyer, or some other standard? Is a $100,000 gift in the context of a $10,000,000 estate substantial? How about a $10,000 gift? By its language, the Florida Bar Rule allows lawyers to prepare documents making themselves gifts in certain instances. The comments to the Rule do not provide meaningful guidance on what is substantial beyond providing that "simple gifts" given at holidays or as tokens of appreciation are not prohibited.[4] The ambiguity in the word "substantial" can potentially create defenses in instances where attorneys have arguably engaged in overreaching. More importantly, it can

[3] The Agee decision is particularly interesting because the lawyer in that case was the one contesting the last will of the decedent in the hopes of reinstating a bequest to the lawyer and his wife under a prior will of his former client (and friend). Id. at 884. The beneficiaries successfully convinced the trial court to dismiss the will contest on the basis that the lawyer lacked standing to contest the validity of the last will because the gift to the lawyer and his wife violated the ethical rule. Id. at 885. The 4th DCA reversed. Id. at 887. On remand, the personal representative and beneficiaries will be forced to defend the validity of the decedent's last will against a challenge *by the lawyer*. Id.

[4] The comment to Rule 4-1.8(c) provides that "a simple gift such as a present given at a holiday or as token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence." R. Regulating Fla. Bar 4-1.8, comment "Gifts to Lawyers".

entice a lawyer into thinking that perhaps, for this client, in this instance, there is nothing wrong, without fully considering all of the consequences.

In most situations, it is the beneficiaries who are left to challenge the gift to the lawyer based upon standard allegations of fraud, undue influence, and duress. This is precisely what happened in Murphy. In that case, the decedent's heir-at-law challenged gifts to the lawyer who drafted the decedent's will and the lawyer's legal assistant. The lawyer and the legal assistant were the sole residuary beneficiaries of the client's estate.

Like Agee, the Murphy court refused to find the gift void as a matter of law. Instead, the decedent's heir-at-law was forced to rely upon a claim for undue influence. The court noted the difficulties of proof which a contestant can face in such cases:

> The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client. 'The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children and other next of kin'.

Murphy, at 8 (quoting Kirschbaum v. Dillon, 567 N.E. 2d 1291, 1296 (Ohio 1991).

These difficulties of proof and the nature of the confidential relationship between a lawyer and client have caused courts and commentators to conclude that the lawyer must prove that the gift was free of undue influence by clear and convincing evidence. *See* Rohan Kelley, Probate Litigation, PRACTICE UNDER FLORIDA PROBATE CODE §21.17 (Fla. Bar CLE 2010) *citing* Ritter v. Shamas, 452 So. 2d 1057 (Fla. 3d DCA 1984); Zinnser v. Gregory, 77 So. 2d 611 (Fla. 1955); Nelson v. Walden, 186 So. 2d 517 (Fla. 2d DCA 1966); In re Estate of Reid, 138 So. 2d 342 (Fla. 3d DCA 1962).

The trial court in Murphy ultimately set aside a series of wills benefitting the lawyer and paralegal notwithstanding the fact that Mrs. Murphy met with independent counsel each time a new will was prepared increasing the share to her longtime counsel. Murphy, at 19. The court was not convinced that Mrs. Murphy understood the size of the gift she was making to her lawyer. Id. Further, the court was troubled by the fact that the lawyer and paralegal seemed to have recognized that they were engaging in questionable behavior. They had entered into an agreement which contained a "self-serving" statement that they had not breached their fiduciary duties and which provided that they would not sue each other for conflicts of interest in

connection with Mrs. Murphy's estate planning. Id. at 22. The court called this agreement a document which "reeks of a consciousness of fraud" and compelling evidence that the perpetrators knew all of the elements of undue influence were present. Id.

One of the most interesting, and troubling aspects of Murphy from the perspective of a drafting lawyer, is that the lawyer in that case likely felt that he was fulfilling his ethical obligations. Although the lawyer's office prepared and retained each of the client's wills, an independent lawyer met with Mrs. Murphy on each occasion when a new will was signed. The comment to Rule 4-1.8(c) provides that a lawyer may accept a substantial gift from a client under a testamentary instrument if the client is represented by independent counsel. It provides:

> If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel.

