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Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition

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I. INTRODUCTION

The question of whether an attorney at law may draft a will for a client in which the attorney names himself a beneficiary is generally an unspoken, yet surprisingly frequent, problem which occurs in the practice of law. In the classic case, the inquiry arises in situations in which elderly clients have had long and trusting relationships with their lawyers, and have no relatives or close friends to whom to bequeath their property. However, the situation often arises in other circumstances as well; for example, when a client wishes to thank her attorney for services which have been or will be rendered, when a client is personally very close to his attorney, and especially when the client is a member of the attorney's immediate family.

Over the years, jurisdictions have attempted to resolve the inherent conflicts implicit in such situations in several different ways.[1] For example, some courts have reacted swiftly and harshly towards attorneys who draft wills for clients in which the lawyers name themselves as beneficiaries, even in cases in which the client has insisted upon it.[2] Most courts have held that a presumption of undue influence arises under various factual circumstances[3] due to the fiduciary nature of the

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1. *See infra* Section III.
2. *See, e.g.*, State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963) (attorney reprimanded for unprofessional conduct).
3. Facts in addition to the setting of the attorney as drafter and beneficiary are often required for the presumption to operate. *See, e.g., In re* Haskell's Estate, 283 Mich. 513, 278 N.W. 668 (1938). *See also infra* Section III.

transaction. The attorney may rebut the presumption, but often only with clear and convincing evidence.[4] A few courts have simply looked the other way.[5] Surprisingly, the Model Code of Professional Responsibility[6] tackled the problem primarily in the form of an Ethical Consideration[7] only,[8] with a mere admonition to avoid the practice if possible.[9] More recently, the Model Rules of Professional Conduct[10] attempt to solve the problem by banning the practice altogether, with seemingly minor exceptions.[11] Far from settling the issue, however, the Model Rules leave certain questions unanswered. This omission tends to create new problems.

A comprehensive inquiry into the subject of testamentary gifts from clients to their scrivener-attorneys has academic as well as practical implications, for the posture of the law has changed considerably over the last three decades. In fact, the law in this area has undergone a remarkable evolution, which evidences a striking, though perhaps unanticipated and unnoticed, transition in the underlying rationale of whether such testamentary gifts should be sanctioned. Indeed, an examination of the changes which have occurred over the last three decades reveals a shift in the substantive underpinnings of the law's treatment of testamentary gifts from clients to their attorneys—from principles of probate law[12] to seemingly hard and fast rules of professional responsibility. A closer look at the past and present state of the law allows certain scholastic considerations to be examined and conclusions to be reached reached, all of which serves to illuminate the complexity of the situation for the practicing attorney. Analysis of the shifts in the law also contributes to the continual search for new ways in which the problems raised by testamentary gifts from clients to their attorneys may be minimized, if not altogether eliminated.

The purpose of this Article is to explore the evolution of the law's treatment of the practice by attorneys of drafting wills for clients in which the attorneys are named as beneficiaries. The Article begins with an exploration of the early probate basis for addressing the practice—specifically, a presumption of undue influence which could only

4. *See, e.g.*, McDowell v. Pennington, 394 So. 2d 323 (Miss. 1981); *In re* Butt's Estate, 201 Cal. 185, 256 P. 200 (1927).
5. *See, e.g.*, Cave v. McLean, 66 Ohio App. 196, 32 N.E.2d 581 (1939).
6. *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE].
7. [Hereinafter EC].
8. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-5 (1980).
9. The ethical considerations of the Model Code were originally intended as aspirational objectives only. *See id.*, Preliminary Statement, at 1c.
10. MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES].
11. *See id.*, Rule 1.8(c).
12. Although "probate" usually refers to the procedure by which a will is proved valid or not, the word is used here in its broadest sense, specifically referring to those rules of property and estate law which regulate testamentary transfers.

be rebutted by clear and convincing evidence. The Article proceeds with an overview of the state of the law prior to the adoption of the Model Code. The transition in the caselaw from probate concerns to ethical ones is then examined, leading up to the Model Code's treatment of the problem. Next, the applicable new Model Rule is analyzed, with particular emphasis on its limitations. Finally, a new rule is proposed which, if adopted, would solve the problem entirely.

II. PROBATE CONSIDERATIONS: THE PRESUMPTION OF UNDUE INFLUENCE AND THE EARLIER STATE OF THE LAW

The precise question of whether an attorney may draft a will for a client in which the attorney names himself a beneficiary can be traced back to antiquity. In ancient Rome, the scrivener of a will could not inherit under it.[13] Although the earlier American decisions were not as oppressive, the circumstance of an attorney naming herself a beneficiary under a will drawn for a client was peculiarly susceptible to charges of undue influence, largely because of the confidential relationship which exists between attorney and client.[14] Most of the earlier cases therefore focused on the concept of undue influence. Delving into the enigmatic nature of the influences which courts consider "undue" is necessary for a complete understanding of the law's early treatment of these cases.

The concept of "undue influence" in probate law resists simplistic definition, primarily because it is an amorphous term used to characterize particular acts or conduct by someone other than the testator which improperly influence a testamentary disposition. The term is easier to recognize than to define.

It seems hackneyed to point out that a testator is free, for the most part, to leave his property to whomever he pleases.[15] Probate law has always permitted wide latitude in the ways in which a person may dis-

13. Digest of Justinian, 48.10.15. *See* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 261 (2d ed. 1953). It seems reasonable to assume that the injunction was mandated in order to protect the authenticity and propriety of testamentary transfers. Indeed, the civil law still imposes such a prohibition. *See* Graham v. Courtright, 180 Iowa 394, 407, 161 N.W. 774, 778 (1917).

14. A confidential relationship may be defined as a fiduciary relationship between two or more parties which results from the unlimited confidence or sense of duty which the relationship naturally creates. The nature of the relationship requires the utmost degree of candor and fair play. *See* G. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 351 (5th ed. 1973).

15. The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor soundness of his memory. He may do what he will with his own; and if there be no defect in his testamentary capacity, and no undue influence or fraud, the law gives effect to the will, though its provisions are unreasonable and unjust.

In re Burns' Estate, 21 Tex. Civ. App. 512, 514, 52 S.W. 98, 99 (1899).

pose of his property upon death. "The right of testamentary disposition of one's property as an incident of ownership, is by law made absolute. It is a valuable right, closely protected by statute and judicial opinion."[16] This seemingly bland premise, however, serves to highlight an extremely important consideration regarding the character of undue influence, since the testamentary preferences must be in accordance with the actual or presumed intent of the testator, and not some other person. Undue influence improperly alters the intent of the testator, which in turn directly affects the testamentary disposition:

> [U]ndue influence . . . mean[s] whatever destroys free agency and constrains the person whose act is under review to do that which is contrary to his own untrammelled desire. It may be caused by physical force, by duress, by threats, or by importunity. It may arise from persistent and unrelaxing efforts in the establishment or maintenance of conditions intolerable to the particular individual. It may result from more subtle conduct designed to create an irresistible ascendancy by imperceptible means. It may be exerted by deceptive devices or by material compulsion without actual fraud. Any species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person signing the instrument.[17]

Undue influence, however, should not be confused with the benign influence which persons exert on one another in the ordinary course of daily activity, such as the influence which results from natural affection.[18] The most frequently used definition of undue influence requires that the influence "destroy the testator's free agency and substitute for his own another person's will."[19] Courts sometimes express the elements necessary to reject a will or one of its provisions for probate on the ground of undue influence as follows: (1) the testator must have been subject to the influence; (2) the opportunity must have existed for the exercise of undue influence at the time the will was executed; (3) the person exerting the influence must have a predisposition to exercise it; and (4) the procurement of the will or provi-

16. *In re* Martison's Estate, 29 Wash. 2d 912, 913, 190 P.2d 96, 97 (1948). In this country, the "right" of testamentary disposition is taken for granted. Because this property right is almost exclusively a creature of statutory law, however, nothing prevents a legislature, in theory at least, from abolishing the right of inheritance altogether. As Justice Jackson pointed out in Irving Trust Co. v. Day, 314 U.S. 556 (1942): "Rights of succession to the property of a deceased . . . are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." *Id.* at 562.

