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MAHONING COUNTY BAR ASSOCIATION v. THEOFILOS: FUMBLING FOR A STANDARD

INTRODUCTION

Theoretically, a practicing attorney in Ohio must tailor his conduct to meet certain minimum professional standards adopted by the Ohio Supreme Court.¹ In reality however, an attorney suddenly may find himself confronted with a disciplinary proceeding because of judicial inconsistency and ambiguity within the Code of Professional Responsibility. In *Mahoning County Bar Ass'n v. Theofilos*,² the Ohio Supreme Court faced an issue representative of "borderline" conduct.³ Unfortunately, the court sidestepped this timely opportunity to provide some much-needed guidance for the legal profession. In *Theofilos*, the attorney knew a client only four months before drafting a will for her which named the attorney and his son as beneficiaries. Subsequently, the attorney received a one-year suspension.⁴

BACKGROUND

An attorney whose practice includes estate planning and will-drafting may often engage in conduct which, albeit commonly acceptable by fellow probate practitioners, brushes precariously close to Code violations. Prevalent examples include: the drafting attorney's "safekeeping" a client's will in the attorney's office,⁵ the drafting attorney being named as executor of the estate,⁶ and the drafting attorney being named as a beneficiary in the client's will. The situation in which the drafting attorney is also a beneficiary raises the most serious questions of ethical conduct. This dual status places the attorney in a position to alternatively gain and lose a great deal because "there are serious professional, ethical, and practical considerations at stake in connection with such a gift that may far

¹The Ohio Supreme Court adopted the Ohio Code of Professional Responsibility [hereinafter Code] in 1974. The preface to the Code explains that the Disciplinary Rules are mandatory, and establish the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." However, the Ethical Considerations [hereinafter EC] of the Code are "aspirational in character and represent objectives toward which every member of the profession should strive."

²36 Ohio St. 3d 43, 521 N.E.2d 797 (1988).

³See generally Johnston, *An Ethical Analysis of Common Estate Planning Practices--Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57 (1984). Johnston observes that "many of the practices have gone unquestioned, and many of the lawyers engaged in estate planning do not fully appreciate the ethical concerns that their activities raise." *Id.* at 59. See also *State v. Beaudry*, 53 Wis. 2d 148, 156 191 N.W.2d 842, 846 (1972), wherein the court stated, "An attorney who sees how close he can come to the line of demarcation always runs the risk of overstepping."

⁴*Theofilos*, 36 Ohio St. 3d 43, 521 N.E.2d 797 (1988).

⁵See Johnston, *supra* note 3, at 125. Johnston states that by safekeeping a client's will, an attorney may be unethically soliciting future employment because after the testator dies, the executor must obtain the will from the drafting attorney.

⁶*Id.* at 88 & n.191. Such conduct may violate EC 5-6 of the Code, which states in part that "a lawyer should not consciously influence a client to name him as executor . . . in an instrument." See *supra* note 1. See generally Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456 (1972).

outweigh any pecuniary advantages.”⁷ Typically, the attorney-as-beneficiary case arises in two contexts: (1) in disciplinary proceedings brought against the attorney-beneficiary,⁸ or (2) in challenges to a will which names the attorney as beneficiary.⁹

Historically, courts have cast suspicious glances upon the attorney who drafted a will in which he was named as a beneficiary.¹⁰ However, early American courts were receptive to leaving certain options open to the drafting attorney. Indeed, one early case¹¹ stated:

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 that 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.¹²

*State v. Horan*¹³ was the first case to articulate the strict rule that beneficiaries should not serve as drafting attorneys. Here, the Wisconsin Supreme Court diluted the standard by listing several exceptions: “A lawyer may draft a will for his wife, his children, or his parents, or other close relatives, in which he is a beneficiary and stands in the relationship to the testator as one being the natural object of the testator's bounty.”¹⁴ Faced with similar circumstances, the Wisconsin Supreme Court attempted to rearticulate and trim the *Horan* guidelines five years later in *State v. Collentine*.¹⁵

⁷Schwab, *The Lawyer as Beneficiary*, TEX. B.J. 1422 (1982); see also *Magee v. State Bar of Cal.*, 58 Cal. 2d 423, 430, 374 P.2d 807, 811, 24 Cal. Rptr. 839, 843 (1962), wherein the court stated, “[A]ll business dealings between attorney and client whereby the attorney benefits are closely scrutinized for any unfairness on the attorney's part.”