R. Regulating Fla. Bar 4-1.8, cmt. "Gifts to Lawyers."

However, the facts and circumstances were such in Murphy that the court felt that the lawyer had still acted with a conflict of interest and breached his fiduciary duties to his elderly client. The lawyer lost the gift under the will and was ultimately disbarred.[5] Beyond losing the gift, the lawyer's name and career were forever tagged with an asterisk. Indeed, Judge Laughlin was placed in the unenviable position of meting out justice against an attorney who had, up to that point, served our profession honorably. The Order setting aside the Last Will placed a solemn epitaph on the lawyer's career:

> [T]he attorney whose bequests are at issue in this case was himself sixty-eight years old and retired at the time of the [disputed] will. This court must acknowledge that [the attorney] has had an exemplary career in the legal profession. He enjoys a reputation as an honest professional and a civic-minded citizen of great integrity. For this reason, deciding the facts and issues in this case has been especially painful and troubling. The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct.

Murphy, at 26.

It is important to note that the prohibition on lawyers drafting wills which name themselves as beneficiaries extends to other lawyers in the same firm. See R. Regulating Fla. Bar 4-1.8(k) ("while lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to anyone of them shall apply to all of them"). Thus, a lawyer cannot avoid the conflict simply by requesting his or her partner to prepare the document. Further, the Rule applies to gifts by a client to members of the lawyer's family. Accordingly, the ethical rule prohibits a lawyer from drafting an instrument making a substantial gift to the lawyer's wife, child, and grandchildren. *See* R. Regulating Fla. Bar 4-1.8(c).

[5] The Florida Bar v. Carey, 46 So.3d 48 (Fla. 2010).

There are countless situations where a gift to the drafting lawyer or the lawyer's family may be natural given the nature or extent of the relationship. For example, beyond the situation of a longtime client of the lawyer, the lawyer or lawyer's spouse may have a life-long friend, who wishes to make them a substantial gift. There is nothing which prohibits a lawyer from accepting an unsolicited gift or which prohibits the client from making such a gift. However, regardless of the situation, it is important to be mindful of the ethical rule, and the potential consequences of violating it. If an instrument needs to be prepared to effectuate a "substantial" gift, Rule 4-1.8(c) requires the client to have independent counsel. Yet, even if with independent counsel, the drafting lawyer may still be placed in the uncomfortable position of having to defend claims of undue influence and breach of fiduciary duty with the client's lips sealed and unable to provide support. The overarching lesson to be learned from Murphy is that no gift is worth risking your livelihood and having your integrity questioned.

III. Proposed Legislation

In response to these concerns about lawyers naming themselves as beneficiaries under estate planning documents, the Real Property Probate and Trust Law Section of the Florida Bar created the Ad Hoc Estate Planning Conflicts of Interest Committee to examine the law in the area and determine whether a statute specifically addressing the issue of gifts to lawyers was necessary. The committee has proposed a new statute, Florida Statutes § 732.806, to address this issue. The proposed legislation makes a gift to a lawyer, or certain people related to, or affiliated with, the lawyer, void if the lawyer prepares the instrument making the gift, or solicits the gift, unless the lawyer or recipient of the gift is related to the client.

The proposed legislation adds a new section to the Florida Probate Code that would render any part of a written instrument which makes a gift to a lawyer, or a person related to the lawyer, void if the lawyer prepared or supervised the execution of the written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift. This new section makes the gift *void* rather than *voidable*. The proposed statute makes an exception for the typical situation in which the lawyer prepares a document for a family member or other related person.

The new statute would prevent unnecessary litigation over whether the client intended to make the gift to the lawyer taking the case out of a contested evidentiary proceeding after the decedent's death. The statute does not prevent a lawyer from inheriting from a client. Indeed, a client is free to draft a will or other instrument making a gift to the lawyer or the lawyer's family. The statute merely prevents the lawyer or persons related to the lawyer from preparing the document making the gift. In such circumstances, the client should be advised to go to an independent lawyer to have the instrument making the gift prepared. Indeed, this tracks the recommendation in the Comment to Rule 4-1.8(c).

