AN ETHICAL OUTLOOK ON ATTORNEYS PREPARING WILLS AND TRUSTS

I. INTRODUCTION

The question of whether an attorney may prepare a will or trust for a client and also be the named beneficiary therein is a conflict which arises in the practice of law.¹ There are several ways in which this situation occurs. The client may want to thank his attorney by leaving the attorney something in his will, may be close friends with the attorney, or may have no heirs or issue to whom to leave the estate.² The purpose of this Article is to examine cases which have dealt with this issue and to examine the Model Code of Professional Responsibility and the Model Rules of Professional Conduct to determine the general rule on this point and how attorneys may better abide by that rule.

II. DISCIPLINARY ACTION IN CASES

In Magee v. State Bar of California,³ the California Supreme Court showed a lenient attitude towards the conduct of the attorney who drafted a will for a client and named himself beneficiary. In Magee, the attorney prepared a will for his client, who was eighty-one and in poor health, and named himself as residuary beneficiary and executor.⁴ After the will was executed, the client gave the attorney $4,500 as an advance on the estate.⁵ Following the death of the client, a relative contested the will.⁶ The probate court held that the will was the product of the attorney's undue influence.⁷ After the California Supreme Court studied the evidence presented in the will contest, it concluded that the attorney had

2. See id.
4. Id.
5. Id. at 810.
6. Id.
successfully rebutted the presumption of undue influence, and did not discipline the attorney.\textsuperscript{\textit{8}}

In 1963, one year after the \textit{Magee} decision, the Supreme Court of Wisconsin in \textit{State v. Horan}\textsuperscript{\textit{9}} handed down a much stricter ruling. This decision remains a leading case in the field.\textsuperscript{\textit{10}} In \textit{Horan}, the attorney drafted a total of six wills for his client who was eighty-seven years old and a close friend.\textsuperscript{\textit{11}} As he drafted each will, the attorney's amount to be received increased at the expense of the other beneficiaries.\textsuperscript{\textit{12}} In the final draft, the attorney's share was over $50,000 of a $265,000 estate.\textsuperscript{\textit{13}} The court prohibited this conduct because of the inherent conflict of interest which existed between the attorney and the client, the resulting impossibility of an attorney to testify in support of the will's admission to probate, the possibility of harm to other beneficiaries, and the undermining of the public's confidence in the integrity of the legal profession.\textsuperscript{\textit{14}} The court created one exception to the prohibition for cases in which an attorney acts as draftsman and beneficiary. This exception has been reaffirmed in other decisions as well.\textsuperscript{\textit{15}} Speaking of this exception, the \textit{Horan} court noted:

We do not mean to state that a lawyer may never draw a will for a personal friend or members of his family or close relatives in which he or a member of his family is a beneficiary. A lawyer may draft a will for his wife, his children, or his parents, or other close relatives in which he is a beneficiary and stands in the relationship to the testator as one being the natural object of the testators bounty.\textsuperscript{\textit{16}}

The court punished the attorney with a reprimand and costs of the proceeding.\textsuperscript{\textit{17}}

Five years later, the Wisconsin Supreme Court in \textit{State v. Horan}\textsuperscript{\textit{9}}

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\textit{Magee}, 374 P.2d at 811.

\textit{Horan}, 123 N.W.2d at 489.

\textit{Id.}

\textit{Id.}

\textit{Id.}

\textit{Id.} at 490.

\textit{See} Johnston, supra note 7, at 68; \textit{see also e.g.}, Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980); \textit{State v. Gulbankian}, 196 N.W.2d 730 (Wis. 1972).

\textit{Horan}, 123 N.W.2d at 492.

\textit{Id.}
Collentine\textsuperscript{18} created a restriction on their exception in Horan. According to the court:

[a] lawyer may be the scrivener of a will in which he is a beneficiary only when he stands in relationship to the testator as the natural object of the testator's bounty and where under the will he receives no more than would be received by law in the absence of a will. Under any other circumstances in which the lawyer-draftsman is a beneficiary, this court will conclude that the preparation of such a will constitutes unprofessional conduct.\textsuperscript{19}

