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Comment

CONSIDERATIONS OF PROFESSIONAL RESPONSIBILITY IN PROBATE MATTERS

I. INTRODUCTION

The legal profession, contrary to the belief of some skeptics, is generally quite concerned with the rigorous observation of ethical standards. All too often, however, the ethical standard becomes hidden in a maze of technical legal problems. Probate, probably more than any other area of practice, abounds in ethical pitfalls. Since such a large portion of probate is thought of as nonadversarial, conflicts of interest often pass unnoticed. Recognizing this recurrence of ethical problems, this comment is both a presentation of some of the more salient problems of professional responsibility arising in probate matters and a critical analysis of the rules and practices pertinent to these problems. Specifically, the following situations will be considered: (1) the drafting attorney named as executor or as counsel to the executor; (2) the drafting attorney as witness and counsel in the probate contest; and (3) the drafting attorney as beneficiary under the will.

II. THE DRAFTING ATTORNEY NAMED AS EXECUTOR OR AS COUNSEL TO THE EXECUTOR

The general rule regarding the propriety of the scrivener being named as executor or counsel to the executor in a will is stated in Ethical Consideration 5-6 of the *Code of Professional Responsibility*: "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."[1]

[1] ABA CODE OF PROFESSIONAL RESPONSIBILITY (1969) [hereinafter cited as the CODE]. An interesting legal problem may arise where the attorney is both the named counsel to the executor and attesting witness to the will ("An attorney may, with propriety, act as an attesting witness to execution of a will he has drawn, when requested to do so by the client." ABA COMM. ON PROFESSIONAL ETHICS, ABA INF. DEC. No. C738 (1963)). In most jurisdictions statutes provide that the witness shall receive no beneficial interest under the will. Such statutes present this problem: If an attesting attorney is named counsel to the executor, is he receiving a beneficial interest under the will so as to void his designation? Courts have answered this in the negative. One line of cases reasons that the type of interest referred to in the statute must be a direct, certain, and vested interest. Since the designation of an attorney to the executor is an uncertain and remote interest, the fee being merely compensation for serving the estate, the statute does not apply.

Generally, the testator's attorney is familiar with the affairs of the deceased's estate, and it is advantageous that he should serve the estate in probate.[2] However, the manner in which the attorney is named to represent the estate may raise some definite ethical problems. One method of naming the attorney which causes some ethical difficulty is to provide for a corporate executor in the will.

Where a will provides for a corporate executor, the corporate executor is almost certain to appoint the scrivener to represent the estate upon the death of the testator. This practice is generally the result of a "gentleman's agreement" between the scrivener and the corporate executor, but occasionally it is the product of a written agreement. For example, a written agreement between the Minnesota Hennepin County Bar Association and the banks of Minneapolis provides:

> In all legal matters involved in the administration of estates and trusts, the trust institution shall employ, or if acting jointly with co-executor or co-trustee, shall recommend the employment of, the testator's or donor's or family's lawyer in all instances where such lawyer is available, unless there are compelling reasons to the contrary such as disqualification because of interest or disability. The trust institution shall not recommend or suggest to its customer that he forego including in his proposed Will or Trust a recommendation that the fiduciary employ the customer's lawyer to perform the legal services arising thereunder.

E.g., Yribar v. Fitzpatrick, 87 Idaho 366, 393 P.2d 588 (1964). Another group of cases holds that the public policy of the rule is to preserve the competency of the witness, and allowing the attorney to serve as counsel for the executor does not defeat that purpose. *E.g.*, Rosenbaum v. Cahn, 234 Ark. 290, 351 S.W.2d 857 (1961). A final line of authority holds that since the executor is not bound by the designation, the will has given the attorney no right but is purely advisory. *E.g.*, Pickett's Will, 49 Ore. 127, 89 P. 377 (1907).

[2] To avoid impropriety in this area the scrivener should take several precautions. First, to prevent any allegation of undue influence, the suggestion that the scrivener be named executor or counsel in probate must originate with the testator. In the words of the New York Ethics Committee: "It is obviously improper for a lawyer to include such a provision in the client's will of his own motion, or to suggest to the client that such a provision be inserted. There is, however, no essential or inherent impropriety in inserting such a proviso in the absence of undue influence upon the client." N.Y. CITY OP. 580 (1941). Second, where the suggested provision is that the scrivener be named counsel to the executor, the drafting attorney should advise his client that the provision is not mandatory but functions only as advice to the executor. Finally, according to the Ethics Committee of the American Bar Association, "in cases where the testator desires to name the lawyer as executor or trustee or to leave him a legacy, the lawyer should consider having the testator submit the will to another lawyer prior to its execution." H. DRINKER, LEGAL ETHICS, Appendix G (1953).