HB 583 Section 7

732.806 Gifts to lawyers and other disqualified persons.—

(1) Any part of a written instrument which makes a gift to a lawyer or a person related to the lawyer is void if the lawyer prepared or supervised the execution of the

written instrument, or solicited the gift, unless the lawyer or other recipient of the gift is related to the person making the gift.

(2) This section is not applicable to a provision in a written instrument appointing a lawyer, or a person related to the lawyer, as a fiduciary.

(3) A provision in a written instrument purporting to waive the application of this section is unenforceable.

(4) If property distributed in kind, or a security interest in that property, is acquired by a purchaser or lender for value from a person who has received a gift in violation of this section, the purchaser or lender takes title free of any claims arising under this section and incurs no personal liability by reason of this section, whether or not the gift is void under this section.

(5) In all actions brought under this section, the court must award taxable costs as in chancery actions, including attorney fees. When awarding taxable costs and attorney fees under this section, the court may direct payment from a party's interest in the estate or trust, or enter a judgment that may be satisfied from other property of the party, or both. Attorney fees and costs may not be awarded against a party who, in good faith, initiates an action under this section to declare a gift void.

(6) If a part of a written instrument is invalid by reason of this section, the invalid part is severable and may not affect any other part of the written instrument which can be given effect, including a term that makes an alternate or substitute gift. In the case of a power of appointment, this section does not affect the power to appoint in favor of persons other than the lawyer or a person related to the lawyer.

(7) For purposes of this section:

(a) A lawyer is deemed to have prepared, or supervised the execution of, a written instrument if the preparation, or supervision of the execution, of the written instrument was performed by an employee or lawyer employed by the same firm as the lawyer.

(b) A person is "related" to an individual if, at the time the lawyer prepared or supervised the execution of the written instrument or solicited the gift, the person is:

1. A spouse of the individual;

2. A lineal ascendant or descendant of the individual;

3. A sibling of the individual;

4. A relative of the individual or of the individual's spouse with whom the lawyer maintains a close, familial relationship;

5. A spouse of a person described in subparagraph 2., subparagraph 3., or subparagraph 4.; or

6. A person who cohabitates with the individual.

(c) The term "written instrument" includes, but is not limited to, a will, a trust, a deed, a document exercising a power of appointment, or a beneficiary designation under a life insurance contract or any other contractual arrangement that creates an ownership interest or permits the naming of a beneficiary.

(d) The term "gift" includes an inter vivos gift, a testamentary transfer of real or personal property or any interest therein, and the power to make such a transfer regardless of whether the gift is outright or in trust; regardless of when the transfer is to take effect; and regardless of whether the power is held in a fiduciary or nonfiduciary capacity.

(8) The rights and remedies granted in this section are in addition to any other rights or remedies a person may have at law or in equity.

IV. Drafting Lawyer Named as Fiduciary

Fiduciary appointments are treated much different than client gifts under the law. The Comments to Rule 4-1.8(c) specifically recognize that:

> "This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative position."

Id.

Many commentators have pointed out that often the lawyer who drafts the will or trust is the one best-suited to serve as personal representative or trustee because of their training in issue spotting and analysis, substantive law, communication, conflict resolution, and legal ethics. *See generally* ABA Formal Op. 02-426 (May 31, 2002); Edward D. Spurgeon & Mary Jane Ciccarello, The Lawyer in Other Fiduciary Roles: Policy and Ethical Considerations, 62 Fordham L. Rev. 1357, 1378-79 (1994). However, this does not mean that a lawyer may solicit such appointments with impunity. Indeed, a lawyer who prepares a document appointing the lawyer or another lawyer in the firm as a fiduciary is subject to the general conflict of interest provisions in Rule 4-1.7 "when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyers independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary." Id. The comment to Rule 4-1.8(c) provides that in "obtaining the client's *informed consent* to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position."