One of the next significant decisions on this issue was decided by the Iowa Supreme Court in Committee on Professional Ethics v. Behnke.\textsuperscript{20} Behnke, the attorney/draftsman, took advantage of a wealthy brother and sister in their eighties, who were in poor health and had no close family ties.\textsuperscript{21} The attorney received an inter vivos gift of $7,500 from his clients and was a contingent beneficiary of $320,000 that would be payable to him in the event the eighty-five year old sister predeceased the testator.\textsuperscript{22} In addition, within the three years immediately preceding the brother's death, the brother and sister changed lawyers several times. Each time a different lawyer prepared their wills, Behnke's legacy disappeared only to reappear, in substantial amounts, in each succeeding will that Behnke prepared.\textsuperscript{23} However, Behnke argued that even if he had violated the provisions of Ethical Consideration 5-5 of the Iowa Code of Professional Responsibility,\textsuperscript{24} his conduct would not be worthy of discri-

\begin{itemize}
\item[18.] 159 N.W.2d 50 (Wis. 1968).
\item[19.] Id. at 53.
\item[20.] 276 N.W.2d 838 (Iowa 1979).
\item[21.] Id. at 844-846.
\item[22.] Id.
\item[23.] Id.
\item[24.] At issue in this case was the version of IOWA CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 as it existed prior to December 16, 1977:

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 over-reached 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.
\end{itemize}
plinary action because ethical considerations are only aspirational. The court rejected the attorney’s argument and held that violation of an ethical consideration alone will support disciplinary action. The court suspended the attorney’s license for a minimum of three years.

In the recent case of Toledo Bar Association v. Sheehy, the Ohio Supreme Court considered the case of an attorney who prepared a will for his client which provided a $3,000 bequest to one of the client’s cousins, a $10,000 bequest to two of the client’s friends, and bequested the residuary of the estate to the attorney himself and two of the client’s neighbors. When the client died, her estate was valued at over $360,000. The court referred to the earlier case of Krischbaum v. Dillon in which it had noted that a presumption of undue influence, rebuttable by a preponderance of the evidence, arises when an attorney prepares an unrelated client’s will from which he or she is to benefit. The Sheehy court, in discussing why professional objectivity was required in this case, considered a statement by a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court, which had heard the case below:

A lawyer who is the beneficiary of a bequest of his client has a financial interest in the outcome of his representation. The consequence of this interest may be an impairment of his professional judgment on behalf of his client. This is amply demonstrated in this case. Exercising independent judgment, [r]espondent should have instructed . . . Thomas to consult with another lawyer to prepare the will. Had he done so, . . . Thomas'[s] wishes as expressed in her will would have been fulfilled. Instead, as would be expected, a will contest was filed claiming undue influence . . . As a consequence, . . . Thomas'[s] express intent was frustrated.

Since the client was not “incompetent or especially vulnerable to influence” when the attorney drafted her will, the attorney only received a

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Behnke, 276 N.W.2d at 840.
25. Behnke, 276 N.W.2d at 840.
26. Id.
27. Id. at 846.
29. Id. at 765.
30. Id.
32. Toledo Bar Ass’n, 652 N.E.2d at 765.
33. Id. at 765-766.
III. POLICY IMPLICATIONS AND ALTERNATIVES

Ethical Consideration 5-5 of the Code of Professional Responsibility\(^{35}\) contains several problematic words that could weaken the provision due to ambiguous interpretations of the words. First, the verb “should” could pose a problem because a drafter who looks to the rule for guidance could argue that the rule says he should not but that does not mean that he cannot.\(^{36}\) The rule should be more definite and provide that “A lawyer cannot suggest . . . ” If this were the case, the drafter of the will would have no argument. The next problematic phrase is “should urge.”\(^{37}\) A more precise verb here would be the mandatory “shall” or “must.”\(^{38}\) The next clause that could be controversial is “exceptional circumstances.”\(^{39}\) This phrase is not defined, therefore adding a needless ambiguity that might exempt an attorney’s conduct from the provisions of Ethical Consideration 5-5 because one could make an exceptional circumstance out of almost anything he wanted.\(^{40}\) Perhaps the greatest oversight in Ethical Consideration 5-5 is its failure to recognize that questions regarding the propriety of an attorney’s inclusion of such a gift, at least in the will drafting context, are likely to arise only after the testator has passed away and the will is probated.\(^{41}\) Therefore, the person who would be in the best position to shed light on the testamentary gift to the scrivener has been silenced by death, thereby leaving the lawyer free to testify that he did not “suggest” the gift, that the draftsman did “urge” the testator-client to seek disinterested advice, and that the attorney did “insist” that the testator-client utilize another lawyer to prepare the will.\(^{42}\)