On its face, this agreement would seem proper because, as previously pointed out, the drafting attorney is the most likely candidate for processing the will through probate. The difficulty with the agreement is that it is an embodiment of what some critics believe is a conspiracy between the attorney and various commercial institutions to exploit the client. It is charged that corporate executors and corporate trustees are often designated, not on the basis of need, but on the basis of a quid pro quo between the attorney and the banking institution. In exchange for being appointed corporate executor the bank assures the attorney that he will be retained when the estate is probated. In addition, many banks, knowing they are to be named corporate executor or corporate trustee, have a standing offer to assist the attorney in drafting his client's will, the bank charging nothing for the service. One attorney has charged that in such situations it is quite common for the lawyer to charge a full fee for planning the estate even though he has done virtually no work.[3]

Perhaps there is nothing that can be done about the corporate executor appointing the scrivener as attorney for probate. Besides, as has been mentioned, there is considerable advantage to such practice. Nevertheless, it is feasible to circumscribe the will drafting activities of the banking institutions. If a client requests the construction of some difficult provision in his will, rather than allowing the attorney to take recourse to a bank, let the unknowledgeable lawyer suggest a number of "specialist" attorneys capable of properly drafting the instrument. In that way, the premium on naming a corporate executor or even recommending the need for a corporate executor is at a minimum.[4]

III. THE DRAFTING ATTORNEY AS WITNESS AND COUNSEL IN THE PROBATE CONTEST

A. Introduction

The Latin maxim, *Mandatis cavetur, ut praesides attendant, ne patroni in causa, cui patrocinium praestiterunt, testimonium dicant,*[5]

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[3] Personal communication with a Minneapolis attorney.

[4] One difficulty which might accompany any restriction on banking activity in this area is that since attorneys will not be able to rely on the expertise of their bank, they may construct difficult provisions themselves which do not reflect the testator's intent and which have great difficulty surviving probate. In other words, by excluding banks from drafting wills the attorney may not be encouraged to refer the task to more competent counsel but may, instead, be encouraged to draft a shoddy instrument himself.

[5] Potter v. Inhabitants of Ware, 55 Mass. (1 Cush.) 519 (1840).

warned judges not to allow advocates as witnesses in any litigation. The reason for the prohibition was that Roman law considered advocates "as not credible, because of the identity of their interest, opinions, and prejudices with those of their clients."[6] However:

> This reason, it may be said once and for all, has totally disappeared from the controversy. It was easy to appreciate its force in the epoch when pecuniary interest was a disqualification in general; but with the disappearance of that disqualification has passed away any inclination to see special danger in the even less tangible interest of a counsel.[7]

Today a different rationale supports a similar rule. The general rule concerning the propriety of an attorney witnessing for his client is stated in Disciplinary Rule 5-102 (A) of the Code:

> If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial . . . .[8]

More elaborate guidelines are set out in Ethical Consideration 5-10:

> It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision, he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.[9]

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[6] *Id.* at 520.

[7] 4 J. WIGMORE, EVIDENCE § 1911 (1940).

[8] CODE, *supra* note 1. ABA CANONS OF PROFESSIONAL ETHICS Canon 19 (1908): "When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court on behalf of his client."

[9] CODE, *supra* note 1.

B. CASE LAW

There is a similarity between case law and the Code regarding the propriety of the lawyer serving as both counsel and witness in the probate proceeding. The general rule was stated by the Nebraska Supreme Court in *McCormick v. McCormick:*[10]

> It is against sound principles of professional ethics for one who knows that he is to be called as a witness in a case, to accept the retainer as lawyer in that case. And where after retainer it is apparent to an attorney that his testimony will be material in behalf of his client, it is his duty to confer with his client and associate counsel at once and finally determine whether he will become a witness. If it is decided that he shall be a witness, he should immediately sever his connection with the litigation.[11]

In accord with the Code the courts are hesitant to forbit absolutely serving as both advocate and witness. Courts readily find that the attorney should not withdraw from conducting the litigation where it would serve an injustice to the client.[12] This is particularly true in probate where the attorney's involvement with the estate is often quite extensive. As the Kentucky Supreme Court has said: "In our opinion the circumstances surrounding the drafting of a will are of such importance in a will contest case that it is proper for an attorney who represented the testator to testify concerning this matter even though he represents the testator's estate."[13]

It should be noted that while it is generally improper for a lawyer to both conduct litigation and testify, if an attorney violates this rule, he is not incompetent to testify.[14] Further, the client may, at his own insistance, retain the original counsel in a later stage of the proceeding.[15]

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[10] 150 Neb. 192, 33 N.W.2d 543 (1948). *Accord,* Protheroe v. Davies, 149 Kan. 720, 89 P.2d 890 (1939) (In this case, the testifying attorney was the scrivener, an attesting witness, named executor, and served throughout the lawsuit as attorney for defendants.); *In re* Estate of Cunningham, 219 Minn. 80, 17 N.W.2d 85 (1944); Otto Will, 249 Pa. 205, 36 A.2d 797 (1944).