"Informed consent", as defined in the Preamble to the Rules Regulating the Florida Bar, "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." R. Regulating Fla. Bar Preamble "Terminology". The Comments to the Preamble go on to explain that the:

> communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

R. Regulating Fla. Bar Preamble, Comment "Informed Consent".

It is important to note that Rule 4-1.7 requires that waivers of conflicts be "confirmed in writing". "Confirmed in writing" is likewise a defined term in the Preamble to the Bar Rules. "Confirmed in writing, when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." R. Regulating Fla. Bar Preamble, "Terminology."

In the case of Rand v. Giller, 489 So. 2d 796 (Fla. 3d DCA 1986), the Court grappled with the difficulties involved when a lawyer fails to confirm the nature of the discussion concerning the selection of a fiduciary in writing. In Rand v. Giller, a beneficiary and co-personal representative of an estate filed an action to remove a lawyer, Mr. Giller, who had prepared a will which nominated himself as personal representative. Mr. Giller had only know the decedent for a "few hours" at the time the will was prepared. Judge Nesbitt, writing for the court, noted that:

> Giller testified that he attempted to discourage Mrs. Rosen from appointing him and his law firm as co-personal representative and trustee, but that she indicated a desire that they serve in those capacities. There was no documentary or testimonial evidence to corroborate that fact. *For the benefit of the bar, we strongly suggest that attorneys establish procedures for such cases which allow for evidence, other than the self-serving testimony of the attorney involved, of the care taken to avoid the appearance of impropriety*.

Rand v. Giller, 489 So. 2d at 797, n. 2.[6]

The ACTEC Commentaries to the Model Rules of Professional Conduct also contain an extensive discussion concerning the appointment of the lawyer as a fiduciary. *See ACTEC Commentaries on the Model Rules of Professional Conduct, ACTEC Commentary on MRPC 1.7* (ACTEC Foundation 4th ed. 2006). The ACTEC Commentaries provide that "a lawyer should be free to prepare a document that appoints the lawyer to a fiduciary office so long as the client is properly informed, the appointment does not violate the conflict of interest rule of MRPC 1.7, and the appointment is not the product of undue influence or improper solicitation by the lawyer." The Commentaries note that:

> "a client is properly informed if the client is provided with information regarding the role and duties of the fiduciary, the ability of a lay person to serve as fiduciary with legal and other professional assistance, and the comparative costs of appointing the lawyer or another person or institution as fiduciary."

Id.

The American Bar Association has issued a Formal Opinion on this issue as well. The ABA opines that:

> One of a lawyer's important responsibilities in providing estate planning for his client is to help her select an appropriate personal representative to administer her estate and a trustee to manage any trust established by the will. The lawyer is required by Rule 1.4(b) to discuss frankly with the client her options in selecting an individual to serve as fiduciary. This discussion should cover information reasonably adequate to permit the client to understand the tasks to be performed by the fiduciary; the fiduciary's desired skills; the kinds of individuals or entities likely to serve most effectively, such as professionals, corporate fiduciaries, and family members; and the benefits and detriments of using each, including relative costs. When exploring the options with his client, the lawyer may disclose his own availability to serve as a fiduciary. The lawyer must not, however, allow his potential self interest to interfere with his exercise of independent professional judgment in recommending to the client the best choices for fiduciaries. When there is a significant risk that the lawyer's independent professional judgment in advising the client in the selection of a fiduciary will be materially limited because of the potential amount of the fiduciary compensation or other factors, the lawyer must obtain the client's informed consent and confirm it in writing. When the client is considering appointment of the lawyer as a fiduciary, the lawyer must inform the client that the lawyer will receive compensation for

[6] The court in Rand v. Giller ultimately concluded that the lawyer did not receive a "substantial benefit" by virtue of the appointment and that the beneficiary could not therefore state a claim for removal on the basis of undue influence. The court cited a line of cases which makes it clear that, because any compensation paid is for actual work performed and liability incurred, there is no substantial benefit to serving as a fiduciary. Id. at 797 *citing* Zinnser v. Gregory, 77 So.2d 611, 613-14 (Fla.1955) and Allen v. Estate of Dutton, 394 So.2d 132, 134 (Fla. 5th DCA 1980).

> serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated and approved. The lawyer also should inform the client what skills the lawyer will bring to the job as well as what skills and services the lawyer expects to pay others to provide, including management of investments, custody of assets, bookkeeping, and accounting. The lawyer should learn from the client what she expects of him as fiduciary and explain any limitations imposed by law on a fiduciary to help the client make an informed decision. One reason for selecting the lawyer as fiduciary is his capacity to handle the legal services that will be required from time to time. The lawyer should discuss with the client the fact that the lawyer, acting as fiduciary, may select himself or his firm to serve as the lawyer for the trust or estate, with the result that additional fees may be received by the lawyer.

ABA Formal Op. 02-426 (May 31, 2002).

Some have argued that the failure to make the suggested disclosures should impact the amount of the fees which the lawyer receives for serving in the dual roles of personal representative and attorney for the personal representative. *See* John Arthur Jones and Rohan Kelley, *Fees and Other Expenses of Administration, PRACTICE UNDER FLORIDA PROBATE CODE* §15.52 (Fla. Bar CLE 2010). In some states, such as New York, the statutes mandate a reduction in fees if the lawyer fails to make proper disclosures. *See, e.g.*, NY Surr. Ct. P. R. § 2307-a. The New York statutes require a signed affidavit by the client confirming the types of disclosures referenced above. The failure to obtain the affidavit reduces the amount of the executor commissions payable to the lawyer by one-half. The Florida Statutes allow the Court to consider the fees paid to the personal representative in other capacities in setting a reasonable fee. "Any fees and compensation paid to a person who is the same as, associated with, or employed by, the personal representative shall be taken into consideration in determining the personal representative's compensation." Fla. Stat. § 733.612(19).

V. Other Drafting Considerations

A. Attorney Conflicts and Liability in Recommending a Fiduciary

It is common for a drafting lawyer to be asked by a client for a suggestion as to who should serve as corporate fiduciary. When this issue arises, practitioners should keep in mind that the ACTEC Commentaries to the Model Rules provide that a client should be informed "of any significant lawyer-client relationship that exists between the lawyer or the lawyer's firm and a corporate fiduciary under consideration." In Gunster, Yoakley & Stewart, P.A. v. McAdam, 965 So. 2d 182 (Fla. 4th DCA 2007), two beneficiaries sued the law firm alleging that a lawyer in the firm wrongfully procured a corporate fiduciary's appointment and "caused the estate administration to be more expensive" by suggesting a client of the firm to serve as a fiduciary. The beneficiaries sought damages for "all avoidable probate expenses."

Bruce Stone of Goldman, Felcoski, & Stone has graciously agreed to allow me to share a portion of his engagement letter, which includes sample disclosures to the client regarding the

fact that the lawyer represents various corporate fiduciaries on other matters and that those institutions refer work to the firm:

> Our firm works with various banks, trust companies, and other financial institutions. Sometimes we may represent those institutions as clients, either in a fiduciary capacity such as when they serve as personal representatives or trustees, or directly such as when defending them in litigation matters. Those institutions may refer potential clients to our firm, and we may recommend their services to our clients. If you ask us to recommend a financial institution for your estate planning arrangements, it is possible that we may have separate attorney-client relationships with the institution or institutions we recommend. If you name a corporate fiduciary to serve as your personal representative or trustee, it is possible that the corporate fiduciary might retain our law firm in the future to represent it in performing its duties (assuming that there are no conflicts of interest). You acknowledge that the decision whether to use a corporate fiduciary and the selection of a particular institution is your responsibility, even if you ask us for advice and recommendations.
>
> Florida law does not fix compensation for personal representatives or trustees, although statutory guidelines are given for fees for personal representatives. You are free to negotiate the amounts that will be paid as compensation to your personal representative or trustee, and do not have to agree that fees (including termination fees) will be paid to a corporate fiduciary based on its standard fee schedule.