17. Neill v. Brackett, 234 Mass. 367, 369, 126 N.E. 93, 94 (1920).

18. Bollinger v. Arkansas Valley Trust Co., 202 Ark. 525, 531, 151 S.W.2d 675, 678 (1941).

19. *In re* Arnold's Estate, 16 Cal. 2d 573, 575, 107 P.2d 25, 27 (1940).

sion must appear to be the result of the coercion.[20]

Due to the peculiar nature of the confidential relationship between attorney and client, then, the earlier cases concerning clients who gifted property to their scrivener-attorneys naturally often spoke in terms of undue influence, and particularly in terms of a presumption thereof which frequently arose under such circumstances.[21] Unless the presumption was overcome, the gift was usually invalidated. Although the cases were hardly uniform, they were firmly rooted in probate law, which was rarely, if ever, questioned. The caselaw can no doubt be explained, in part at least, by the fact that the only formal ethical guidelines which existed for lawyers prior to the advent of the Model Code were the old Canons of Professional Ethics,[22] which did not specifically address the issue. The only provisions even remotely relevant to the problem were Canons Eleven and Twenty-nine. Canon Eleven, entitled "Dealing with Trust Property," stated in part: "The 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 his client."[23] Canon Twenty-nine, entitled "Upholding the Honor of the Profession," also proclaimed, in part: "[A lawyer] should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."[24]

Many courts thus invoked a rebuttable presumption of undue influence—a probate concept—when the client's will was drawn by an attorney who benefited thereby. Most cases, however, stopped short of holding that the fiduciary relationship between client and attorney alone was sufficient to raise the presumption.[25] The attorney must have also drafted or participated in the drawing of the will in some

20. *See In re* Inda's Estate, 146 Neb. 179, 183, 19 N.W.2d 37, 40 (1945); *In re* Arnold's Estate, 16 Cal. 573, 577, 107 P.2d 25, 27 (1940).

21. Courts often use the words "presumption" and "inference" interchangeably, even though there is a difference between the two. "A presumption affects the duty of producing further testimony, not merely the weight of that already produced. The distinction can be made in that an inference is a permissive deduction, while a presumption is a deduction to be drawn by law." *In re* Estate of Wagner, 265 N.W.2d 459, 463 (N.D. 1978).

22. *See* CANONS OF PROFESSIONAL ETHICS (1908). The Canons were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface (1980).

23. CANONS OF PROFESSIONAL ETHICS Canon 11 (1908).

24. *Id.* Canon 29.

25. The rule was otherwise for *inter vivos* transfers between attorney and client, since the living are presumably in greater need of protection from the consequences of their actions than the dead. *See In re* Cooper's Will, 75 N.J. Eq. 177, 181, 71 A. 676, 677 (1909), *aff'd*, Harrison v. Axtell, 76 N.J. Eq. 614, 75 A. 1100 (1910).

way,[26] or unduly benefited under the terms of the will.[27] For instance, in *In re Lances' Estate*,[28] a lawyer drew a will, which left the entire estate to the attorney, at the request of a mentally competent testator. The Supreme Court of California noted: "Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, . . . a presumption of undue influence [arises] which must be overcome by the [attorney]."[29] Even when the testator freely contracted with his attorney for the attorney to receive a testamentary gift, and the contract appeared fair, the presumption still operated.[30]

Mere opportunity and motive to influence the drafting, however, were not considered sufficient by courts to give rise to the presumption of undue influence, but rather simply raised a suspicion, which amounted to no more than conjecture.[31] In other words, the evidence at least had to be circumstantial. Moreover, attorneys were often able to overcome the presumption. For example, in *In re Cooper's Will*,[32] the attorney who drafted the testatrix's will was her legal advisor and intimate friend for many years. The New Jersey Prerogative Court pointed out:

> Considering the relations of [the testatrix] with [her attorney], the provisions for the [attorney] can hardly be called unnatural, however we may question the wisdom of its bountiful character. It is not unnatural that she should have wished to substantially remember a dear friend with whom, apparently, her business relations had always been satisfactory, and to whose wife and family she had become greatly attached . . . . The only reason that this court has considered at length the question as to whether the will is natural or unnatural is for the purpose of ascertaining whether its provisions sprang from the natural impulse of the testatrix or resulted from coercion.[33]

Attorneys also tended to overcome the presumption if the "client" were an immediate family member,[34] or if the client had received independent legal advice regarding the preparation of the will.[35]

Once the presumption arose, its effect varied according to jurisdic-

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26. *See* Liddle v. Salter, 180 Iowa 840, 847, 163 N.W. 447, 450 (1917).
27. *In re* Butt's Estate, 201 Cal. 185, 188, 256 P. 200, 201 (1927). *See, e.g., In re* Bleil's Estate, 96 Cal. App. 283, 273 P. 1088 (1929), in which the California District Court of Appeal allowed the will to stand, because no affirmative proof was offered to suggest that the attorney, other than being legal advisor to the testatrix, participated in or procured the execution of the will. *Id.* at 288, 273 P. at 1090.
28. 216 Cal. 397, 14 P.2d 768 (1932).
29. *Id.* at 402, 14 P.2d at 770.
30. *In re* Witt's Estate, 198 Cal. 407, 413, 245 P. 197, 202 (1926).
31. *See* Buckner v. Tuggle, 356 Mo. 718, 723-24, 203 S.W.2d 449, 452-53 (1947).
32. 75 N.J. Eq. 177, 71 A. 676 (1909), *aff'd*, Harrison v. Axtell, 76 N.J. Eq. 614, 75 A. 1100 (1910).
33. *Id.* at 189, 71 A. at 680.
34. *See, e.g.*, Evans v. Trimble, 88 Misc. 667, 152 N.Y.S. 333, *rev'd*, 169 App. Div. 363, 155 N.Y.S. 25 (1915), *appeal dismissed*, 217 N.Y. 701, 112 N.E. 1058 (1916) (lawyer prepared a new will for his wife in which he became the favored beneficiary).
35. *See, e.g., In re* Guidi's Will, 259 A.D. 652, 20 N.Y.S.2d 240, *aff'd*, 284 N.Y. 680, 30

tional and even decisional preferences. Courts often spoke of the effect of the presumption as shifting the burden of proof from the contestant to the proponent of the will, but usually this referred to the burden of going forward with the evidence from a legal standpoint, rather than the burden of persuading the fact finder. In one of the better explanations of the presumption's effect, the Florida Supreme Court reasoned:

> What will a rule shifting to the proponent only the burden of coming forward with the evidence mean in practice? First, the burden will be satisfied when the beneficiary comes forward with a reasonable explanation for his or her active role in the decedent's affairs. . . . Second, when the burden is satisfied, the presumption will vanish . . . and the judge will be empowered to decide the case in accord with the greater weight of the evidence. Third, since the facts giving rise to the presumption are themselves evidence of undue influence, those facts will remain in the case and will support a permissible inference of undue influence, depending on the credibility and weight assigned by the trial judge to the rebuttal testimony.[36]

Nevertheless, a few courts actually shifted the burden of proof onto the attorney-proponent once the presumption was raised, which placed the attorney in a virtually untenable position.[37] Other courts chose a "preponderance" evidentiary test to rebut the presumption of undue influence.[38] Many courts decided upon a "clear and convincing" test, largely because of the extremely confidential nature of the attorney-client relationship.[39] Perhaps the best approach, however, can be ascribed to those courts which adopted varying gradations of the proof required to overcome the presumption, depending on the facts of each case:

> The strength of the presumption and the amount of proof required to overcome it must depend upon the circumstances of each case. In the case of a testator who [is] in feeble health, [and who disregards] the claims . . . of his . . . family . . . [and] devises all his property to a confidential adviser, who, alone with the testator, prepares the will and supervises its execution, the degree of proof required to overcome the presumption will be much greater than in the case of one having no near relatives . . . , who [is] in good physical and mental health [and] goes to his legal adviser and has him prepare his will . . . disposing of his property to strangers to his blood . . . .[40]

N.E.2d 723 (1940), *reh'g denied*, 285 N.Y. 540, 32 N.E.2d 829 (1941) (attorney-beneficiary recommended that client consult other counsel for advice).

36. *In re* Estate of Carpenter, 253 So. 2d 697, 704 (Fla. 1971). The meaning of "burden of proof" and the legal effect of a presumption have been extensively treated by commentators, and will not be considered here at length. For a more detailed discussion of the subject, *see* 5 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 434-53 (2d ed. 1923).
37. Since the testator would be unavailable to testify, it would be very difficult for the attorney to prevail. *See also In re* Estate of Carpenter, 253 So.2d 697, 704 (Fla. 1971).
38. *See In re* Inda's Estate, 146 Neb. 179, 182, 19 N.W.2d 37, 41 (1945).
39. *See, e.g., In re* Butt's Estate, 201 Cal. 185, 188, 256 P. 200, 201 (1927); Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 463, 448 N.E.2d 872, 877-78 (1983).
40. Wunderlich v. Buerger, 287 Ill. 440, 445, 122 N.E. 827, 829 (1919).