[11] 150 Neb. at 194, 33 N.W.2d at 545.

[12] Schwartz v. Wenger, 267 Minn. 40, 43-44, 124 N.W.2d 489, 492 (1963): "It is the general rule that a lawyer may not testify in litigation in which he is an advocate unless circumstances arise which could not be anticipated and it is necessary to prevent a miscarriage of justice. In those rare cases where the testimony of an attorney is needed to protect his client's interests, it is not only proper but mandatory that it be forthcoming."

[13] Adams v. Flora, 445 S.W.2d 420 (Ky. 1969), cited for this proposition in Duncan v. O'Nan, 451 S.W.2d 626 (Ky. 1970).

[14] *In re* Tipton's Estate, 173 Neb. 520, 113 N.W.2d 664 (1962).

[15] *Id.*

The issue arises whether it is proper for the law partner to represent the estate should an attorney be required to be a witness. In a 1953 case, *In re Estate of Benson,*[16] the Nebraska Supreme Court held such conduct proper:

> We are unable to agree with the reasoning which attaches any impropriety to the participation of a lawyer as a witness and his partner as trial counsel in a matter where the partners have represented the client from the outset and where they are not engaged upon opposing or conflicting sides of the controversy.[17]

In contrast, the Code would disqualify the associate. Disciplinary Rule 5-102(A) provides that "he shall withdraw from conduct of the trial and his firm, if any, shall not continue representation in the trial . . . ."[18] Since Nebraska has officially adopted the Code, the status of cases which conflict with the Code, such as *Benson,* comes into issue. If the Code has the status of case law (which it apparently does since it has been adopted by the Nebraska Supreme Court), previous cases in conflict are now overruled.

C. Evaluation of the Code Rules

The Code provisions in this area are extensive, well-developed and deserving of strict application by the courts. The Code correctly stops short of absolutely prohibiting the attorney from both advocating and witnessing. The separation of roles, however, can only be corrupted where justice demands it. In all other circumstances, logic and reason militate in favor of upholding the separation.

When the attorney becomes a witness he becomes impeachable for having an interest in the outcome of the litigation, and the credibility of his testimony may be lessened. Conversely, the jury may subconsciously have difficulty separating the witnessing from the advocating when evaluating testimony. By becoming a witness the advocate is put in the uncomfortable position of arguing his own credibility. There is also a basic inconsistency between the functions of an advocate and a witness. The advocate's function is to advance his client's cause while the witness's function is to objectively state the facts. Finally, the impression such a dual role leaves upon the public mind is injurious to the legal profession. While the attorney would probably not deliberately distort the truth in favor of his client, the public might choose to believe he

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[16] 153 Neb. 824, 46 N.W.2d 176 (1953).

[17] *Id.* at 837, 46 N.W.2d at 183.

[18] Code, *supra* note 1.

had. It should be emphasized that Canon Nine of the Code provides that "[a] lawyer should avoid even the appearance of professional impropriety."[19]

D. WITNESSING AND THE PROBLEM OF PRIVILEGED COMMUNICATION

A related ethical consideration arises from the various rules and statutes on privileged communications between the attorney and his client. In some jurisdictions communications between the testator and his attorney, except as to the formal requirements of executing a will, are confidential and inadmissible in the probate proceeding unless the testator expressly waives the privilege or has his attorney attest the will. Since the scrivener knows that he will most likely be appointed counsel to the executor, this rule enables him to avoid the possibility of being disqualified from probating the will should his testimony become necessary. As long as he does not attest the will and the testator does not sign a waiver, the scrivener is precluded from testifying as to privileged communications and there is no reason for him to avoid probating the will. Thus, a premium is placed on not advising the testator to waive privileged communications. The issue arises whether this is a conflict of interest in violation of Canon Five of the Code. Does the interest of the scrivener in the possibility of probating the will conflict with the interest of the testator in having all relevant communications introduced into the probate proceeding? If this is a conflict of interest, how should the attorney avoid the conflict? Resolution of this issue necessitates a closer view of the various rules on privileged communications and a consideration of those principles which may create an ethical obligation.

Since most courts find some basis for allowing into evidence all relevant communications between the testator and his attorney, this ethical problem seldom presents itself. In general, most courts employ four arguments to find such communications admissible. One rationale is that while the testator wanted the execution and contents of his will kept confidential during his lifetime, after his death the attorney is at liberty to disclose all that is pertinent to the execution and tenor of the will.[20] As a second basis for admitting privileged communications into evidence the courts reason that since the executor exercises authority over the interest of the estate, he can waive the privilege: "It is further generally agreed that in testamentary contests the privilege is *divisible* and may be waived by the executor, the administrator, the heir, the next of kin or the legatee."[21] A third rationale is that the privileged com-

[19] CODE, *supra* note 1.

[20] 8 J. WIGMORE, EVIDENCE § 2314 (McNaughton rev. 1961).