⁸See, e.g., *Magee v. State Bar of Cal.*, 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962); *State v. Horan*, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); *Columbus Bar Ass'n v. Ramey*, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972); *In re Krotenberg*, 111 Ariz. 251, 527 P.2d 510 (1974).

⁹See, e.g., *Estate of Pedrick*, 505 Pa. 530, 482 A.2d 215 (1984). In *Pedrick*, the attorney visited the dying testator in the hospital and drew a will which named him beneficiary. The Pennsylvania Supreme Court disallowed the distribution and noted that the attorney's conduct “shocks the conscience of this Court.” *Id.* at 546, 482 A.2d at 223.

¹⁰For a brief historical discussion in this area, see Schwab, *supra* note 7, at 1422, who writes that, under Roman law, “one who wrote himself heir in a will could take no benefit thereunder.”

¹¹*Magee*, 58 Cal.2d 423, 374 P.2d 807, 24 Cal. Rptr. 839. In *Magee*, the California Board of Bar Governors charged that the defendant “abused the confidence placed in him” by his elderly client and recommended a two-year suspension from practice. The California Supreme Court noted that an attorney who drafts a will naming himself as a beneficiary takes certain risks. However, the court held that the defendant rebutted the presumption of undue influence which arose in drawing the will because another attorney had witnessed the will, taken the testator aside, and questioned her about her wishes and whether the will accurately reflected those wishes. *Magee*, 58 Cal.2d at 429-30, 374 P.2d at 811, 24 Cal. Rptr. at 843.

¹²*Id.* at 433, 374 P.2d at 813, 24 Cal. Rptr. at 845.

¹³21 Wis. 2d 66, 123 N.W.2d 488 (1963). In *Horan*, the Wisconsin Supreme Court reprimanded an attorney who drew several wills for close friends, all naming the attorney as a beneficiary. The court noted that the attorney should have “insisted that a disinterested attorney of the client's own choosing be engaged to draft the will . . . , or at least he should have taken such action with his client's consent and approval after being fully advised as would make available the testimony he foreclosed himself from giving by becoming a beneficiary.” *Id.* at 73, 123 N.W.2d at 491.

¹⁴*Id.* at 74, 123 N.W.2d at 492.

In order to prevent future misunderstandings, we conclude and establish as a rule for prospective application that 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 receives no more than would be received by law in the absence of a will. Under any other circumstances in which the lawyer-draftsman is a beneficiary, this court will conclude that the preparation of such a will constitutes unprofessional conduct.¹⁶

Mounting judicial intolerance for wills which named a drafting attorney as a beneficiary resulted in the Wisconsin Supreme Court revising its position. In *State v. Gulbankan*,¹⁷ the court held that the *Collentine* standard should be extended to prohibit the drafting of a will in which a close relative of the attorney is a beneficiary.¹⁸ Attorney Gulbankan received a sixty-day suspension for drafting a will for a longtime friend who named Gulbankan's sister as beneficiary.¹⁹

In *Columbus Bar Ass'n v. Ramey*,²⁰ the Ohio Supreme Court held that an attorney who drafted both a will and trust which named him sole beneficiary and trustee "clearly" violated EC 5-5.²¹ Attorney Ramey was given only a public reprimand.²² While it may have been out of step with its judicial peers,²³ this disciplinary measure serves as an important piece in the evolution of a growing

¹⁶*Id.* at 332, 159 N.W.2d at 53. The *Collentine* court noted that, though the standard may result in "occasional inconvenience" to attorneys, "the problems that are inherent in the drawing of an unnatural will far outweigh such inconveniences." *Id.* at 333, 159 N.W.2d at 53-54. *But see* Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D. 1980), which rejected the "strict" approach of *Collentine* and held that, "under exceptional circumstances" an attorney may draw a will naming himself as a beneficiary. *Id.* at 442. The court found that the attorney's close, lifelong relationship with the testator, and the testator's insistence, after disclosure, that the attorney draft his will, constituted exceptional circumstances. For a case involving another adamant client, see *In re Barrick*, 87 Ill. 2d 233, 429 N.E.2d 842 (1981).

¹⁷54 Wis. 2d 599, 196 N.W.2d 730 (1972).

¹⁸*Id.* at 604, 196 N.W.2d at 732.

¹⁹*Id.* at 599, 196 N.W.2d at 730.

²⁰32 Ohio St. 2d 91, 290 N.E.2d 831 (1972).