On the other hand, many of the earlier decisions refused to invoke the presumption of undue influence. "The coincidence that the lawyer who drew the will is also a legatee, without more, does not raise [the] presumption . . . ."[41] Moreover, "the doctrine of independent advice, [has] no pertinency to testamentary gifts," as long as the disposition was clearly understood by the testator.[42] One court expressed its view more eloquently:

> [S]uch a condition of affairs creates no presumption, but merely raises a suspicion which ought to appeal to the vigilance of the court. Such wills are certainly not looked upon with favor. The court will cautiously and carefully examine into the circumstances which are attendant upon their execution, and will scan with a scrutinizing eye the evidence offered to procure their probate. No presumption of undue influence invariably arises from the fact that a will is drawn by a beneficiary under it . . . . It is a fact to be considered with other facts. It is undoubtedly a suspicious fact; but its weight depends, not solely upon its character, but upon the facts and circumstances with which it is connected.[43]

Even the earlier legal annotations noted that a considerable body of caselaw permitted attorneys to draft wills for clients in which the attorney received a legacy or devise.[44] Many commentators seemed to agree. For example, Drinker[45] wrote:

> A question is sometimes raised as to the propriety of a lawyer's inserting in the will a legacy to himself . . . . This, of course, depends on the surrounding circumstances. . . .Where. . . a testator is entirely competent and the relation has been a longstanding one, and where the suggestion originates with the testator, there is no necessity of having another lawyer in the case of a reasonable legacy . . . .[46]

Whether the presumption of undue influence was deemed raised or not, most, if not all, of the early cases addressed the drafting practice in clear-cut terms. A presumption either did or did not operate. The decisions addressed the issue of testamentary gifts in black and white terms with little, if any, consideration given to the grey areas inherent

41. *In re* Bottier's Estate, 150 A. 786, 786 (N.J. 1930).
42. *Id.*
43. Graham v. Courtright, 180 Iowa 394, 407-08, 161 N.W. 774, 779 (1917) (quoting 1 H. UNDERHILL, A TREATISE ON THE LAW OF WILLS § 137 at 195 (1900)). *See also* Swarington v. Swanstrom, 67 Idaho 245, 175 P.2d 692 (1946).
44. *See* Annotation, *Presumption and Burden of Proof as to Undue Influence on Testator*, 66 A.L.R. 228 (1930); Annotation, *Presumption and Burden of Proof as to Undue Influence on Testator*, 154 A.L.R. 583 (1945).
45. H. DRINKER, LEGAL ETHICS (1953).
46. *Id.* at 94 (footnote omitted). Indeed, as late as 1962, at least one court commented:

> 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, providing the gift to him is reasonable under the circumstances. Similarly, there is nothing improper in drawing wills for close friends or clients if the gift to the attorney is a modest one.

Magee v. State Bar of Cal., 58 Cal. 2d 423, 433, 374 P.2d 807, 813, 24 Cal. Rptr. 839, 845 (1962). *See generally* Annotation, *Re Estate of Smith*, 19 A.L.R.3d 559 (1968).

in the situation. Although the question of scrivener-attorneys as beneficiaries may appear to be an easy one, it resists simplistic solution. For instance, what if the client, completely free from any inkling of undue influence, *insists* that her attorney draft a will which names the attorney as a significant beneficiary? The attorney is then placed in an unenviable position in which he virtually is forced either to choose to commit a disservice to his client by not assisting the client to the best of his ability, or to refer the client to another attorney, whose services the client may not want and whom the client may even refuse to consult. Should the attorney accede to the client's wishes or allow the client to forego needed legal counsel altogether? This discussion, of course, bespeaks an obvious fact which most of the early decisions tended to ignore: an attorney's duty to his client sometimes conflicts with his duty to himself and his profession. One court which did address the issue stated: "[T]he attorney placed himself in a very indelicate and highly improper position, which made it necessary for him to produce voluminous testimony . . . ."[47] Many years passed, however, before courts uniformly and consistently became visibly concerned about the clear ethical problems implicit in the situation in which an attorney is named as a beneficiary under a will which he has drafted for a client.

III. THE LATER APPROACHES TO THE UNSETTLING PRESUMPTION PRIOR TO THE MODEL CODE

The discussion thus far illustrates how little uniformity existed among the early cases. Nevertheless, the concept of undue influence continued to reign supreme in most of the later decisions, with scant attention paid to the ethical considerations involved.[48] In order to focus on the evolutionary process from probate to professional responsibility concerns in this area, the differing approaches—finally codified by most jurisdictions prior to the adoption of the Model Code by most states—become relevant and instructive in understanding the approaches ultimately taken by the Model Code of Professional Responsibility and the Model Rules of Professional Conduct.[49] An analysis of these approaches, grouped by category,[50] reveals two basic tenets:

47. *In re* Cooper's Will, 75 N.J. Eq. 177, 194, 71 A. 676, 682 (1909), *aff'd*, Harrison v. Axtell, 76 N.J. Eq. 614, 75 A. 1100 (1910).

48. Although a few decisions did begin to deal more noticeably with the ethical problems inherent in the situation, courts infrequently disciplined attorneys for engaging in the drafting practice, even after the American Bar Association adopted the Model Code in 1969. For a more detailed discussion of the "Law in Transition," *see infra* Section IV.

49. The Model Code was not adopted by the overwhelming majority of states until the late 1970s.

50. Every attempt has been made to delineate categories, and the jurisdictions within those categories, as precisely as possible, although reasonable persons may differ

(1) the overwhelming majority of states eventually adopted a rebuttable presumption of undue influence standard when confronted with the issue, and (2) the burden of proof required to overcome the presumption almost always required clear and convincing evidence.

A. The Attorney-Draftsman Merely as Beneficiary

Courts in a few states chose to treat the situation of the attorney-scrivener as beneficiary in harsh fashion. For example, in *Orr v. Love*,[51] the Supreme Court of Arkansas noted that "[w]hen a will is written . . . by a person benefiting by it, or by one standing in the relation of attorney or counsel, and who is also benefited by it," the circumstances require a presumption of undue influence.[52] In fact, the court, in a later case, went so far as to hold that when a will was drafted by the *primary* beneficiary, whether an attorney or not, the beneficiary-proponent had to prove a lack of undue influence *beyond a reasonable doubt*.[53] Courts in two other states treated the situation similarly. In *Cline v. Larson*,[54] the Oregon Supreme Court adopted a presumption of invalidity of the will or provision, based on undue influence, even when the gift was made to the attorney's secretary rather than to the attorney himself.[55] The Nevada Supreme Court also opted for the severe approach: "[W]hen an attorney drafts a will for a client, and the will contains a gift to the attorney, the law raises a rebuttable presumption that the gift was the result of undue influence."[56] These jurisdictions, then, evidently had little tolerance for the situation in which an attorney drafts a will in which she is named as a beneficiary, even if the lawyer were innocently to insert a gift to herself in a will prepared by her at the direction of her client.

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at times as to the placement of a particular jurisdiction in a particular category, especially since the elements of one category may, at times, arguably overlap with those of another. In addition, certain states, such as Connecticut, Delaware, Hawaii, Idaho, Maine, and New Hampshire appear to have no caselaw directly on point. *See also* Note, *Attorney Beware—The Presumption of Undue Influence and the Attorney-Beneficiary*, 47 NOTRE DAME L. REV. 330 (1971); Note, *Problem Areas in Will Drafting Under New York Law*, 56 ST. JOHN'S L. REV. 459, 473-79 (1982).

51. 225 Ark. 505, 283 S.W.2d 667 (1955).

52. *Id.* at 510, 283 S.W.2d at 670 (quoting McDaniel v. Crosby, 19 Ark. 533, 550 (1858)).

53. Greenwood v. Witson, 267 Ark. 68, 588 S.W.2d 701, 703 (1979). The court evidently believed the circumstance was serious enough to warrant the highest standard of proof to rebut the presumption. *See id.* at 74, 588 S.W.2d at 703.

54. 234 Or. 384, 383 P.2d 74 (1963).

55. *Id.* at 411, 383 P.2d at 86. The Oregon rule was later extended to the situation in which a guardian of an incompetent testator retained the drafting attorney and was then made a beneficiary under the will. *See* Whitteberry v. Whitteberry, 9 Or. App. 154, 496 P.2d 240 (1972).

56. Peterson v. Flanary, 77 Nev. 87, 97, 360 P.2d 259, 271 (1961).

B. The Attorney-Draftsman and the Existence of Suspicious Circumstances

Most courts preferred a less oppressive rule. The courts of two states, in particular, serve as models in their use of a generalized "suspicious circumstances" test. Under the test, if an attorney drafted a will naming himself a beneficiary, and additional circumstances of a questionable or suspicious character surrounded the transaction, a presumption of undue influence arose which could be rebutted only by clear and convincing evidence.[57] The supplemental circumstances, however, needed only be slight, as the New Jersey Supreme Court pointed out in the case of a testator who made an "unnatural" disposition of his property to his attorney, to the exclusion of the natural objects of the testator's bounty.[58] Even if the testatrix was simply influenced by her attorney to choose another particular attorney to draw her will, which named her original attorney as a beneficiary, the presumption operated.[59] Mississippi courts employed a like premise, using the doctrine of presumptive invalidity if the suspect circumstances were attendant to the will's execution.[60] In fact, in *In re Moses*,[61] the Supreme Court of Mississippi disallowed a gift of the testatrix's entire estate to her attorney, who had been an intimate friend for many years, even though the will was prepared by supposedly disinterested counsel.[62] Maryland courts also favored a kind of presumptive invalidity test. If an attorney largely benefited from a will prepared by him, any dispute which later arose between attorney and client rendered the will or bequest prima facie invalid.[63] Again, once the presumption arose, clear and convincing evidence was necessary to rebut it.[64]