[21] *Id.* § 2329.

munications statutes frequently apply only to civil actions; since the probate proceeding is not a civil action, the privileged communications statute does not apply.[22] Finally, courts have held that where the attorney is also an attesting witness the testator is deemed to have waived the attorney-client privilege.[23] Some jurisdictions, however, have not been as liberal with the admission of such evidence. One such jurisdiction is Nebraska.

The two definitive cases decided by the Nebraska Supreme Court on privileged communications are *In re Estate of Bayer*[24] and *In re Estate of Coons*.[25] In *Bayer* the testator contacted an attorney and, after expressing in general terms the disposition of his estate, instructed the attorney to draft a will. However, due to delay by the attorney, the testator had another lawyer draft the instrument. At trial the contestants sought to have the communication between the testator and the original attorney introduced into evidence. The court defined the issue as follows: "[W]here an attorney is duly employed and counseled with reference to drawing a will which was never executed, after such employer's death may such attorney testify to such client's communications thus made while the relation was in existence?"[26]

The court held that he could not. Conceding, but not determining, that § 25-1206 of the Nebraska statutes[27] may have codified the common law rule that "in controversies between heirs at law, devisees and personal representatives, the claim that the communication was privileged could not be urged,"[28] the court found that § 25-1201[29] modified § 25-1206 so that the attorney's testimony was inadmissible. Section 25-1201 reads: "The following persons shall be incompetent to testify: . . . an attorney concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court."

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[22] W. PAGE, WILLS § 29.7 (1961). 8 J. WIGMORE, EVIDENCE § 2329 (McNaughton rev. Supp. 1970).

[23] 3 W. PAGE, WILLS § 29.8 (1961). Note, however, that the waiver is withdrawn if the testator revokes the will. Lennox v. Anderson, 140 Neb. 748, 1 N.W.2d 912 (1942).

[24] 116 Neb. 670, 218 N.W. 746 (1928).

[25] 154 Neb. 690, 48 N.W.2d 778 (1952).

[26] 116 Neb. at 674-75, 218 N.W. at 748.

[27] Then NEB. COMP. STAT. § 8840 (1922): "No practicing attorney . . . shall be allowed in giving testimony to disclose any confidential communication, properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the function of his office according to the usual course of practice or discipline."

[28] 116 Neb. at 677, 218 N.W. at 749.

[29] Then NEB. COMP. STAT. § 8835 (1922).

Coons relied heavily on the *Bayer* statutory interpretations and held that:

> [C]ommunications made to an attorney by his client, in the absence of a proper waiver, [are] inadmissible in a contested probate proceeding to establish the competency of such client in a contest between legatees and devisees on the one hand and the legal hears on the other, even though the will was not drafted by him.[30]

The court found, however, that the attorney was not precluded from testifying concerning the legal requirements for executing the will.

> We do not think that the testimony of the attorney who drafted the will, concerning the formal requirements of its execution, is a confidential communication within the meaning of section 25-1206, R. R. S. 1943, or within the prohibition of section 25-1201, R. R. S. 1943. The word "communication" is used to denote the fact that one person has brought an idea to the perception of another. Testimony of the mechanics followed in executing the will are not within such definition.[31]

In *Coons* the witnessing attorney had drafted the will but had not attested the instrument. The court distinguished other Nebraska cases which had allowed the attorney to testify.

> These are cases where the testator waived the privilege by requesting the attorney to attest the will as a subscribing witness. They do not sustain the right of an attorney who drafted the will of the testator, in the absence of a waiver, to testify to the mental competency of the testator at the time of the execution of the will.[32]

Thus, the Nebraska rule appears to be that "privileged" communications between the testator and his attorney are inadmissible except where expressly waived by the testator in accord with § 25-1201 or impliedly waived in accord with § 25-1207[33] which arises only when the attorney has attested the will as a subscribing witness.

As has been mentioned, the Nebraska rule enables the attorney to avoid disqualifying himself from serving as counsel in the probate proceeding. As long as the attorney does not attest the will he is ineligible to testify, and there is no need to refuse employment

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[30] 154 Neb. at 696, 48 N.W.2d at 782.

[31] *Id.* at 697-98, 48 N.W.2d at 782.

[32] *Id.* at 696, 48 N.W.2d at 782. *See* Brown v. Brown, 77 Neb. 125, 108 N.W. 180 (1906); Lennox v. Anderson, 140 Neb. 748, 1 N.W.2d 912 (1942).

[33] "The prohibition of the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted, waives the rights thereby conferred."

as counsel. Ultimately, then, the attorney is faced with this dilemma: Should he advise his client that he be made an attesting witness to the instrument (or, in the alternative, that the client sign a written waiver of the client-attorney privilege) and thus possibly preclude himself from serving as counsel in the probate proceeding, or should he remain silent as to attestation and thus be assured that he will not lose the probate because his testimony may become necessary? Whether this is a conflict of interest in violation of Canon Five is largely contingent on the interest of the testator that is served by avoiding the privilege and the exact manner in which the attorney approaches the dilemma.