B. Drafting Considerations

As indicated above, there are many good reasons why a client may choose to appoint a lawyer as fiduciary, including, among other things, their knowledge and experience in the area as well as the familiarity with the client's wishes and affairs. Assuming the lawyer is willing to fill that role, the typical boilerplate provisions in the document should be reviewed to determine whether they are appropriate. Standard clauses in a will or trust can sometimes raise questions.

For example, many wills and trusts contain exculpatory provisions. Florida Statutes § 736.1011 provides that an exculpatory provision is unenforceable to the extent that it was inserted into the trust instrument as a result of an abuse by the trustee of a fiduciary or confidential relationship with the settlor. An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of fiduciary or confidential relationship unless the clause is fair under the circumstances and the term's existence and contents were adequately communicated directly to the settlor or the independent attorney of the settlor. Fla. Stat. §736.1011(2); see also Fla. Stat. § 733.620 (addressing exculpatory provisions in wills in an identical way). It is also important to consider the impact of Rule 4-1.8(h) which provides that "a lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently representing in making the agreement."

Other clauses to consider include boilerplate compensation provisions, waivers of the prudent investor rule, and removal provisions. In some cases, beneficiaries have argued that as

part of the "conflict", the lawyer allowed a corporate fiduciary client to self deal by investing in institutional products, to be compensated at standard fee schedules, and to be locked into the fiduciary position by not providing a mechanism for removal and replacement.

C. Gifts to Charities

Another common scenario which presents potential conflict of interest considerations is the issue of a lawyer preparing a will or trust which makes a gift to a charity with which the lawyer has an affiliation. For example, many estate planning lawyers serve on the boards or as officers of local charities. It is generally not improper for a lawyer to prepare an instrument which makes a gift to a charity with which the lawyer is the affiliated. However, there are a number of conflict of interest and undue influence issues which come into play.

One of the leading ethics opinions which gets cited frequently in this area is Oregon Ethics Opinion 525 (1989). The opinion addresses two separate issues: (a) whether the lawyer who represents a charitable organization and sits on its board may draft a will in which the charity is designated as a beneficiary if the lawyer discloses his or her representation of the charity to the testator; and (b) whether the lawyer may prepare a document for the client making a lifetime gift to that charity.

Under the facts of the ethics opinion, the lawyer represented the charity on a continuing basis and was also a member of its board of directors. The lawyer's client asked the lawyer to assist him in making a sizable gift to the charity. The client also asked the lawyer to prepare a will in which the charity would be a named beneficiary. The opinion answered the following questions: (a) may the attorney represent both the charity and the donor in the charitable gift transaction? (No); (b) may the attorney represent only the donor in the charitable gift transaction? (Yes, qualified); and (c) may the attorney prepare the donor's will naming the charity as a beneficiary? (Yes, qualified)

The opinion cited to Oregon's Model Rules of Professional Conduct, Rule 1.7, which is similar to Florida Rule 4-1.7:

> **(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:**
>
> **(1) the representation of one client will be directly adverse to another client;**
>
> **(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer;**
>
> **(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.**
>
> **(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:**
>
> **(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;**

(2) the representation is not prohibited by law;

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

The opinion concluded that because of the potential for differing interests or positions between charity and donor concerning the terms of the transaction, representation of both charity and donor in a transaction making a gift would constitute a prohibited, nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3). The opinion compared such a transaction to that in which the lawyer undertakes simultaneously to represent both sides of a buyer-seller, lender-borrower, or similar transaction.