²¹*Id.* at 98, 290 N.E.2d at 835. The court also weighed other factors in its decision, including the attorney's short acquaintance with the testator, and the testator's condition as a "distressed, confused woman. . . ." *Id.* at 98, 290 N.E.2d at 836. EC 5-5 of the Code 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 overreached 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.

²²*Ramey*, 32 Ohio St. 2d at 100, 290 N.E.2d at 837.

²³*Cf.* Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa 1979) (an attorney who drafted several wills which named him contingent beneficiary and executor received an indefinite suspension); Committee on Professional Ethics v. Sylvester, 318 N.W.2d 212 (Iowa 1982) (an attorney who drafted a will for a close friend and was named a beneficiary received an indefinite suspension for his conduct, both in drafting the will and in delaying probating the estate; *Krotenberg*, 111 Ariz. 251, 527 P.2d 510 (1974) (an attorney who drafted a will which named him beneficiary violated his "fiduciary duty" to his client and received a six-month suspension); *Gulbankan*, 54 Wis. 2d 599, 196 N.W.2d 730 (1972) (an attorney who drafted a will for a long-time family friend, which named the attorney's sister as beneficiary, received a sixty-day suspension).

contempt for such conduct.

The formulation of the present accepted standard, commencing with *Horan*,²⁴ tightened in *Collentine*,²⁵ and fine-tuned in *Gulbankan*,²⁶ evinces a spreading intolerance for the attorney-beneficiary in a client's will.²⁷ In *Theofilos*,²⁸ the Ohio Supreme Court missed a prime opportunity to set the modern standard for Ohio, while simultaneously furthering the goal of promoting an ethical bar.

FACTS

*Mahoning County Bar Ass'n v. Theofilos*²⁹ arose out of a complaint filed in 1986 by the Mahoning County Bar Association against attorney Gus K. Theofilos, alleging a single count of misconduct.³⁰ The Bar Association later amended its complaint to charge specifically that Theofilos violated Disciplinary Rules 1-102(A)(4)³¹ and 5-101(A),³² and Ethical Considerations 5-5³³ and 5-6³⁴ of the Ohio Code of Professional Responsibility in preparing a will for Philomena G. Dailey.³⁵

Philomena G. Dailey retained Gus K. Theofilos in 1984 to probate the will of her sister Elizabeth Dailey.³⁶ Elizabeth's will had named Philomena as executor.³⁷ Both Elizabeth and Philomena had executed identical wills, each leaving her respective assets to the other.³⁸ Theofilos informed Philomena that, because Elizabeth had predeceased her, Philomena's will could be ineffectual and, as a result, Philomena's assets would pass to her next of kin.³⁹ Philomena regularly visited Theofilos' office for personal matters during the last three months of 1984.⁴⁰

²⁴21 Wis. 2d 66, 123 N.W.2d 488 (1963).

²⁵39 Wis. 2d 325, 159 N.W.2d 50 (1968).

²⁶54 Wis. 2d 599, 196 N.W.2d 730 (1972).

²⁷For a discussion of other standards, see generally Comment, *supra* note 6, and Johnston, *supra* note 3.

²⁸36 Ohio St. 3d 43, 521 N.E.2d 797 (1988).

²⁹*Id.*

³⁰*Id.*

³¹Disciplinary Rule 1-102(A)(4) [hereinafter DR] of the Code provides in part as follows: "A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

³²DR 5-101(A) of the Code provides as follows: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property or personal interests."

³³See *supra* note 1.

³⁴EC 5-6 of the Code provides as follows: "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 to avoid even the appearance of impropriety."

³⁵*Theofilos*, 36 Ohio St. 3d at 45, 521 N.E.2d at 798.

³⁶*Id.* at 43, 521 N.E.2d at 797.

³⁷*Id.*

³⁸*Id.* at 44, 521 N.E.2d at 797.

³⁹*Id.* at 44, 521 N.E.2d at 797-98.