The major advantage of allowing the attorney to testify about communications with the testator, at least as to the validity of the instrument, is that it promotes the will of the testator. Since a substantial reason for allowing inheritance is the belief that one generally has the right to distribute as he desires, the admitting of all evidence which reflects on that desire is in the interest of the testator. Even if that evidence tends to show the testator was "insane" or "unduly influenced," it is in the testator's interest to have it admitted for if insanity or undue influence is proved, the instrument would not be a true expression of the testator's desires. Clearly, the interest of the client that is protected when the attorney is made a competent witness is strong and surely stronger than any interest the attorney may have in protecting an opportunity to probate the will.

It is submitted, therefore, that it is improper for the attorney to remain silent when the question of who should attest the will arises. This is not to say, however, that the attorney is under an absolute duty to insist that the client sign a waiver or have the attorney attest the will. Where the attorney is practicing in a jurisdiction with rules similar to Nebraska the attorney should be under an obligation to fully inform his client that the effect of not having the attorney attest the will or of not signing a waiver is that the attorney may be precluded from testifying should a contest arise. Further, it may be desirable for the attorney to urge his client to avoid the privilege problem. The extent to which the attorney is involved with executing the will should also influence his obligation in this area. Where the attorney is the scrivener of the will, he should be under a duty both to inform the client of the privilege problem and to advise him to avoid the potential consequences. However, where the attorney's involvement is only remote, as in the *Bayer* case, he should only be expected to advise the testator that communication between them is privileged. In fact, where the attorney's involvement is as remote as in *Bayer* there

is strong justification for the privilege, and it may not be necessary that the client even be advised of its existence.[34]

IV. THE DRAFTING ATTORNEY AS BENEFICIARY UNDER THE WILL

A. Introduction

The belief that it is improper for a scrivener to include himself as a beneficiary of a will dates to ancient Rome. The Emperor Claudius declared that the writer of a will shall not draft a legacy to himself.[35] While present standards may not be as prohibitive such practice still evokes the wrath of ethics-conscious courts. Yet that wrath has not reached such a fervor that precise guidelines have been forthcoming as to when the attorney can draft himself a legacy. As the California Supreme Court has remarked: "[T]he boundary between the ethical and unethical behavior in such cases is not clearly defined . . . ."[36] The following will analyze what guidelines have been presented, both in the Code and in the cases, and also present a proposed rule to guide future conduct.[37]

B. The Code Provisions

The *Canons of Professional Ethics,* since replaced by the Code, made no direct mention of the propriety of a lawyer receiving a gift under a will that he drafted. The courts have traditionally taken recourse to Canons Eleven and Six in deciding these cases.

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[34] Bringing the rules on privileged communications in conformance with other jurisdictions is another way to avoid this conflict of interest. For an analysis of the Nebraska rules and the available means for changing them see 31 Neb. L. Rev. 111 (1951).

[35] Digest 48.10.15. As a result of legislation, the Lex Cornelia and an edict of the Emperor Claudius, it was declared that a legacy to one who drew the will was invalid. *See In re* Blake's Will, 21 N.J. 50, 120 A.2d 745 (1956); *In re* Lobb's Will, 177 Ore. 162, 160 P.2d 295 (1945).

[36] Magee v. State Bar, 58 Cal. 2d 423, 431, 24 Cal. Rptr. 839, 844 (1962).

[37] The attorney-beneficiary problem has been dealt with on two levels: (1) as a problem of professional responsibility; and (2) as a problem of undue influence in the will's execution. The breadth of this comment does not include the problem of undue influence. It should be noted, however, that rules as to one of these levels are not necessarily applicable to the other. For example, that the taking of a legacy may be unethical conduct does not affect the issue of undue influence. *See* Annot., 19 A.L.R.3d 575 (1968). Yet one of the criteria for determining unethical conduct is whether the drafting attorney exercised undue influence in obtaining the devise. Magee v. State Bar, 58 Cal. 2d 423, 24 Cal. Rptr. 839 (1962); Lantz v. State Bar, 212 Cal. 213, 298 P. 497 (1931).

Canon Eleven provides that "[t]he lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by the client."[38] Canon Six in turn declares that "it is unprofessional to represent conflicting interests, except by express consent of all concerned after a full disclosure of the facts."[39] The present Code is more specific in this area. Ethical Consideration 5-5 reads as follows:

> A lawyer should not suggest to his client that a gift be made to himself 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.[40]

While the attorney cannot be accused of impropriety if he insists that the client select other disinterested counsel to draft a benefiting will, the issue arises as to what "exceptional circumstances" will allow the attorney to draft the instrument benefiting himself.

C. Case Law

As has been mentioned, case law has left this area of professional responsibility without precise guidelines. Nevertheless, a search for some kind of pattern discloses four basic rules proffered by the various courts: (1) the absolute prohibition rule; (2) the suspicious practice rule; (3) the modest gift rule; and (4) the intestate devise rule.