1. "Active Involvement" in the Preparation or Execution of the Will

Courts in many other states, however, were somewhat less restrictive in their approach, and required that the suspicious circumstances be more particularized in order for the presumption to arise. Specifically, the attorney must have been actively engaged or involved or have participated in the procurement, preparation, or execution of the will. Florida courts epitomized this approach: not only did the attorney have to draft the will and name himself a beneficiary, but he also

57. *In re* Davis' Will, 14 N.J. 185, 101 A.2d 521 (1953).
58. Blake v. McConnell, 21 N.J. 50, 56, 120 A.2d 745, 747-48 (1956).
59. *In re* Estate of Lehner, 142 N.J. Super. 56, 60, 360 A.2d 400, 406 (1975).
60. Bilello v. Smith, 317 So. 2d 916, 918 (Miss. 1975).
61. 227 So. 2d 829 (Miss. 1969).
62. *Id.* at 834.
63. Cook v. Hollyday, 185 Md. 656, 668, 45 A.2d 761, 766 (1946).
64. *See, e.g.*, McDowell v. Pennington, 394 So. 2d 323, 325 (Miss. 1981).

had to actively procure, in some way, the execution of the will.[65] However, one Florida case defined "active procurement" very broadly, using such criteria as: (1) whether the attorney-beneficiary was present at the execution of the will; (2) whether the attorney-beneficiary was present on those occasions when the testator expressed a desire to make a will; (3) whether the attorney-beneficiary recommended a specific attorney to draw the will; (4) whether the attorney-beneficiary knew the contents of the will prior to its execution; (5) whether the attorney-beneficiary gave instructions to the attorney drafting the will regarding its preparation; (6) whether the attorney-beneficiary secured witnesses to the will; and (7) whether the attorney-beneficiary retained possession of the will subsequent to its execution.[66]

Most courts using the "active involvement" test, however, used more general language: the attorney simply had to involve himself with the preparation and execution of the will,[67] or affirmatively concern himself in some way with its execution and preparation.[68] The more generalized language allowed courts more leeway to tailor their decisions to the facts of each case.[69] For instance, the Indiana Supreme Court applied the rule to situations in which a member of the attorney's immediate family was named as a beneficiary rather than the attorney himself,[70] and the Iowa Supreme Court demanded that the legacy to the attorney be large in comparison with the total value of the estate.[71]

2. *"Unduly Profiting" Under the Will*

Many more states used a somewhat different test to pinpoint the concept of "suspicious circumstances." These jurisdictions, for the most part, used langauge to the effect that the attorney had to "substantially benefit" under the will,[72] receive the bulk of the testator's

65. Zinnser v. Gregory, 77 So. 2d 611 (Fla. 1955).

66. *In re* Estate of Carpenter, 253 So. 2d 697, 702 (Fla. 1971).

67. Hollon's Executor v. Graham, 280 S.W.2d 544 (Ky. 1955).

68. Gehm v. Brown, 125 Colo. 555, 245 P.2d 865 (1952); *In re* Estate of Swan, 4 Utah 2d 277, 293 P.2d 682 (1956).

69. *See* Hubbell v. Houston, 441 P.2d 1010, 1018 (Okla. 1968). *See also* Burke v. Thomas, 282 Ala. 412, 211 So. 2d 903 (1968); *In re* Estate of Cocanougher, 141 Mont. 16, 375 P.2d 1009 (1962); *In re* Estate of Garfield, 192 Neb. 461, 222 N.W.2d 369 (1974); Hummer v. Betenbough, 75 N.M. 274, 280, 404 P.2d 110, 115 (1965); McNeill v. McNeill, 223 N.C. 178, 25 S.E.2d 615 (1943); Apollonio v. Kenyon, 101 R.I. 578, 596, 225 A.2d 778, 788 (1967); Taliaferro v. Green, 622 S.W.2d 829, 837 (Tenn. Ct. App. 1981).

70. Sweeney v. Vierbuchen, 224 Ind. 341, 66 N.E.2d 764 (1946).

71. Olsen v. Corporation of New Melleray, 245 Iowa 407, 414, 60 N.W.2d 832, 837 (1953). *See In re* Estate of Ramsey, 252 Iowa 48, 105 N.W.2d 657 (1960).

72. *In re* Estate of Vollbrecht, 26 Mich. App. 430, 436, 182 N.W.2d 609, 613 (1970).

property,[73] be designated as the principal,[74] major, main,[75] or substantial[76] beneficiary, or somehow "unduly profit"[77] under the will. As the Supreme Court of South Dakota demonstrated in two cases, the term "unduly profit" could also be interpreted broadly to encompass both a situation in which an attorney drafted a client's will under which the attorney received the entire estate,[78] and also a situation in which the attorney-beneficiary was not a natural object of the testator's bounty.[79] The Illinois courts concurred, holding that, even if the testator's attorney were merely named trustee of a large trust and had broad discretionary powers, a good deal of proof would be required in order to overcome the presumption of undue influence.[80] Minnesota courts held likewise if the attorney-scrivener's children[81] or father[82] was named beneficiary. In New York, a similar rule was observed.[83] Although attorneys sometimes prevailed over the contestants of a will, the New York courts emphasized that, in order to rebut the presumption by clear and convincing evidence, the attorney had to adequately explain the circumstances of the gift and show that the gift was made freely and willingly by the client.[84]

C. The Attorney-Draftsman and Statutory Prohibition

Only one state, Kansas, has a statutory provision which directly addresses the circumstance of an attorney who receives a gift under a will which he has prepared.[85] The statute states, in relevant part:

> If it shall appear that any will was written or prepared by the sole or principal

73. *In re* Estate of Teed, 288 P.2d 921, 922 (Cal. Dist. Ct. App. 1955).
74. *In re* Estate of Thompson, 1 Ariz. App. 18, 23, 398 P.2d 926, 931 (1965). *See also* Paskvan v. Mesich, 455 P.2d 229 (Alaska 1969); *In re* Nelson's Estate, 72 Wyo. 444, 266 P.2d 238 (1954).
75. *See* Croft v. Snidow, 183 Va. 649, 651, 33 S.E.2d 208, 211 (1945); Savage v. Nute, 180 Va. 394, 403, 23 S.E.2d 133, 137-38 (1942).
76. Pasternak v. Mashak, 392 S.W.2d 631, 636 (Mo. 1965); *In re* Estate of Smith, 68 Wash. 145, 153, 411 P.2d 879, 881 (1966); Frye v. Norton, 148 W. Va. 500, 513, 135 S.E.2d 603, 611 (1964).
77. *In re* Estate of Nelson, 274 N.W.2d 584, 588 (S.D. 1978).
78. *Id.*
79. *See generally In re* Estate of Fleege, 89 S.D. 137, 230 N.W.2d 230 (1975). *See also* Oglesby v. Harris, 130 S.W. 2d 449 (Tex. Civ. App. 1939).
80. Teter v. Spooner, 279 Ill. 39, 116 N.E. 673 (1917). Indeed, notwithstanding the fact that the attorney did not prepare the will, but instead merely superintended its execution, the presumption still arose. *See* Dial v. Welker, 328 Ill. 56, 159 N.E. 286 (1927).
81. *In re* Estate of Peterson, 283 Minn. 446, 168 N.W.2d 502 (1969).
82. *In re* Estate of Reiland, 292 Minn. 460, 194 N.W.2d 289 (1972).
83. *In re* Estate of Hayes, 49 Misc. 2d 152, 153, 267 N.Y.S.2d 452, 453-54 (1966).
84. *In re* Estate of Eckert, 93 Misc. 2d 677, 681, 403 N.Y.S.2d 633, 635 (1978).
85. Although two other states, Georgia and Louisiana, have statutes which, at first glance, can be considered relevant to the situation, the caselaw in both states indicates that they are not truly on point. *See infra* Section D.

> beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, . . . such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew of the contents of such will, and had independent advice with reference thereto.[86]

It should be noted that the statute applies only to "principal" or "sole" beneficiaries, and can be overcome by ensuring that the testator fully comprehends the contents of his will, and by providing him with "independent" counsel. However, nowhere does the statute define "principal" beneficiary, nor does it state what "independent advice" consists of, or from whom it should come.