Rule 1.8(c) of the Model Rules of Professional Conduct provides

\(^{34}\) Id. at 766.
\(^{35}\) See supra note 25.
\(^{36}\) Johnston, supra note 7, at 78.
\(^{37}\) Id. at 62.
\(^{38}\) Id.
\(^{39}\) Id. See also Committee on Prof’l Ethics and Conduct of the Iowa State Bar Ass’n v. Randall, 285 N.W.2d 161 (Iowa 1979).
\(^{40}\) See Johnston, supra note 7, at 62.
\(^{41}\) Id. See, e.g., Randall, 285 N.W.2d 161 (Iowa 1979); State v. Horan, 123 N.W.2d 488 (Wis. 1963).
\(^{42}\) See Johnston, supra note 7, at 62; see also Magee v. State Bar of California, 374 P.2d 807 (Cal. 1962).
that “a lawyer should not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client including a testamentary gift, except where the client is related to the donee.”\textsuperscript{43} Just as in Ethical Consideration 5-5, there are several problematic phrases for drafters of wills and trusts to have room to argue. Again, the phrase “should not” leaves room for controversy as mentioned above.\textsuperscript{44} Another controversial phrase in Rule 1.8 (c) is “substantial gift.”\textsuperscript{45} The drafter could make “substantial” mean anything he chooses it to mean because nowhere is the word adequately defined.\textsuperscript{46} A suggestion would be for the rule to state “any gift of a value over $X . . . ,” and provide in the event there is any discretion over the value of the gift, that it be appraised. Finally, the term “related” could also cause problems because nowhere is it defined either.\textsuperscript{47} In the field of estate law, the category of “relative” can be quite large, and can encompass not only linear ancestors and descendants, but collaterals as well, including those of the third, fourth, or fifth degree.\textsuperscript{48} There should be a limitation as in husband, wife, children, parents, and conditioned thereafter.

An ethical provision creating an absolute prohibition of an attorney being the drafter of a will and also a beneficiary under that will is the best alternative.\textsuperscript{49} An absolute rule of this kind eliminates ambiguity by limiting the construction terms to specific meanings.\textsuperscript{50} One disadvantage to this rule would be that a client would be put to the trouble of seeking new counsel if the testator wanted to include his original attorney as a beneficiary of a will or trust.\textsuperscript{51} But if the initial lawyer explained the reasons behind the ethical prohibition, the client might gain an appreciation for the desire to instill a high level of integrity in the legal profession even though the testator may believe that this protection was unnec-

\textsuperscript{43} ANNOT. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (c) (1984).
\textsuperscript{44} See Johnston, supra note 7, at 78.
\textsuperscript{45} See id. at 79; see also de Furia, supra note 1, at 720.
\textsuperscript{46} See Johnston, supra note 7, at 78; see also ANNOT. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1984) (legal background section).
\textsuperscript{47} See Johnston, supra note 7, at 79; see also de Furia, supra note 1, at 721.
\textsuperscript{48} See Johnston, supra note 7, at 79.
\textsuperscript{49} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) of the initial Discussion Draft provided: “A lawyer shall not participate in the preparation of an instrument giving the lawyer or a member of the lawyer’s family any gift, including a testamentary gift, from a client.”
\textsuperscript{50} See de Furia, supra note 1, at 723.
\textsuperscript{51} See Johnston, supra note 7, at 80.
essary in his particular case.\textsuperscript{52} Further, the number of clients who choose to include a gift in their will to their attorney is so small that only a few testators would have to seek new counsel anyway.\textsuperscript{53} Additionally, the need for a blanket prohibition is prevalent due to the appearance of impropriety which exists when an attorney receives payment for drafting a testamentary instrument for a client which names the attorney as beneficiary.\textsuperscript{54} This practice places the attorney in a difficult conflict of interest situation.\textsuperscript{55} The Model Rules state in Rule 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests . . . "\textsuperscript{56} In Rule 2.1 the Model Rules recognize that lawyers should give truly independent advice to their clients.\textsuperscript{57} In order to comply with the these rules, the blanket prohibition rule would be the best alternative.

V. Conclusion

In light of case law, it would be advisable for an attorney not to draft a will and name himself as a beneficiary. The cases and the rules of professional conduct state that there is the exception where the testator is related to the attorney, but even this exception is limited to cases where the client is a close relative of the attorney. For someone other than an immediate family member, the judicious attorney should tell the testator that if he wants to include the attorney in the will he should seek individual counsel on his own.\textsuperscript{58} It is unlikely that the client would change his mind and exclude the gift simply because it is made in a different attorney’s office.\textsuperscript{59}

The safest route to take would be for an attorney never to prepare a will and include himself as beneficiary. The attorney can make the judgment on what is more valuable—the gift or the opportunity to draft the will.

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\textsuperscript{52} See id. at 81.
\textsuperscript{53} See id.
\textsuperscript{54} See de Furia, supra note 1, at 723.
\textsuperscript{55} See id.
\textsuperscript{56} \textit{Model Rules of Professional Conduct} Rule 1.7(b) (1995).
\textsuperscript{58} See Johnston, supra note 7, at 81.
\textsuperscript{59} See id.