⁴⁰*Id.* at 44, 521 N.E.2d at 798. The last three months of 1984 was the time period during which Theofilos handled Elizabeth's estate. *Id.*

Their discussions turned to Theofilos' son Ian, and Theofilos testified at the Board of Commissioners' hearing that Philomena had expressed interest in Ian's education.⁴¹

In January, 1985, Philomena told Theofilos that she wanted him to draft her a new will in which she would leave her savings bonds to Ian, for his education.⁴² Theofilos testified that on several occasions he suggested to Philomena that she consider retaining another attorney to draft the will.⁴³ She declined, saying, "I don't think I want to go to any other attorney."⁴⁴ Eventually, Theofilos did draft the will which named his son and himself as beneficiaries.⁴⁵ Philomena died on June 18, 1985.⁴⁶ Philomena's entire estate did not pass through probate, as Theofilos had established joint and survivorship bank accounts in both their names.⁴⁷

The Board of Commissioners on Grievances and Discipline of the Bar found that Theofilos violated EC 5-5 because he "did not 'insist' that [she] consult other 'independent counsel' before he drafted her will, but merely suggested that she 'consider' seeing another attorney."⁴⁸ The Board also relied on the fact that Theofilos became acquainted with Philomena over a period of only four months before he drafted her will, and that Theofilos offered no evidence to "offset [his] particular susceptibility to charges of undue influence."⁴⁹ The Board concluded that Theofilos' conduct violated DR 1-102(A)(6),⁵⁰ and recommended that he be suspended from practice in Ohio for six months.⁵¹

The case arrived at the Ohio Supreme Court on certified report by the Board.⁵² The court, in a per curiam opinion, agreed that Theofilos violated DR 1-102(A)(6).⁵³ The scanty one-paragraph opinion adopted, without explanation, the Board's findings, but found that Theofilos' conduct required a more severe sanction than six months. Thus, it ordered him suspended for one year.⁵⁴ Justice Holmes dissented, stating that he would require Theofilos to return the money he received as a condition for reinstatement.⁵⁵

⁴¹*Id.*

⁴²*Id.* The savings bonds were valued at approximately \$6,600.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* Theofilos was also named executor of the estate.

⁴⁶*Id.*

⁴⁷*Id.* at 44-45, 521 N.E.2d at 798. The bank accounts were established with Philomena's authorization. *Id.*

⁴⁸*Id.* at 45, 521 N.E.2d at 799.

⁴⁹*Id.*

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.* at 43, 521 N.E.2d at 797.

⁵³*Id.* at 45, 521 N.E.2d at 799.

⁵⁴*Id.*

⁵⁵*Id.* (Holmes, J., dissenting).

ANALYSIS

“The practice of the law is not a business but a profession — a form of public trust, the performance of which is entrusted only to those who can qualify by fitness, not the least of which is good moral character.”⁵⁶ While this statement may be unduly idealistic for the modern attorney, it does serve as a useful paragon by which one should model his practice. However, without proper professional guidance from bar associations, legislatures, and judiciaries, the attorney practices in the dark.⁵⁷ The *Theofilos* court shirked its responsibility to the profession when it: (1) failed to address the true problems inherent in “attorney-as-beneficiary” situations, and thus failed to adopt the appropriate standards for Ohio; and (2) erroneously affirmed the Board’s finding of a DR 1-102(A)(6) violation, when other Code provisions directly address the issue.

The Problems Created by an Attorney-Draftsman Serving as Beneficiary

The problems an attorney faces when drafting a will which names him as beneficiary are manifold. Among these recurrent concerns identified by the courts are: the attorney’s potential conflict of interest, the attorney’s lack of competency to testify in a will contest, the possible ineffectuality of a will if contested,⁵⁸ and an erosion of public confidence in the legal profession.⁵⁹ Additionally, some jurisdictions presume that the testator acted under undue influence when the drafting attorney is also a named beneficiary.⁶⁰ The Ohio Supreme Court held correctly in sanctioning *Theofilos*. Although *Theofilos* suggested that Philomena retain another attorney, he did not “insist” that she do so.⁶¹ His conduct was clearly contrary to the present trend toward absolute prohibition.⁶² Further, his conduct was arguably violative of the lesser standard of EC 5-5, which states that the attorney should “urge” that the testator obtain independent advice.⁶³ Additionally, *Theofilos*’ relationship with Philomena consisted only of her occasional visits to his office, stretched over a mere four-month period.⁶⁴ The brevity and context of the relationship, coupled with the lack of independent advice, accounted for

⁵⁶*Horan*, 21 Wis. 2d at 70, 123 N.W.2d at 489-90.

⁵⁷See Johnston, *supra* note 3, at 59: “[M]any of the lawyers engaged in estate planning do not fully appreciate the ethical concerns their activities raise.”

⁵⁸See *In re Vogel*, 92 Ill. 2d 55, 61 440 N.E.2d 885, 889 (1982) (“thus harming other beneficiaries and possibly nullifying the testator’s intended distribution of his estate.”)