The Kansas caselaw, sparse as it is, seems to indicate that the statute will be construed strictly. For example, in *In re Estate of Barclay*,[87] the Kansas Supreme Court pointed out that an attorney was not a principal beneficiary when his share, although significant as compared to the total estate, was smaller than others under the will.[88] Another Kansas case indicated that the word "prepared" in the statute would also be interpreted narrowly, and would not apply to the situation in which a confidential advisor merely furnished the names of the beneficiaries to the testator.[89]

D. The Attorney-Draftsman and the Lack of a Presumption

A few jurisdictions declared that no presumption of undue influence existed when a lawyer drew a will under which she was named as a beneficiary. The Supreme Court of North Dakota, for instance, decided that a presumption did not invariably arise when a will was drawn for a client by an attorney who became a major beneficiary thereunder, since the conditions under which such wills were drawn varied too greatly to apply a hard and fast rule.[90] Instead, the situation merely created a question of fact for the jury.[91] The Ohio courts voiced a similar rule, and indicated that no presumption, inference, or invalidity would arise if the attorney named as beneficiary also drafted the will,[92] as long as there was no evidence that the attorney had abused his position of trust with his client.[93]

Although Louisiana has a statute which prohibits physicians or

86. KAN. STAT. ANN. § 59-605 (1983).
87. 215 Kan. 129, 523 P.2d 376 (1974).
88. *Id.*
89. *In re* Estate of Robinson, 231 Kan. 300, 644 P.2d 420 (1982).
90. Stormon v. Weiss, 65 N.W.2d 475, 517 (N.D. 1954).
91. *Id.* at 518. Massachusetts also appeared to believe that such a situation was not determinative, although the circumstances would be viewed with considerable circumspection. *See* Wood v. McDonald, 332 Mass. 220, 222, 124 N.E.2d 264, 265 (1955).
92. Cave v. McLean, 66 Ohio App. 196, 203-04, 32 N.E.2d 581, 584-85 (1939).
93. *See* Caswell v. Lermann, 85 Ohio App. 200, 206, 88 N.E.2d 405, 408 (1948).

ministers from receiving any kind of testamentary gift from a terminal patient or penitent,[94] the Louisiana Court of Appeal noted the absence of any state rule which would prohibit an attorney from taking under a will which he prepared, even when he is the principal beneficiary thereunder.[95] Georgia, too, has a statute which, at first blush, arguably could be construed to reach such conduct,[96] but, again, the Georgia courts evidently adopted the no-presumption rule in cases in which one in a confidential relationship with the testator drafted a will in which the advisor was made a beneficiary.[97]

Nevertheless, the overwhelming majority of state courts adopted a presumption of undue influence as the selected sanction when confronted with such conduct. Little, if any, consideration was given to the ethical implications of such conduct. However, this state of affairs was soon to change.

IV. THE LAW IN TRANSITION

Prior to the adoption of the Model Code of Professional Responsibility in 1969 by the American Bar Association, precious few courts rendered decisions which highlighted the ethical problems involved in situations in which attorneys drew wills for clients which named the attorneys as beneficiaries. In fact, the law remained static for some time in many jurisdictions. One reason for this state of affairs was no doubt the fact that the old Canons of Professional Ethics, which were the only formal ethical guidelines for lawyers prior to the Model Code, did not really address the situation,[98] perhaps because it was assumed that lawyers, as consummate professionals, would conduct themselves in a proper and scrupulous manner—an assumption which unfortunately no longer rings true. However, even after the adoption of the Model Code by the American Bar Association, most courts continued to view the problem in probate terms, with only a handful prioritizing the ethical considerations.[99] Probate concepts, being part and parcel of property and estate law, were well-settled rules which were difficult to abandon.

94. 5 LA. CIV. CODE ANN. art. 1489 (West 1987).
95. Gibson v. Grumbel, 333 So. 2d 340, 341 (La. 1976). It should be noted, however, that Louisiana does not recognize undue influence as a ground for invalidating a will. *Id.* at 342.
96. See GA. CODE § 53-2-42 (1982), which states, in relevant part: "Knowledge of the contents [of a will] is necessary to the validity of a will. . . . However, if the scrivener [is] a large beneficiar[y] under the will, greater proof shall be necessary to show knowledge of the contents by the testator."
97. *See* White v. Irwin, 220 Ga. 836, 142 S.E.2d 255 (1965).
98. *See supra* text accompanying note 22.
99. It must be remembered, however, that a majority of states did not adopt the Model Code until several years after its adoption by the American Bar Association.

Nevertheless, a few courts gradually began to hint at the ethical implications inherent in the situation. Considerations of undue influence began to give way to concerns about conflicts of interest. For example, in *In re Davis' Will*,[100] a testatrix named her attorney's children as beneficiaries under her will, which the attorney had drafted. Although still speaking from a probate perspective, the New Jersey Supreme Court was one of the first to emphasize ethical concerns about this practice when it asserted, as early as 1953:

> We wish to emphasize what has been said repeatedly by our courts as to the proprieties of a situation where the testat[or] wishes to make [his] attorney or a member of his immediate family a beneficiary under a will. Ordinary prudence requires that such a will be drawn by some other lawyer of the testat[or's] own choosing, so that any suspicion of undue influence is thereby avoided.[101]

As time went on, other courts increasingly began to address the situation primarily in terms of ethical considerations rather than probate concerns.[102]

One of the first disciplinary cases squarely based on the professional conduct of an attorney named as a beneficiary under a client's will which he drafted came from Nebraska. In *State ex rel. Nebraska State Bar Ass'n. v. Richards*,[103] a lawyer drew a will for a client in which the lawyer named himself the principal beneficiary, albeit at the insistence of the testatrix. After a series of unsuccessful procedural skirmishes,[104] the Attorney General of Nebraska, on behalf of the Nebraska State Bar Association, alleged that the attorney was guilty of unprofessional conduct under the Canons of Professional Ethics.[105] Although the Supreme Court of Nebraska did not agree with the accusation,[106] the court did observe:

> Attorneys for clients who wish to leave them . . . 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 . . . 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. However, when such is the case the attorney's responsibilities . . . are much greater

100. 14 N.J. 166, 101 A.2d 521 (1953).

101. *In re* Davis' Will, 14 N.J. 166, 171, 101 A.2d 521, 523-24 (1953). In this regard, *see In re* Cooper's Will, 75 N.J. Eq. 177, 71 A. 676 (1909), *supra* note 47. *See* Annotation, *Presumption or Inference of Undue Influence from Testamentary Gift to Relative, Friend, or Associate of Person Preparing Will or Procuring its Execution*, 13 A.L.R.3d 381 (1967).

102. *See also* Annotation, *Drawing Will or Deed under Which He Figures as Grantee, Legatee, or Devisee as Ground of Disciplinary Action against Attorney*, 98 A.L.R.2d 1234 (1964).

103. 165 Neb. 80, 84 N.W.2d 136 (1957).

104. *Id.* at 82-83, 84 N.W.2d at 139-40.

105. The attorney also represented himself as administrator of the decedent's estate, receiving both administrator's and attorney's fees. *Id.* at 87, 84 N.W.2d at 142.

106. *Id.* at 94, 84 N.W.2d at 146.

. . . .[107]

A few years later, the California Supreme Court tackled the problem from a more comprehensive ethical vantage point. In *Magee v. State Bar of California*,[108] an attorney drew a will, naming himself residuary beneficiary of an elderly client's estate. Although the State Board of Bar Governors recommended that the attorney be suspended from practice for two years,[109] the California Supreme Court did not concur. A major reason for the court's decision, however, was the fact that a virtually independent attorney had reviewed the will, paragraph by paragraph, with the client, and had clearly established that the client understood the disposition she wished to make and the reasons therefor. Although the client resented being questioned about her preferences by the independent attorney,[110] the court cautioned:

> For the very reason that the boundary between ethical and unethical behavior in such cases is not clearly defined, attorneys should avoid drawing wills containing gifts to themselves under circumstances in which there is a reasonable basis for suspicion that the client was overreached or that the gift would prevent the attorney from acting in the client's best interests. Such a practice would remove any temptation to deal unfairly and would protect the reputation of the profession.[111]

However, the court went on to assert: "There is no rule that attorneys should never draw wills in which they receive gifts."[112] Furthermore,

> [T]here is nothing improper in [an attorney's] drawing wills for close friends or for clients if the gift to the attorney is a modest one. As the instant case suggests, however, 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.[113]

The Supreme Court of Wisconsin, in *State v. Horan*,[114] was one of the first courts to actually invoke a disciplinary sanction against an attorney who drafted a will for a close friend and client in which the attorney was given a substantial bequest. Significantly, no claim of undue influence was asserted, largely due to the longstanding per-

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107. *Id.* at 94-95, 84 N.W. 2d at 146 (citations omitted).
108. 58 Cal. 2d 423, 374 P.2d 807, 24 Cal. Rptr. 839 (1962).
109. At the time, Canon 11 of the CANONS OF PROFESSIONAL ETHICS stated: "The 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 his client." In interpreting this canon, the Ethics Committee of the American Bar Association had previously stated: "[I]n cases where the testator desires . . . to leave [his attorney] a legacy, the lawyer should consider having the testator submit the will to another lawyer prior to its execution." ABA Committee on Professional Ethics and Grievances, Decision 266 (1957).
110. Magee v. State Bar of California, 58 Cal. 2d 423, 427-30, 374 P.2d 807, 810-11, 24 Cal. Rptr. 839, 842-43 (1962).
111. *Id.* at 431, 374 P.2d at 812, 24 Cal. Rptr. at 844.
112. *Id.* at 433, 374 P.2d at 813, 24 Cal. Rptr. at 845.
113. *Id.* (citation omitted).
114. 21 Wis. 2d 66, 123 N.W.2d 488 (1963).