1. *The Absolute Prohibition Rule*

This rule states that under no circumstances should the attorney draft a will which names him beneficially. Except for an Oregon case, *In re Jones,*[41] a case which only superficially supports the rule,

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[38] ABA Canons of Professional Ethics Canon 11 (1908). The Ethics Committee of the American Bar Association in interpreting Canon Eleven stated that "in cases where the testator desires to name the lawyer as executor or trustee or to leave him a legacy, the lawyer should consider having the testator submit the will to another prior to its execution." H. Drinker, *supra* note 2.

[39] ABA Canons of Professional Ethics Canon 6 (1969).

[40] Code, *supra* note 1 (emphasis added). Canon Five reads: "A lawyer should exercise independent professional judgment on behalf of a client."

[41] 254 Ore. 617, 462 P.2d 680 (1969).

there appears to be no jurisdiction that has officially condemned such practice as unprofessional in all circumstances.

In *Jones* the drafting attorney was charged with unethical conduct when he, as the sole beneficiary of the testator's estate, failed to advise the testator to seek independent counsel. In reprimanding the defendant the court said:

> Any lawyer should know, without being told, that when a client wants to make a testamentary provision for the benefit of the lawyer, that lawyer should withdraw from any participation in the preparation or execution of the will. Poor judgment does not excuse such an inflexible ethical rule.[42]

On its face, the statement is a powerful prohibition. However, in deciding that the defendant should not be suspended but only reprimanded, the court said the drafting attorney "was charged and found guilty only of failure to insist that his client obtain independent legal advice."[43] Apparently the accused would not have been guilty of unethical conduct if he had insisted "that his client obtain independent legal advice."[44]

2. *The Suspicious Practice Rule*

According to this rule, while the attorney may draft a will which leaves him a legacy such a practice is viewed with a jaundiced eye. If such drafting is coupled with improper conduct, it will be declared an unethical practice. The general principle is expressed *In re Karabatian's Estate.*[45]

In *Karabatian* the attorney drafted a will for the testator in which the attorney received a bequest of $10,000 in addition to being named executor of the estate. Subsequent to the drafting the testator became displeased with the attorney and had another scrivener draw a second will which left the first attorney nothing. In rejecting the attorney's contention that the testator was under an insane delusion at the time this second will was created, the court commented adversely on the attorney's having drafted the first instrument.

> [It is] generally recognized by the profession as contrary to the spirit of its code of ethics for a lawyer to draft a will making dispositions of property in his favor, and this court has held that such dispositions are properly looked upon with suspicion.[46]

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[42] *Id.* at 618, 462 P.2d at 680.
[43] *Id.*
[44] *See infra* note 50.
[45] 17 Mich. App. 541, 170 N.W.2d 166 (1969).
[46] *Id.* at 546, 170 N.W.2d at 169.

The court reasoned further that since a statute invalidated any bequest to a witness, public policy also justifies invalidating a bequest to a scrivener. Thus, "[i]f an attorney's conduct so violates the spirit of the lawyer's code of ethics, it also runs contrary to the public policy of this state. The bequest to contestant being void, he has no standing to contest the later will."[47]

Another case which can be considered representative of the suspicious-practice rule is *Nebraska Bar Association v. Richards*,[48] a case cited in a footnote to Ethical Consideration 5-5. In *Richards* the defendant-attorney drafted several wills for the testarix. In the last of these wills, besides being named the executor, the defendant was named the principle beneficiary of the estate. Decedent's estate was appraised at $86,000, of which the defendant received a cash bequest of $2,000 and a section of land appraised at $34,000 but apparently worth about $45,000. The only heirs at law were a grandniece and a grandnephew. With regard to the propriety of the attorney drafting himself a legacy the court said:

> We do not think respondent was guilty of unethical conduct merely because he drafted a client's will containing a provision therein whereby he became a beneficiary of a part of her estate when, as the record here shows, she insisted he do so. . . . Attorneys for clients who wish to leave them or their families a bequest or devise of part of their property, which they have a perfect right to do, will do well to have the will drawn by some other lawyer. But if a client insists on having his or her attorney draft a will containing such a provision we can see no reason why the attorney should refuse to do so and thereby defeat his client's wishes.[49]

Besides drafting the will, the defendant also served as the estate's attorney in probate. In this latter capacity the defendant sent a copy of the will to the heirs at law. When he sent the instrument, however, he merely noted that the will was then in the process of probation and did not mention that they were the sole heirs at law. This failure to notify the heirs of their full interest was the circumstance which, when coupled with the legacy under the will, made his conduct unprofessional. The defendant had rendered himself subject to a conflict of interest and had sacrificed the interest of the heirs for his own interest. The court said:

> We think the status of respondent required him, when he wrote the Kertons, to make a full disclosure of all facts within his knowledge which were material for them to know for the protection of their interests. His default in this respect, under all of the circumstances here established, constituted a breach of his trust as an attorney.

