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CONFLICTS, COMPETENCE AND CONFIDENTIALITY IN WILL DRAFTING

by
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A client for whom a lawyer is providing estate planning services is one of several nieces and nephews who are the closest relatives of their uncle, a widower. The client asks the lawyer to draft her uncle's will and offers to pay the lawyer if her uncle does not pay. These circumstances are the subject of ABA Formal Opinion 02-428. The issues discussed in the opinion—and two not discussed—are important for all lawyers who prepare estate planning documents on any level, from the simple to the complex.

The fundamental obligation of the lawyer is to "exercise independent professional judgment" on behalf of all clients. In this scenario, the uncle is the client, and the lawyer cannot allow his or her representation of the uncle to be influenced by the niece. The lawyer should make it clear to the niece that he or she cannot protect the niece's interests in the uncle's will. The lawyer should also consider "reject[ing] the niece's offer if the uncle is able to pay the fee himself." Otherwise, the lawyer will be required to obtain the uncle's informed consent to the niece's payment of his bill. See Mass. R. Prof. C. 1.8(f).

The opinion also discusses the lawyer's obligation to maintain client confidences. Both the niece and the uncle should be advised that the lawyer must protect the confidences of the other client. The lawyer should also seek guidance from each client on whether any confidences can or should be disclosed to the other client.

Finally, the opinion discusses the potential conflicts of interest in representing both the niece and the uncle. The opinion concludes that, under the specific circumstances described, there is no conflict because "there is no significant risk that, in the lawyer's concurrent representation of both the niece and her uncle in estate planning services, his representation of either will be materially limited by the representation of the other." See Mass. R. Prof. C. 1.7(b).

The ABA opinion contains valuable discussion of some issues specifically raised by the facts of the hypothetical. When a lawyer is consulted to prepare a will for a testator, the fact that the lawyer also represents a potential beneficiary can create other issues that may also require attention, depending upon the circumstances. Two will be discussed here—the testator's competence and the possibility of undue influence, and the confidentiality of the testator's estate plan.

Using the ABA's hypothetical, what if the uncle is elderly and the situation raises issues of his competence and the possibility of undue influence by his niece? In Logotheti v. Gordon, 414 Mass. 308, 311-312 (1993), the Supreme Judicial Court considered the obligations of an attorney preparing a will in such circumstances and stated:

An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable

determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence. In making the required determination, the attorney must have undivided loyalty to the client.

The lawyer cannot "make reasonable inquiry" about possible undue influence with undivided loyalty to the testator, however, if the inquiry may disclose undue influence by another client to whom the lawyer also owes an obligation of undivided loyalty. It would be a conflict of interest for the lawyer to represent the testator in such circumstances. See Matter of Two Attorneys, S.J.C.-BD-2003-048 (Memorandum of Decision, March 1, 2005), Admonition 05-08, 21 Mass. Att'y Disc. R. ___ (2005) (admonition for attorney who prepared will for elderly widow leaving her estate to another client); Matter of Reynolds, 15 Mass. Att'y Disc. R 497 (1999) (public reprimand for lawyer who prepared estate planning documents for elderly client that benefited other clients).

ABA Opinion 02-428 discusses the issue of possible undue influence to a limited extent. Footnote 14 discusses what to do if "factors emerge making a will contest likely, e.g., the niece is to be unreasonably favored over other potential beneficiaries." The advice is to "discuss with the uncle measures that will reduce or eliminate the likelihood that such litigation would be successful", including having another lawyer do the will. The advice to consider another lawyer is well-placed; in Old Colony Trust Company v. Yonge, 302 Mass. 49, 53 (1938), a finding that a will was procured through undue influence was affirmed in part because the will was prepared by the beneficiary's lawyer and the testatrix "acted without independent and disinterested advice." The teaching of Logotheti, however, requires more of a Massachusetts lawyer than to consult with the uncle about reducing the risk of a will contest.

When there is a suggestion that the niece may be unduly influencing the uncle, Logotheti obliges the lawyer to make inquiry and a "determination" based on reasonable belief that "the testator is competent and free from undue influence." The lawyer cannot proceed with inquiry, however, since the niece is also a client entitled to undivided loyalty. Declining to assist the uncle with his will would therefore be required by Logotheti and not just a tactical option to be discussed with the uncle.

The other potential issue raised by the ABA hypothetical involves the confidentiality requirements between the two clients, the uncle and the niece. As the ABA noted, the lawyer would be required to maintain the confidentiality of each client and could not disclose confidential information to the other client without consent. As a general proposition, this is a standard application of confidentiality obligations lawyers are required to honor for all clients and among all clients, and its application does not change just because the niece might have some curiosity about how her uncle is providing for her in his will.

But assume that the contents of the uncle's will are more than an issue of curiosity for the niece. In order to put this issue in stark perspective, let's add to our hypothetical the fact that the uncle in fact wants to disinherit the niece, and instructs the lawyer not to inform her of this fact. Can the lawyer prepare the will and continue to represent the niece?

ABA Formal Opinion 05-434 considers whether a lawyer can prepare a will disinheriting a beneficiary the lawyer represents in an unrelated matter. The general conclusion is that there is no direct adversity, since the potential beneficiary has no legal right to a bequest, but that the lawyer's ability to give the testator independent advice might be materially limited if the testator seeks advice on whether to disinherit the other client. The opinion also cautions that if the lawyer has provided estate planning services to a number of family members on the basis of shared assumptions, he or she should consider the impact of changing one client's plan on the other family members before proceeding, especially if the client wants the change to remain confidential.

Other than in the "shared assumptions" context, however, neither ABA opinion discusses the

possibility that the uncle's disinheritance of the niece might be material to her—that is, significant or important—on a matter on which the lawyer is representing her. The niece may be depending on her uncle's bequest to fund part of a long-term real estate development. Or she may be about to sign a separation agreement assuming an obligation for her children's college expenses expecting the inheritance to cover those costs.

In these circumstances, the lawyer would want to inform the niece of the disinheritance in order to help her reconsider options, and disclosure would also be required by Mass. R. Prof. C. 1.4(b), which requires a lawyer to explain a matter sufficiently to permit the client to make an informed decision. Disclosure would, however, be a violation of the lawyer's obligation of confidentiality to the uncle. In this circumstance, the materiality to the niece of the disinheritance puts the lawyer in a position of conflict regarding his obligations to the clients. Because of this conflict, the lawyer cannot prepare the will for the uncle and may also be forced to withdraw from representing the niece.

Even if the uncle's estate plan is not material to the lawyer's representation of the niece, practicalities should be considered in representing a testator in disinheriting another client. Picture this phone call. You prepared the will for the uncle disinheriting the niece, the uncle has just died, and the niece is on the phone. She wants to meet with you right away to plan the business expansion she will fund with her inheritance. At some point, either in this conversation or the next, you will have to tell the niece not only that her uncle did not include her in the will, but that you prepared the will that disinherited her. At a minimum, this will probably cost you a long-term client.

As both ABA opinions stress, preparing a will for one client that will affect another client requires consideration of a number of ethical constraints. In considering such a representation, the obligation to provide each client with independent professional judgment should be the starting point. As the hypotheticals considered here show, the lawyer must consider not only conflicts of interest between the clients but also conflicts in the lawyer's obligations to the clients. Full consideration of the clients' interests and the lawyer's obligations in any given situation will go a long way toward assuring the ethical practice of law.

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