sonal relationship between the attorney and the decedent.[115] In reprimanding the attorney for his conduct, the court emphasized that:

> [t]he conflict of interests, the incompetency of an attorney-beneficiary to testify because of a transaction with the deceased, the possible jeopardy of the will if its admission to probate is contested, the possible harm done to other beneficiaries and the undermining of the public trust and confidence in the integrity of the legal profession, are only some of the dangers which a lawyer must consider [in this type of transaction].[116]

The court further specified that, even in the most benign circumstances, the attorney should have insisted that a disinterested attorney of the client's own choosing be engaged to draft the will.[117]

The Wisconsin court, however, perhaps unwilling to go further than the older "presumption of undue influence" rule, refused to impose a flat ethical prohibition. Indeed, the court acknowledged that certain conduct was permissible:

> We do not mean to state that a lawyer may never draw a will for a personal friend or members of his family or close relatives in which he . . . is a beneficiary. A lawyer may draft a will [for a family member or friend] if the proposed legacy to himself . . . is reasonable and natural under the circumstances . . . and no reasonable grounds in fact exist for the . . . public to have reasonable cause to lose confidence in the integrity of the bar . . . .[118]

Nevertheless,

> [I]f the attorney acted as draftsman of the will and there are any circumstances either because of preferential treatment in relationship to others or if the bequest is more than a token or modest bequest from a personal friend . . . the inference [of undue influence] arises and would reasonably lead the public to question the integrity of the lawyer. . . . [The] lawyer should draw a will in these circumstances only after fully advising his client of the effect thereof and when he is justified in believing that there is or will be independent competent evidence which rebuts the inference.[119]

The *Horan* case broke new ground by disciplining an attorney for preparing a client's will in which the attorney was named as a beneficiary.[120] Other courts soon followed suit. The Oregon Supreme Court, for instance, in a case reprimanding an attorney for failing to insist

115. *Id.* at 69, 123 N.W.2d at 489.
116. *Id.* at 70, 123 N.W.2d at 490.
117. *Id.* at 73, 123 N.W.2d at 491.
118. *Id.* at 74, 123 N.W.2d at 492. The Wisconsin rule was apparently later incorporated into the Model Rules. *See infra* text accompanying note 177.
119. State v. Horan, 21 Wis. 2d 66, 74, 123 N.W.2d 488, 492 (1963).
120. Wisconsin gradually tightened the vise in later decisions. *See, e.g.*, State v. Beaudry, 53 Wis. 2d 148, 191 N.W.2d 842 (1971) (reprimand and censure of attorney-beneficiary who selected another attorney to act as scrivener in drafting client's will); State v. Haberla, 39 Wis. 2d 334, 159 N.W.2d 11 (1968) (*per curiam* reprimand of attorney-beneficiary); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968) (attorney admonished even though he ensured that the testator's judgment to name him as a beneficiary was independent). *See also* State v. Eisenberg, 29 Wis. 2d 233, 138 N.W.2d 235 (1965) (attorney reprimanded for drafting will which benefited his mother rather than himself).

that his client obtain independent legal advice before bequeathing his entire estate to the attorney, stated matter-of-factly: "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 and execution of the will. [This is an] inflexible ethical rule."[121]

With the adoption of the Model Code in 1969[122], the American Bar Association, perhaps taking its cue in part from the emerging caselaw, continued the fledgling trend by attempting to fashion some coherent public policy regulating such conduct. Although several sections of the Model Code were relevant to the situation, none was determinative.[123]

Canon One of the Model Code emphasizes that a lawyer should always maintain the integrity and competence of the legal profession, and EC 1-5 warns that a lawyer should refrain from "morally reprehensible conduct."[124] Canon Nine expresses the generalized sentiment that a lawyer should avoid even the appearance of impropriety.[125] Only Canon Five and its attendant EC 5-5, however, contain language which bears directly on the conduct at issue. Canon Five states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." EC 5-5 continues:

> 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*

121. *In re* Jones, 254 Or. 617, 618, 462 P.2d 680, 680 (1969). Curiously, the Oregon court cited no prior caselaw or codifications to support its statement. Perhaps the court looked to the emerging Model Code for guidance.

122. The Model Code was adopted by the ABA House of Delegates in 1969, although it did not become effective until January 1, 1970. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preface (1969).

123. The Model Code was drafted and adopted by the ABA in order to provide more specific guidance about the professional conduct required of lawyers, which the older Canons of Professional Ethics had failed to do. *Id.*

The Model Code consists of three interrelated parts: canons, ethical considerations (EC's), and disciplinary rules (DR's). The canons are statements of axiomatic norms, generalized statements expressing the standard of professional conduct expected within the legal profession. The EC's are aspirational in character, and represent objectives toward which every lawyer should strive. Only the DR's, however, were intended as mandatory in character, stating the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980).

124. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1980). *See also id.*, DR 1-102(A)(4), (5).

125. *See also id.*, EC 9-2, 9-6.

prepared by another lawyer selected by the client.[126]

Unfortunately, EC 5-5 is merely aspirational in character. In addition, nowhere does EC 5-5 define "exceptional circumstances." However, the ABA Ethics Committee, in an informal opinion, did indicate that one exceptional circumstance occurred when a lawyer prepared a will for his spouse which named himself beneficiary.[127] Even so, the Committee advised: "[A] lawyer in some cases is vulnerable to later accusation of impropriety. If he has any doubt that there are supporting facts in the surrounding circumstances buttressing such an accusation, he should advise the selection of independent counsel."[128] In fact, "a lack of parental relationship with [other beneficiaries] would be a circumstance worthy of note."[129] Moreover, "the ethical lawyer should prudently suggest that even his own spouse claim [independent] counsel . . . when the circumstances raise any reasonable doubt that the will of the spouse would be legally enforcible [sic]."[130]

Another problem with EC 5-5 is that *inter vivos* and testamentary gifts seem to be treated similarly, even though each type of gift appears to warrant different considerations. Nevertheless, despite the broad, unspecific language, a growing number of courts began to use this section of the Model Code to indicate that the practice of an attorney naming himself beneficiary under a client's will would not be tolerated. Accordingly, the rationale behind these decisions was couched more and more frequently in terms of ethical principles rather than probate rules, although some courts naturally still continued to speak of probate concerns.[131] Even so, the overall number of cases which actually disciplined attorneys for such conduct was still not very large, perhaps because the very nature of EC 5-5 is more discretionary than mandatory, by the Model Code's own admission.[132] Notwithstanding, many courts began imposing ethical sanctions on attorneys in light of the overall tenor of the Model Code, which was in keeping with Justice White's statement in *In re Ruffalo*:[133] "[M]embers of the bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct . . . includes conduct which all responsible attorneys

126. *Id.* (emphasis added). EC 5-6 also appears relevant: "A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases in which a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."

127. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1145 (1970).

128. *Id.*

129. *Id.*

130. *Id.*

131. *See, e.g., In re* Anderson, 52 Ill. 2d 202, 206, 287 N.E.2d 682, 684 (1972).

132. *See also* Park v. George, 282 Ark. 155, 667 S.W.2d 644 (1984).

133. 390 U.S. 544 (1968) (procedural due process required in state disbarment proceedings).

would recognize as improper for a member of the profession."[134]

The shift in emphasis from probate to professional responsibility concerns therefore began to accelerate. For example, in *Florida Bar v. Schonbrun*,[135] the Supreme Court of Florida declared that an attorney who refused a testamentary gift from his client but then drew the will naming, instead, the attorney's sister as residuary legatee warranted public reprimand.[136] Later, in *In re Saladino*,[137] the Supreme Court of Illinois decided that an attorney who, *inter alia*, named himself sole residuary legatee in a client's will without advising her to seek independent legal advice deserved to be suspended from practice for three months.[138] The rationale behind the court's disciplinary decision, however, was based on the presumption of undue influence, which had not been rebutted.[139] The Illinois court did explicitly speak in ethical terms, however, in the subsequent case of *In re Vogel*,[140] in which the court censured an attorney who drafted for a client a series of wills and trust documents in which the attorney was named as a beneficiary.[141]

Such conduct, however, was still permissible in Illinois under certain circumstances. For example, in *In re Barrick*,[142] an attorney drafted, at the insistence of his client, a will which provided that the attorney was to receive a lifetime annuity. The Illinois Supreme Court dismissed the disciplinary charges against the attorney because the attorney had acted properly by making full disclosure to his client of the ethical considerations involved, by ensuring that the client received disinterested, independent advice, and by having the will witnessed by strangers to whom the client spoke her mind.[143]

Ohio nevertheless continued the trend towards ethical sanctions for such practices. In *Columbus Bar Ass'n v. Ramey*,[144] the Ohio Supreme Court declared that an attorney who had prepared a trust agreement and will under which he stood to inherit his client's entire estate had violated EC 5-5, and that a public reprimand was warranted.[145] Similarly, the Arizona Supreme Court suspended for six months an attorney-guardian who had drafted a will for his ward