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[47] *Id.* at 546-47, 170 N.W.2d at 169.
[48] 165 Neb. 80, 84 N.W.2d 136 (1957).
[49] *Id.* at 94-95, 84 N.W.2d at 146.

> . . . It is apparent he was more concerned in making secure his rights under the will than he was of performing his duty as an attorney.[50]

3. The Modest Gift Rule

By this rule the scrivener is not precluded from receiving a legacy under a will, provided the legacy is a modest one. Indicative of the modest gift rule is *Magee v. State Bar of California.*[54] In *Magee* the testatrix executed a will that made three $1,000 bequests to charities, left a neighbor $500 and gave the remainder of the estate to the defendant, in addition to naming him executor. The residue of the estate was ultimately valued at $21,000, a value the defendant claimed he was unaware of when drafting the will. When the will was executed the scrivener asked an attorney from a nearby office to attest the instrument. The attorney, upon discovering the bequest, read the will to the testatrix asking whether each provision was her intent. She responded affirmatively. In evaluating the defendant's conduct, the court set out the modest gift rule.

> There is no rule that attorneys should never draw wills in which they receive gifts. There is nothing improper in an attorney's drawing wills for his family or for relatives, provided the gift to him is reasonable under the circumstances. Similarly, there is nothing improper in drawing wills for close friends or for clients if the gift to the attorney is a modest one. . . . [H]owever, attorneys take a grave risk in drawing wills in which they receive more than a modest gift that is in keeping with the nature of the relationship they have with the client.[52]

The gift to the attorney was by no means a modest one. Nevertheless, the court refused to find the defendant's conduct improper, apparently because the attesting lawyer, albeit on his own initiative, served as a disinterested advisor.

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[50] *Id.* at 101, 84 N.W.2d at 149. Insisting that the client seek independent advice might negate any suspicion which arises by virtue of the scrivener benefiting from the will. Two Oregon cases, *In re* Kneeland, 233 Ore. 241, 377 P.2d 861 (1963), and *In re* Moore, 218 Ore. 403, 345 P.2d 411 (1959), suspended the defendant attorneys from practice for one year because they failed to advise their clients to seek independent advice and also because they persuaded their clients to make the legacies. To the extent that the attorneys were found guilty of unethical conduct with regard to their client's wills, by implication, they might have been exculpated had they not influenced the testators and had they insisted independent advice be sought. *In re* Jones, 254 Ore. 617, 462 P.2d 680 (1969), distinguished these two cases. *Jones* held the defendant should only be reprimanded because he had not influenced the testator but was only guilty of failing to insist his client seek independent advice.

[51] 58 Cal. 2d 423, 24 Cal. Rptr. 839 (1962).

[52] *Id.* at 433, 24 Cal. Rptr. at 845.

4. The Intestate Devise Rule

According to this rule the drafting attorney can take by the will only what he could take by intestacy. A Wisconsin case, *State v. Collentine,*[53] is representative of the intestate devise rule. The testatrix in *Collentine* requested the defendant attorney to draft a will in which he was to be named both executor and sole beneficiary. Since the testatrix was in debt, the defendant knew that he would receive nothing under the will. Nevertheless, the defendant advised her to have other counsel draft the instrument. The testatrix, being a person who "wanted to prove she had control over anybody she was dealing with,"[54] prevailed over the defendant's objections, and he drafted the will. The Wisconsin Supreme Court, in censoring the defendant for unprofessional conduct, held:

> [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 received no more than would be received by law in the absence of a will.[55]

The court concluded:

> When a testator wishes to have his attorney draft a will in which the attorney is entitled to anything more than he would be at law, it is the absolute duty of the attorney to refuse to act. He has the responsibility of advising his client to consult another attorney if he wishes to pursue such a bequest.[56]

D. A Suggested Rule

It is suggested that the following rule be adopted as a guideline for evaluating the propriety of a scrivener drafting himself a legacy: *Except where circumstances do not allow the testator to seek other counsel, the lawyer is absolutely precluded from drafting a will in which he is named a beneficiary.*[57]

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[53] 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

[54] *Id.* at 329, 159 N.W.2d at 52.

[55] *Id.* at 332, 159 N.W.2d at 53.

[56] *Id.* at 332-33, 159 N.W.2d at 53.

[57] This is not to say that the court should punish a scrivener who drafts a benefiting will in conformance with some previous judicial decision of his jurisdiction. Such punishment would, without some kind of notice, constitute unfair surprise. The rule proposed should be brought about by either an interpretation of Ethical Consideration 5-5 to be applied prospectively or by amending the Code.