The Oregon Bar concluded, however, that lawyer could proceed with preparing the documents necessary to make the gift <u>if the lawyer only represented the donor</u> even though the lawyer continued to represent the charity in other matters and to serve on its board. The opinion noted that "when, as here, there is a significant risk that Lawyer's representation of Donor would be materially limited by Lawyer's obligations to Charity, the representation is permissible with the informed consent of all clients, confirmed in writing." The opinion notes that the same rules would apply to the lawyer's efforts to draft the donor's will if the charity is to be a beneficiary. The opinion concluded that, in both instances, there is a significant risk, that the lawyer's representation of the donor would be materially limited by lawyer's obligations to the charity. As a consequence, the Oregon Bar found that, under the circumstances, the lawyer would have to obtain "informed consent, confirmed in writing" pursuant to Rule 1.7(b) from both the donor and the charity before undertaking the work.

In Maryland State Bar Association Ethics Opinion 2003-09, the bar was requested to opine on whether an attorney who chairs his church's legacy committee could prepare, on a pro bono basis, wills for parishioners in which the parishioners bequeath property to the church. The facts of the opinion were a bit peculiar in that the lawyer would be chairing a church committee that "promotes legacy giving from its parishioners (i.e., bequests in wills, charitable trusts, charitable annuities, etc.)" As chair, the lawyer was expected to "explain the program to parishioners."

Like Oregon, the Maryland Bar concluded that the lawyers role on the church's legacy committee implicated Rule 1.7(b). The Maryland Bar noted that under Rule 1.7(b), in order to represent fellow parishioners, the lawyer would have to reasonably believe that his representation of such parishioners would not be "adversely affected" by his responsibilities to his church or his own interests before obtaining a parishioner's consent to such representation. However, in the Maryland opinion, the lawyer was actually being put in the position of talking to parishioners about making a gift to the church. The Maryland Bar concluded that it was unethical to proceed with the representation under such circumstances:

"It is the consensus of the Committee, which correlates to the hypothetical "disinterested attorney" referred to in the comments to Rule 1.7, that such a belief would not be reasonable, and that consequently, you cannot

simultaneously serve as a member of the Legacy Committee and represent parishioners in connection with their estate planning when they may contemplate a gift or bequest to the church. The Committee's opinion in this regard is based upon Rule 2.1 which provides that "(i)n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Similarly, Rule 5.4C provides that "(a) lawyer shall not permit a person who recommends the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." The Committee believes that your laudable interest in advancing your church's interests would inevitably compromise your independent professional judgment in advising practitioners regarding whether their own interests will be served by such giving in general or by bequests to your church in particular, as issues regarding the nature, magnitude, and timing of parishioners' giving might be affected by considerations relating to your church's financial needs. The Committee also has reservations regarding whether parishioners would be sophisticated enough to weigh the risks involved in order to knowingly consent to your representation. Consequently, it is the Committee's opinion that the conflict posed by virtue of your membership on the Legacy Committee will not be able to be addressed by the consultation and consent requirements of Rule 1.7(b)(2) and (c) (and/or Rule 2.2) and that to advise parishioners as your propose, you would have to resign from the Legacy Committee."

A similar issue was presented in Washington State Bar Association Ethics Opinion 1568 (1994). The lawyer in that case inquired whether a law firm can enter into a business arrangement with a charitable organization to represent church members wishing to make charitable donations to the church. The charity wanted to recommend the firm to members who asked for recommendations for an attorney to prepare the documents for donating to the church. The charity would pay for the prospective donor to have the attorney review the documents. In addition, the law firm could be asked to do legal work on general charity matters unrelated to the giving department. The Washington Bar was of the opinion that the proposed arrangement for representation was impermissible on three grounds:

1) It would be a conflict of interest under RPC 1.7(b) if the firm represents the charity on general matters because under the plan, the lawyer's duty to the client/donor competes with the lawyer's duty to the church.

2) It would violate RPC 1.7(b)(2) because the plan does not allow for consultation and full disclosure to the client; and

3) The communication between the client/donor and the lawyer would be violated under RPC 1.4(b).

