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[COMMENTARY]

THE RISKS OF DRAFTING WILLS FOR FAMILY AND FRIENDS

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At some point, every lawyer receives a telephone call from a family member or friend that starts off with, "I need your help with a simple will." For many lawyers the legal issues involved in drafting a will, simple or not, are way outside the scope of their ordinary practice.

Careful attorneys may wonder what the ramifications are of representing family members and friends in areas outside their normal practice. And, they may wonder if there are risks associated with trying to help family and friends — help that can result in the formation of an attorney-client relationship with all the attendant duties.

Lawyers should begin the analysis by asking themselves if they are competent to handle such representation. Texas Disciplinary Rule of Professional Conduct 1.01(a), which deals with competent and diligent representation, provides that: "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence."

The disciplinary rules implicitly recognize that the law is becoming highly specialized and it may not be proper for an attorney to accept a representation outside his usual area of practice. Nevertheless, the disciplinary rules do provide an exception that permits a lawyer to undertake a representation that he is otherwise not competent to handle. For instance, Rule 1.01(a)(1) allows a lawyer who is otherwise not competent to handle the representation to go forward with it when "another lawyer who is competent to handle the matter is . . . associated in the matter." While I do not want to sound too jaded, the problem with the exception is that it may defeat the loved one's goal of getting free, or near free, legal advice.

The question the lawyer with the family relationship (the related lawyer) needs to ask is why is he getting involved? Is it merely to act as an "interpreter" for the family member? Is it to facilitate providing family information to the associated lawyer who will perform the legal services? There can be many reasons for having the related lawyer involved in the representation. He may be familiar with the parties involved. He may know the family dynamics and may be able to facilitate the completion of the representation. On the other hand, the related lawyer may be invested emotionally in the issues at hand and may lack the objectivity that is one of the hallmarks that a competent lawyer exercises on behalf of a client.

Of course, the question still remains: Is the representation of the family member worth the risk of venturing into a new area of practice for the related lawyer, and can that risk be minimized? Rule 1.02 of the disciplinary rules allows a lawyer to limit the scope of a representation and thus endeavor to minimize its risks. Rule 1.02(b) provides: "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation."

Thus, Rule 1.02(b) would allow the related lawyer to identify specific aspects of the representation for which he will be responsible. For example, the related lawyer might try to limit his participation in the representation to assisting in obtaining information on specific issues to be addressed in the will and

leave the drafting of and counseling on the will to the associated lawyer. The related lawyer will have to gauge the extent to which his family member will try to keep him involved in all aspects of the representation, thereby possibly undercutting the Rule 1.02(b) limitations the related lawyer is trying to impose on the representation.

Assuming the related lawyer decides to engage in the representation, he may wonder what other potential ethical traps exist for him. One such trap is that the related lawyer may not be able to accept a gift under the will.

Texas Disciplinary Rule of Professional Conduct 1.08(b), regarding prohibited transactions, provides that: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as a parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."

Comment No. 3 to Rule 1.08 acknowledges that "Paragraph (b) recognizes an exception where the client is a relative of the donee or the gift is not substantial." To determine who qualifies as a relative of the donee, look to Texas Probate Code §58(b). For wills executed on or after Sept. 1, 1997, §58(b) provides that a devise or bequest of property in a will to an attorney who prepared the will is void unless the attorney is related to the testator, within the third degree by consanguinity (blood) or affinity (marriage), regardless of whether the gift is "substantial." For example, parents and children are related within the first degree of consanguinity and affinity. Brothers, sisters, grandparents and grandchildren are related within the second degree. Aunts, uncles, great-grandparents and great-grandchildren are related within the third degree. Notably, great-great-grand parents, great-great-grandchildren, great-aunts, great-uncles and cousins are not closely enough related within the meaning of the probate code. Thus, a gift to them will be void as long as the will was executed after Sept. 1, 1997. For wills executed before Sept. 1, 1997, Texas appellate courts have held that testamentary gifts of an entire estate or stocks, bonds, cash and bank accounts valued at more than $2 million are substantial and are prohibited as substantial gifts.

Not So Simple

A related lawyer who manages to skirt the problems of competence and of an improper gift may still find himself subject to other potential risks. Texas historically has protected estate-planning and probate lawyers from legal-malpractice suits brought by disgruntled beneficiaries after the testator's death. In *Barcelo v. Elliott* (1996), the Texas Supreme Court found that even though a lawyer always owes a duty of care to a client, no such duty was owed to a nonclient beneficiary, even if the beneficiary was damaged by the lawyer's malpractice. According to the opinion, the policy reason behind *Barcelo* was that threats of suits by disappointed heirs could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, thus compromising the quality of the lawyer's representation.

The Texas Supreme Court revisited the issue of who can sue an estate-planning or probate lawyer for malpractice after a client's death in *Belt v. Oppenheimer, Blend, Harrison & Tate Inc.* (2006). In *Belt*, the court opined that the executors of an estate may sue the lawyer who drafted a will and advised the testator on asset management. It is not uncommon for a testator to live for another 10 or 15 years after the drafting of the will. Practically speaking, an administrator of an estate often is not appointed until many years after the drafting of the will.

Accordingly, the statute of limitations for malpractice suits against lawyers who draft or advise on the drafting of wills can be open-ended. Upon the death of the testator, and after the administrator is appointed, it is now possible for the administrator to sue the lawyers who represented the testator. Thus, a related lawyer with the benevolent intention of helping a loved one could, after many years, be on the wrong end of a malpractice suit. This could be a painful way to acquire a deeper understanding of the adage, "No good deed goes unpunished."

Lawyers who do not regularly handle estate and probate matters will continue to be asked to help their family and friends with their "simple wills." Hopefully, careful related lawyers will evaluate the risks posed by these requests in light of the disciplinary rules and potential malpractice exposure. At the end of the day, perhaps the cleanest and best response may still be: "While I don't handle such matters, I know several lawyers who do." TNL

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