If the attorney should decide he is justified in drafting a benefiting will, he would do well to follow this advice from Dengler Estate, 13 Pa. D. & C.2d 193, 201-02 (Phila. Co. O.C. 1958): "Failing that [having another attorney draft the will], the interested scrivener should be

Allowing attorneys to draft benefiting wills has certain advantages. The foremost is that it follows the desires of the testator, and the personal fancy of the individual testator is a dominant theme in the law of wills. In addition, it enables attorneys to draft wills for close friends and relatives. Trying to explain to a friend or relative why he cannot draft a benefiting will may cause the attorney some difficulty and may even produce hard feelings. Moreover, if a friend or relative of the attorney takes his will to other counsel, the impression may arise that the attorney is so incompetent that his own friends and relatives do not trust his work.

Granting these advantages, there remain so many potential ethical problems in allowing the scrivener to benefit under the will that the practice should be prohibited. Not the least of these potential problems is a possible conflict of interest. Canon Five of the Code provides that "[a] lawyer should exercise independent professional judgment on behalf of a client."[58] When the attorney drafts a will he stands in a fiduciary relationship with his client. A fiduciary relationship obligates the attorney to insure that his own interest does not clash with that of the testator. The ability of the drafting attorney to live up to this obligation becomes particularly difficult when he obtains a vested interest in a will he has drawn. One area in which this potential clash may manifest itself is where the attorney is requested to testify concerning the will. The attorney may be forced to choose between renouncing his legacy to testify or not testifying with the hope that the will may nevertheless be upheld. Such a problem arose in *State v. Horan*[59] where the drafting attorney avoided the choice by stipulation. The Wisconsin court found that it could not "say the stipulation absolves Horan from creating, in part, the situation which was resolved by the stipulation."[60]

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absolutely certain that testatrix has the knowledge and memory with regard to the classic requisites for making a will, viz., the extent of her assets, the identity of her relatives and those relatives who are the natural objects of her benefactions. This is particularly important where the testatrix is mentally incapacitated."

58 CODE, *supra* note 1.

59 21 Wis. 2d 66, 123 N.W.2d 488 (1963). State v. Horan involved a defendant who drafted six wills for the testator. In each succeeding will the defendant's share of the estate increased as other beneficiaries were either eliminated or had their share reduced. Ultimately, under the fifth will (the sixth will being excluded from probate) the defendant received a legacy and residuary share totalling $38,817.22 in an estate of approximately $265,000. *Horan* is limited by State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

60 21 Wis. 2d at 73-74, 123 N.W.2d at 491.

Another area in which a conflict of interest may arise is with regard to the continuing relationship between a scrivener and his client.[61] The attorney is obligated to inform his client of any change in the law or facts which may affect his client's will. When the attorney is beneficiary under the instrument his willingness to inform his client of a change which might adversely affect that interest may be circumscribed.

Even where the drafting attorney is especially careful to avoid a conflict of interest, his taking a legacy nevertheless creates an appearance of impropriety. This is a violation of Canon Nine.[62] It is almost inevitable that both the public and the press will interpret such a legacy as the product of undue influence. Such adverse publicity brings discredit to both the drafting attorney and the legal profession.

Finally, a gift to the scrivener places the will itself in jeopardy. By creating a possible charge of undue influence the attorney invites a will contest where the instrument might have otherwise gone uncontested. And where there is no rule of partial invalidity the scrivener may be causing harm to other beneficiaries.

The exception that the attorney should be allowed to draft a benefiting will if the testator would be unable to seek other counsel is based on the notion that the advantage of having a will outweighs the possible appearance of undue influence. Of course, circumstances under which the testator would be unable to seek other counsel are rare.

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[61] The duty of the drafting attorney toward his client does not end with the signing of the will. Often events transpire after execution of the will which significantly alter the complexion of that instrument. Changes in legislation, important court decisions, the moving of the testator to another jurisdiction where different laws of descent are in force, changes in economic conditions, and kindred matters may cause the instrument to be markedly different than the one the testator originally intended. Cognizant of such possibilities, the American Bar Association Committee on Professional Ethics and Grievances has said: "It is our opinion that where the lawyer has no reason to believe that he has been supplanted by another lawyer, it is not only his right, but it may even be his duty to advise his client of any change of fact or law which might defeat the client's testamentary purpose as expressed in the will." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 210 (1941).

[62] CODE, *supra* note 1.

V. CONCLUSION

One of the greatest obligations of the attorney to both himself and his profession is to be on a constant guard against creating even the appearance of impropriety. In probate this obligation becomes particularly acute. Because death is the necessary fate of everyone, probate is especially subject to public scrutiny. Aware of the strong need for confidence in the integrity of the legal profession, this comment has proposed the following. First, the probate attorney must avoid the appearance that he is conspiring with commercial institutions to the detriment of his client. Second, the probate attorney must avoid combining witnessing and advocating and thus the possible appearance that he has sacrificed truth for expediency. And finally, the attorney must refrain from drafting benefiting wills and the possible appearance of having unduly influenced his client.

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