⁵⁹See generally *id.* See also Johnston, *supra* note 3, at 60-61.

⁶⁰See *Younger*, 314 Pa. Super. 480, 494-95, 461 A.2d 259, 266 (1983). See also Comment, *Estate of Younger: Violation of an Ethical Consideration Equals a Legal Presumption*, 45 U. PITT. L.R. 719 (1984).

⁶¹*Theofilos*, 36 Ohio St. 3d at 45, 521 N.E.2d at 799.

⁶²See, e.g., *Collentine*, 39 Wis. 2d at 332, 159 N.E.2d at 53: “When 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.”

⁶³See *supra* note 1.

⁶⁴36 Ohio St. 3d at 45, 521 N.E.2d at 799. See also *Ramey*, 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972) (testator had seen attorney only once).

Theofilos' "particular susceptibility to charges of undue influence."⁶⁵

While the issue of Theofilos' violation of the Code seems clear, the supreme court's reticence in failing to articulate a feasible standard for borderline situations is puzzling. The court's one-paragraph per curiam opinion serves little purpose other than to add to the confusion. The court missed an opportunity to adopt a standard which would put Ohio in line with the growing trend toward absolute prohibition of such conduct, as put forth in *Horan* and *Collentine*. Thus, while the "admonishments and reprimands of the 1950s and 1960s have become the suspensions and disbarments of the 1970's and 1980's,"⁶⁶ Ohio attorneys still lack clear guidelines for ethical conduct.

DR 1-102(A)(6): The Correct Code Section to Apply to the Attorney-Draftsman as Beneficiary?

The Board and the Ohio Supreme Court correctly identified Theofilos' conduct as unethical, and disciplined him in accordance with current practice.⁶⁷ However, when the court adopted the board's finding of a DR 1-102(A)(6) violation, it clouded the underlying issue.

DR 1-102(A)(6) mandates that a lawyer shall not "engage in any other conduct that adversely reflects on his fitness to practice law."⁶⁸ This provision arguably could be construed to address Theofilos' conduct, as the provision is quite broad. However, the Code directly addresses the issue of attorney-draftsmen as beneficiaries in EC 5-5⁶⁹ and in DR 5-101(A).⁷⁰ DR 5-101(A) is the provision of the Code which most directly addresses the major problem inherent in the attorney-draftsman serving as beneficiary. "The potential for abuse in the clash of roles is serious enough that the attorney must be deemed to suffer from a conflict of interest, and some effect (on the attorney's independent professional judgment) must be presumed possible."⁷¹ Therefore, the Code presumes that the attorney who drafts a will in which he is named a beneficiary might be more inclined to protect and secure his own future financial and proprietary interests under the will, at the expense of other, more deserving, beneficiaries. DR 5-101(A) addresses such a potential problem.

No reported cases have been decided solely on DR 1-102(A)(6) violations. That the Ohio Supreme Court chose to do so in *Theofilos* is at least unfortunate.

⁶⁵36 Ohio St. 3d at 45, 521 N.E.2d at 799.

⁶⁶Johnston, *supra* note 3, at 70.

⁶⁷For examples of discipline, *see supra* note 23.

⁶⁸*See supra* note 1.

⁶⁹36 Ohio St. 3d at 45, 521 N.E.2d at 799.

⁷⁰*See supra* note 1. *See, e.g., Vogel*, 92 Ill. 2d 55, 440 N.E. 2d 885 (1982). Although the Board of Commissioners charged Theofilos with a DR 5-101(A) violation, why it did not rest its findings on a violation of this particular provision remains unclear.

⁷¹*Barrick*, 87 Ill. 2d at 233, 429 N.E.2d at 842.

In one sense, the court's message to the bar is clear: such conduct will rarely be tolerated. However, the court leaves unanswered the more important questions: when and why?

CONCLUSION

In *Theofilos*, an attorney drafted a will which named himself and his son as beneficiaries, and received a one-year suspension. The Ohio Supreme Court could have followed a growing trend toward absolutely prohibiting an attorney from drafting a will naming himself as a beneficiary. This trend serves two purposes: (1) it sets out clear guidelines for the practitioner, and (2) it protects the interests of both clients and potential beneficiaries under such wills. However, the court fell short of its obligation to the legal profession by failing to articulate a clear standard of conduct for attorneys in Ohio. Until the court does so, attorneys will continue to walk the boundaries, unaware of exactly when their conduct becomes unethical.

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