134. *Id.* at 555 (White, J., concurring in the result).
135. 257 So. 2d 6 (Fla. 1971).
136. *Id.* at 8.
137. 71 Ill. 2d 263, 375 N.E.2d 102 (1978).
138. *Id.* at 276, 375 N.E.2d at 107.
139. *Id.* at 274-75, 375 N.E.2d at 106.
140. 92 Ill. 2d 55, 440 N.E.2d 885 (1982).
141. *See id.* at 65-66, 440 N.E.2d at 890.
142. 87 Ill. 2d 233, 429 N.E.2d 842 (1981).
143. *Id.* at 239-40, 429 N.E.2d at 846. *See also* Franciscan Sisters Health Care Corp. v. Dean, 95 Ill. 2d 452, 448 N.E.2d 872 (1983).
144. 32 Ohio St. 2d 91, 290 N.E.2d 831 (1972).
145. *Id.* at 98, 290 N.E.2d at 835. The attorney also misrepresented the irrevocable nature of the trust instrument to his client. *Id.* at 99, 290 N.E.2d at 836.

which named the attorney and his family as beneficiaries.[146]

As time went on, courts increasingly began to lose patience with attorneys who engaged in such conduct. For instance, the Supreme Court of Iowa indefinitely suspended an attorney's license to practice law because the attorney had drafted a will in which he was named merely as contingent beneficiary.[147] The court went so far as to conclude, perhaps incorrectly, that attorneys were not free to view the ethical considerations of the Model Code as merely aspirational in nature, because the ethical considerations were part of an integrated unit of professional rules of behavior.[148] In doing so, the Iowa court adopted a line of reasoning which was to surface again in a later Pennsylvania case.[149] The Colorado Supreme Court also suspended an attorney's license for ninety days because he did not provide truly independent counsel to verify his client's wishes in naming him as beneficiary.[150]

Even North Dakota, which had previously utilized the "no presumption of undue influence" rule, finally indicated that its stance on the matter was rapidly changing. In a case where an attorney tried in vain to dissuade his client from insisting on having him draw a will in which the attorney was named a beneficiary, the Supreme Court of North Dakota wrote:

> We hasten to add that we recommend attorneys do not draft wills in which they are named beneficiary. [Although] we do not adopt the strict position of the Wisconsin court . . . , in the future attorneys will have difficulty in convincing us of the "unusual circumstances" which justify their drafting a will in which they are named as a beneficiary.[151]

The trend towards the professional responsibility rationale in deciding that an attorney should not be permitted to act as scrivener-beneficiary, however, was not always a smooth one. The caselaw in Pennsylvania, for example, illustrates how some courts were constrained to retain probate considerations in dealing with the problem.

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146. *In re* Krotenberg, 111 Ariz. 251, 527 P.2d 510 (1974).

147. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Behnke, 276 N.W.2d 838 (Iowa 1979).

148. *Id.* at 840. *See also* Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Randall, 285 N.W.2d 161 (Iowa 1979) (former president of ABA disbarred after naming himself as beneficiary under client's will), *cert. denied*, 446 U.S. 946 (1980).

149. *See infra* text accompanying note 152.

150. State v. Berge, 620 P.2d 23, 24-25 (Colo. 1980).

151. Disciplinary Bd. v. Admundson, 297 N.W.2d 433, 442 (N.D. 1980). *See In re* Prueter, 359 N.W.2d 613 (Minn. 1984) (attorney who made himself or a member of his family a beneficiary in a will he prepared was guilty of misconduct warranting public reprimand); Professional Ethics Comm. of the Bar Ass'n of Greater Cleveland, Op. 148 (July 22, 1983), Law. Man. on Prof. Conduct (ABA/BNA) 801:6951 at p. 93 [1980-1985 Ethics Opinions].

In *Estate of Younger*,[152] an attorney, after drawing several wills for a testator over the course of a few years, drafted a final will for his client in which the attorney was named as a primary beneficiary. The contestants of the will, objected to the probate of the will on grounds of undue influence.[153] Because the rule in Pennsylvania was that no presumption of undue influence would arise unless the attorney were to receive the bulk of the estate from a client whose "intellect was weakened,"[154] the bequest to the attorney was upheld by the probate judge, as well as the Orphans' Court, because the testator had been adjudged of sound mind.

However, on appeal, the Pennsylvania Superior Court vacated the probate order.[155] Although the attorney argued, somewhat ingeniously, that his conduct should have been judged by disciplinary, rather than probate, standards, and that EC 5-5 did not have the force of law, the superior court disagreed. Using the Model Code as a touchstone, the court averred that the Code had the force of statutory rules of conduct for attorneys,[156] and could actually overrule prior caselaw.[157] The court therefore ruled that a presumption of undue influence always arose whenever an attorney received a gift under a will that he drafted for a client, and could be rebutted only by clear and convincing evidence.[158]

The rationale of the superior court in *Younger*, however, was later overruled by the Pennsylvania Supreme Court in *In re Estate of Pedrick*.[159] In the *Pedrick* case, an attorney wrote out a will for a terminally ill, *in extremis* testator which left the testator's entire estate to the attorney and the attorney's brother.[160] Although Pennsylvania does not require that a will be witnessed in order to be valid,[161] the attorney did not take the relatively simple precaution of having someone else confirm the testator's wishes.[162] Relying on the *Younger* holding that the canons and ethical considerations of the Model Code

152. 314 Pa. Super. 480, 461 A.2d 259 (1983).
153. *Id.* at 483-84, 461 A.2d at 260.
154. Estate of Reichel, 484 Pa. 610, 614, 400 A.2d 1268, 1270 (1979). *See* Boyd v. Boyd, 66 Pa. 283 (1870).
155. Estate of Younger, 314 Pa. Super. 480, 496, 461 A.2d 259, 267 (1983).
156. *Id.* at 489, 461 A.2d at 263 (citing American Dredging Co. v. City of Philadelphia, 480 Pa. 177, 183, 389 A.2d 568, 571 (1978)).
157. Id. at 488, 461 A.2d at 263. For a critique of the *Younger* case, see Note, *Estate of Younger: Violation of an Ethical Consideration Equals a Legal Presumption*, 45 U. PITT. L. REV. 719 (1984).
158. Estate of Younger, 314 Pa. Super. 480, 494, 461 A.2d 259, 266 (1983).
159. 505 Pa. 530, 482 A.2d 215 (1984).
160. *Id.* at 533-34, 482 A.2d at 216-17.
161. Pennsylvania merely requires proof of the authenticity of the signature by two persons familiar with the testator's signature. *See* 1 R. REMICK, PENNSYLVANIA ORPHAN'S COURT PRACTICE § 3.05, at 98 (rev. ed. 1975).
162. *In re* Estate of Pedrick, 505 Pa. 530, 534-38, 482 A.2d 215, 217-18 (1984).

had the weight of substantive law, the contestant argued that the attorney had the obligation of proving by clear and convincing evidence that the gift was the result of the testator's own volition, and not of the attorney's undue influence.[163] But, the Pennsylvania Supreme Court disagreed. In fact, the *Pedrick* court expressly rejected the superior court's earlier ruling that the Model Code could be used to alter substantive law, noting that disciplinary action must originate with the proper authorities.[164] Equitable considerations of unconscionability were instead used to prevent the lawyer from receiving the gift.[165]

When the attorney in *Younger* tried once again to proceed with probate of his client's will, the Pennsylvania Superior Court was forced to return to probate considerations of undue influence, because the attorney had not acted unconscionably in any way.[166] Noting that the evidence failed to show that the testator suffered from a "weakened intellect,"[167] the superior court upheld the gift to the attorney-scrivener.

The Pennsylvania cases show how little uniformity actually existed among the states in confronting the problem. The cases also indicated that some courts continued to operate in a vacuum, particularly in light of the developments which had occurred and were occurring in this area of the law.

IV. REFORM, BUT APPARENT ONLY

The trend towards reaching an all-encompassing ethical standard for sanctioning the conduct of an attorney who is named as a beneficiary under a will which she drafts for a client culminated with the adoption of the Model Rules of Professional Conduct and, specifically, Rule 1.8(c), by the American Bar Association in 1983.[168]

The new Model Rules were prepared and adopted by the ABA for several reasons. The structure of the Model Code, which contains generalized canons, aspirational ethical considerations, and mandatory disciplinary rules, had not held up well in practice. For instance, little uniformity existed among courts regarding treatment of the interrelated parts of the Model Code, with canons and ethical considerations often employed as substantive rules in disciplinary proceedings, which was not the original intent of the drafters of the Model Code.[169] Moreover, the Code format had not been unanimously adopted by all juris-

163. *Id.* at 541, 482 A.2d at 220.
164. *Id.* at 542-43, 482 A.2d at 221.
165. *Id.* at 545-46, 482 A.2d at 223.
166. *See* Estate of Younger, 352 Pa. Super. 414, 420-21, 508 A.2d 327, 330 (1986).
167. *Id.*
168. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1983).
169. *See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A ANN. REP. 408-10 (1982).

dictions. For example, some states, such as California, Oklahoma, Massachusetts, Illinois, Maine, and Michigan, had adopted the Model Code sans ethical considerations.[170] In addition, the canons of the Code were often at odds with the ethical considerations, which in turn sometimes conflicted with its disciplinary rules.[171] Furthermore, the broad statements often made in the Model Code were frequently too generalized to provide the specific guidance attorneys needed. The Model Rules were therefore adopted in a restatement format to impress upon the profession a uniform set of standardized rules which would be easily comprehensible to attorneys. Indeed, failure to comply with the new rules warranted disciplinary action.[172]

In many ways, however, the overall tenor of the Model Rules is similar to that of the Model Code. Lawyers should act in furtherance of the public good rather than to protect personal concerns.[173] Among other things, the attorney's duty to his client is supreme. Above all, lawyers are to treat their profession, and its attendant duties, honorably.

