

**REPORT...**  
**LAWYERS PROFESSIONAL**  
**RESPONSIBILITY BOARD**

By

Michael Hoover, Administrative Director  
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* (November 1980)

Ethical problems involving estate planning have recently been drawn to the attention of our office. Two practices have been especially troublesome. They are, first, the drafting of instruments in which an attorney or his family members are named as beneficiaries, and second, drafting a will which names the attorney as the personal representative.

In 1969, the Minnesota Supreme Court, in *In re Estate of Peterson*, 283 Minn. 446, 168 N.W.2d 502 (1969), held that even in the absence of undue influence, the practice of an attorney drafting a will in which he or members of his immediate family, who are not the natural objects of the testator's bounty, are named as beneficiaries, raises serious problems of professional responsibility. The Court cited several Wisconsin cases establishing an absolute prohibition in cases where an attorney drafting a will, whether for a relative or not, would be named to receive more than what he would receive if the client died intestate. The same prohibition would apply to bequests to family members of the attorney.

The *Peterson* court outlined the proper procedure:

"Appellant would easily have avoided the effects of this rule by referring decedent to another attorney for a discussion of her wishes, independent advice, and preparation of her will. Such adherence to what we view as a proper standard of professional conduct would have provided disinterested testimony that decedent did in fact intend his [attorney's] children to inherit her estate and quite probably would have avoided placing of the will in jeopardy."

The policy enunciated in *In re Peterson* is consistent with EC 5-5, which provides as follows:

"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."

The underlying policy of EC 5-5 and various ethics opinions and court decisions is grounded in several practical considerations. First, it is obvious that a client is entitled to full and disinterested advice concerning an estate plan. If an attorney or family member is named as a beneficiary the attorney's private interests may conflict with those of the client. Second, it is obvious that an instrument drafted by an attorney who has such a pecuniary interest is peculiarly susceptible to attack on the grounds of undue influence, fraud, and overreaching. Such an attack on a will or another instrument may completely frustrate the wishes of the client, and even where the instrument is sustained, may well result in unnecessary legal proceedings, expense and bitterness.

It is our belief that to be safe, an attorney should not draft a will in which he or a family member is named as a beneficiary unless he or the family member is a natural object of the bounty of the testator, and he or the family member will take no more than he or the family member would take if the decedent died intestate.

It has even been suggested in ABA Informal Opinion 1145 (1970) that:

“ . . . The ethical lawyer should prudently suggest that even his own spouse claim the counsel of an independent lawyer when the circumstances raise any reasonable doubt that the will of the spouse would be legally enforceable.”

We do not undertake, at this time, to decide the exact circumstances under which an attorney may or may not draft a will for a spouse, but we do caution that even with respect to wills for immediate family members, the ethical and legal consequences should be considered by the attorney before drafting the will.

An attorney drafting a will naming himself as personal representative also risks charges of solicitation, as well as undue influence, overreaching, and the appearance of impropriety. EC 5-6 provides:

“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.”

Conscious suggestions to a client to name an attorney as attorney or personal representative have long been held improper. ABA Informal Opinion 602 (1963) held in part:

“ . . . The customary and regular inclusion of provisions in wills directing the retention of the services of the attorney drawing the will, without the specific request or suggestion of the client is clearly . . . improper.”

Conscious influence of a client in this area may thus violate the solicitation prohibitions of the disciplinary rules.

We cannot possibly define all of the circumstances under which the practices above may or may not

give rise to discipline. We can inform the bar that in at least one case, an attorney was privately disciplined for naming an immediate family member as a beneficiary of the estate of a client. The discipline was limited to a private reprimand in whole or in part because it appeared that there was no actual undue influence. We do, however, caution that such complaints are received with some regularity and are all carefully reviewed to ensure that attorneys have abided by the ethical considerations cited above.