In addition to these ethical issues, gifts to the charities with which the lawyer is affiliated implicate issues of undue influence. As explained above in the discussion in In re Estate of Murphy, a will or trust procured by the undue influence of a lawyer is void. Under Florida law, a presumption of undue influence will arise when three element are present: (1) the existence of a

confidential or fiduciary relationship between the decedent and the procurer of a will; (2) the active participation of the procurer in the planning and drafting of the will; and (3) the realization by the procurer of a substantial benefit under the provisions of the will. In Re Estate of Carpenter, 253 So.2d 697 (Fla.1971); Allen v. Dutton, 394 So.2d 132 (5th DCA 1981) In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1970).

Generally, the drafting attorney will almost always satisfy the first two prongs of this analysis: "fiduciary or confidential relationship" and "active procurement". *See, e.g.* Allen, 394 So. 2d at 134-35. The issue will be whether a gift to a charity selected by the lawyer meets the test of "substantial benefit".

In Allen, the lawyer was not only named as the personal representative and trustee under the will but had "absolute discretion to distribute the bulk of [the decedent's] estate" to charities selected by the lawyer. The court held that the under those circumstances the lawyer had "sufficient collateral benefits" to make him a substantial beneficiary of the will. Id. 134-35. *See also* In Re Estate of Nelson, 232 So.2d 222 (Fla. 1st DCA 1970) (finding that the presumption of undue influence was raised where the attorneys were named as personal representatives and trustees and had "unlimited discretion to distribute the income or corpus thereof for such religious, educational, scientific, charitable, or literary purposes as they shall see fit.").

In re Estate of Edel, 700 N.Y.S.2d 664 (Sur. Ct. 1999), a gift under the will was attacked on undue influence grounds where the law firm represented the charity and the lawyer's partner served on the charity's board. The issue presented was whether a presumption of undue influence arose when an attorney prepares a will that leaves the bulk of the testator's estate to a charity that the attorney represents in its legal matters and also serves as chairman of the charity's board of directors. The decedent's estranged son and granddaughter contested a gift of $250,000 and the residue of the estate to a hospital. They claimed that the attorney and the CEO of the hospital utilized "fraud and undue influence" to induce the gift.

The decedent had executed a will drafted by the lawyer in 1980 under which nothing was left to the hospital charity (although it did leave 40% to another hospital which was ultimately acquired by the charity named in the last will). In 1985, the lawyer became a member of the hospital board of directors, and later that year the hospital was named a 30% residuary legatee under the decedent's new will. As time went on, and the lawyer's relationship with the decedent increased and the lawyer was ultimately appointed chairman of the board of the hospital, the percentage of the residue passing to the hospital increased to 100% of the residue.

The will contestants argued that the lawyer's relationship with the charity created a conflict of interest which required written consent by the client. However, the court refused to find that this presented a conflict as a matter of law. The court was "not convinced that an attorney draftsman who serves without pay on the board of directors of a charitable organization has a conflict of interest simply because the attorney's client names the charity in her will." The court noted that "such a holding would serve to discourage attorneys from serving on the boards of charitable and civic organizations."

Further, the court declined to apply cases which hold that a gift to the lawyer or lawyer's family are presumed to be void on undue influence grounds. The court held that the presumption

of undue influence was not applicable to a situation where the lawyer is not the direct recipient of the gift. Notwithstanding the fact that the beneficiaries could not raise the presumption, the court held that the beneficiaries were entitled to a trial on whether the lawyer and the charity had engaged in undue influence noting that the beneficiaries raised a number of issues which warranted serious inquiry by the trier of fact.

The bottom line is that attorneys who render charitable planning advice must be mindful that charitable gift planning is governed by the same conflict of interest considerations as other areas of law practice.

VI. Conclusion

Many of the problems encountered by good lawyers can be avoided with properly directed effort, some clear communication and a few good writings. Hopefully, these materials will assist lawyers in their efforts to improve the services they provide to their clients.

The opinions and views in these materials are solely those of the author and are not necessarily the opinions, views, policies or procedures of the author's law firm. It is not the author's intent to imply that anything in these materials sets forth minimum standards of care or required standards of practice. To the contrary, these materials are merely intended to provide a good lawyer with a well-documented file and to help avoid ethical violations and legal liability.