

ABA Issues Opinion on Will Drafting

May a lawyer draft a will for a testator to whom he is recommended by a potential beneficiary who is the lawyer's current client? The lawyer has not previously met the testator, a widower whose nearest relatives are his nieces and nephews. One of the nieces wishes to recommend the lawyer to her uncle. The lawyer is currently advising the niece on her own estate planning. She has offered to pay any part of the lawyer's fee which the uncle is unable to pay.

These issues were considered by the ABA's Standing Committee on Ethics and Professional Responsibility in Formal Opinion 02-428 issued August 9, 2002. The Committee concluded that Model Rule 1.7, the general conflicts rule, did not apply under these facts ("...there is no significant risk that the lawyer's representation of either client will be materially limited by his representation of the other client...").

The controlling Rule is MR 1.8(f), which applies whenever a lawyer agrees to accept compensation from someone other than the client. Under these circumstances: 1) the client must consent after consultation; 2) there must be no interference with the lawyer's independence of professional judgment or the client-lawyer relationship; and 3) information relating to representation of the client must be protected as required by Rule 1.6. Although the client's consent need not be in writing, the lawyer is advised to document the consent.

The lawyer should also consider the general impact of Rule 5.4(c), which instructs a lawyer not to permit any person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering those services.

Even if the uncle was unable to pay his bills, the lawyer might wish to reject the niece's offer of payment. The Committee recommended that the lawyer advise the niece to tell her uncle that he should pay the lawyer's fees to avoid the implications of Rule 1.8(f). Also, the lawyer should have a frank discussion with the niece about his obligation to exercise independent professional judgment on behalf of her uncle and to protect her uncle's confidences.

In representing the uncle, the lawyer would be expected not to reveal the niece's confidences without her informed consent. Before beginning the representation, the lawyer should reveal to the uncle his concurrent representation of the niece and tell the uncle that he will protect his confidences. If in the course of the representation of the uncle, it appears that a will contest may occur among the beneficiaries, the lawyer should recommend measures that will protect the testator's intent.