Concerning the specific problem of the attorney as both scrivener of and beneficiary under a will, Rule 1.8(c), "Conflict of Interest: Prohibited Transactions," located under the general category and heading, "Client-Lawyer Relationships," states: "A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee."[174]

The comment to Rule 1.8, although not authoritative,[175] further advises:

> As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. . . .
>
> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will . . . , however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.[176]

170. *Id.* The need for uniformity was considerable, as in situations where the testator owned real property in a jurisdiction other than that of his domicile at the time of his death.
171. *Id.*
172. *Id.*
173. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (1983).
174. *Id.* Rule 1.8(c).
175. *See id.* Preamble.
176. *Id.*, Rule 1.8(c) comment.

There is no question that Model Rule 1.8(c) makes great strides in confronting the problem head-on. First and foremost, by the terms of the rule, a determination of whether undue influence was exerted by the lawyer is no longer relevant to the propriety of such a gift. Such conduct is now disallowed from an ethical standpoint rather than from a probate one, because the prohibition on testamentary gifts is pointedly noted. The most noticeable specific reform is that the former aspirational guide of EC 5-5 of the Model Code has now become a seemingly flat ethical prohibition in the Model Rules, with limited exceptions. Rule 1.8(c) also appears to codify some of the earlier approaches previously taken by a few jurisdictions, especially that of Wisconsin, with respect to the exception for non-substantial gifts and wills drawn for relatives.[177]

In fact, at first glance, the rule appears to provide clear guidance to the lawyer who is confronted with the situation in which a client wishes to name him a beneficiary under a will which the attorney drafts. Such conduct on the part of the attorney is now grounds for disciplinary action. For instance, an attorney is now clearly prohibited from acting as scrivener-beneficiary in order to receive a "fee" in the form of a bequest so that he may be taxed on it at the lower inheritance rate. However, a closer inspection of the rule reveals that the section has been poorly drafted, and the apparently "minor" exceptions present some major problems. Indeed, the section may in fact only assist the good-faith attorney whose client *insists* that she draft a will in which the attorney is named as a beneficiary, by flatly prohibiting the attorney from doing so, and by allowing her to say "no" to her client.

Rule 1.8(c) deals only with *instruments* prepared for the client. It therefore does not prevent an attorney from allowing a client to make a gift *causa mortis* to her in order to circumvent the rule. Although the proof problems inherent in proving this type of gift are considerable, they are not insurmountable. Indeed, the Louisiana statutory prohibition preventing physicians and ministers from accepting testamentary or quasi-testamentary gifts[178] could have served as a useful guide in this context. More importantly, under the language of the rule, an attorney would be permitted to name her fiance or another intimate friend as beneficiary under a will she drafts for a client, since the rule only prohibits the attorney from naming her parents, children, siblings, or spouse(s), in addition to herself, as beneficiaries.

More problematic is the exception that is made when the gift is not "substantial." But, nowhere is the word "substantial" adequately de-

177. *See* State v. Horan, 21 Wis. 2d 66, 123 N.W.2d 488 (1963); State v. Collentine, 39 Wis. 2d 325, 159 N.W.2d 50 (1968).

178. 5 LA. CIV. CODE ANN. art. 1489 (West 1987).

fined.[179] Although the comment to Rule 1.8 attempts to clarify the situation, it actually provides little guidance. Since "substantial" means considerable in amount or value,[180] exactly what constitutes a "substantial" gift? Is it measured by its value in relation to the entire estate, or independently thereof? Although the Preamble to the Model Rules does note that the Rules are rules of reason, the Preamble is not a substantive part of the Model Rules,[181] and therefore what is considered reasonable, or substantial, by one attorney or client may not be so considered by another, depending on his station in life and various other factors.[182] The section also allows an exception where the lawyer is "related" to the client-donee. Unfortunately, "related" is nowhere defined, either. In the field of estate law, the category of "relative" can be quite large, and can encompass not only linear ancestors and descendants, but collaterals as well, including those of the third, fourth, or even fifth degree. Is the term's definition to be governed by state intestacy statutes, or otherwise? Taken at face value, a lawyer could apparently justify the behavior of naming himself as a beneficiary under a client's will which he drafts if he could demonstrate that he was a relative of the client-donor, however distant.

Finally, nowhere does the rule prohibit a partner or associate of the attorney-beneficiary from drafting the will in a formal sense only, as a mere strawman in the transaction. Again, the Comment is helpful on this point, but not authoritative. Since the potential for overreaching on the part of attorneys always exists, it is unfortunate that the Rule itself does not contain specific language in order to prevent this type of conduct.

Rather than solving the problem at issue, then, the Model Rules may well have created some difficult new ones. Rule 1.8(c) also may not end the controversy over what is and is not ethical conduct on this point for another reason: not every jurisdiction may adopt the Rule. Although some twenty-two states have already adopted the Model Rules *in toto*,[183] and several others have recommended adoption of the

179. *See* Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57 (1984), who has voiced similar criticisms of Model Rule 1.8(c) purely within the context of an ethical perspective. *Id.* at 73-75, 78-79. *See also* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(c) (1984) (legal background section).

180. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (3d ed. 1981).

181. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1983).

182. It is interesting to note, in this regard, that the word "substantial" was added to Rule 1.8(c) in its drafting stages at the recommendation of the American College of Trial Lawyers, Section of Estate and Trust Law, and the Association of the Bar of the City of New York (Committee on Trusts, Estates, and Surrogates Courts). *See Report of the Commission on Evaluation of Professional Standards*, 107 A.B.A. ANN. REP. 831 (1985).

183. Arizona, Arkansas, Connecticut, Delaware, Florida, Idaho, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire,

Rules or parts thereof,[184] New York has refused to do so,[185] while Vermont has pointedly recommended against adoption.[186] Whether Model Rule 1.8(c) will truly result in greater uniformity and consistency, then, is, at best, only a possibility.[187] Because there appears to be no caselaw on point of as yet with respect to application of Model Rule 1.8(c) in practice, emergent caselaw and opinions of the American Bar Association Ethics Committee may perhaps shed more light on the problematic areas of the rule at some point in the near future.

V. CONCLUSION: AN INESCAPABLE SOLUTION

Over the last three decades, probate considerations have given way to ethical ones in determining whether an attorney may draft a will for a client in which the attorney is named as a beneficiary. Although the earlier decisions were unsettled, the later ones, for the most part, established a presumption of undue influence for such conduct, which the attorney could rebut, but usually only with clear and convincing evidence. Gradually, a transition in the law occurred in which courts began to view such conduct as an ethical problem rather than a probate issue. With the advent of the Model Code, some progress was made towards regulating the conduct of attorneys confronted with such situations. The Model Rules later routinized the ethical concerns by constructing an apparently strict prohibition against the practice.

All state bar associations should move to adopt Rule 1.8 as quickly as possible. Each state must realize that uniformity and consistency are essential in order to preserve a cohesive and coherent system of ethics clearly apprehensible to the public. The Model Rules are at least a first step in realizing this goal.

New Jersey, New Mexico, North Carolina, Oregon, Virginia, Washington and Wyoming have all adopted the Model Rules, with amendments not relevant hereto. *See* [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 3 (April 15, 1987).

184. These jurisdictions include District of Columbia, [1 Current Reports] *Law. Man. on Prof. Conduct (ABA/BNA)* 71 (Feb. 22, 1984); Illinois, [1 Current Reports] *Law. Man. on Prof. Conduct (ABA/BNA)* 881 (July 24, 1985); Michigan, [1 Current Reports] *Law. Man. on Prof. Conduct (ABA/BNA)* 70 (Feb. 22, 1984); Pennsylvania, [2 Current Reports] *Law. Man. on Prof. Conduct (ABA/BNA)* 17 Jan. 25, 1984); South Carolina, [1 Current Reports] *Law. Man. on Prof. Conduct 1006* (Oct. 16, 1985); Utah, [1 Current Reports] *Law. Man. on Prof. Conduct (ABA/BNA)* 881 (July 24, 1985); and Wisconsin, [1 Current Reports] *Law. Man. on Prof. Conduct* (ABA/BNA) 630 (Feb. 6, 1985).

185. [1 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 1047 (Nov. 13, 1985).

186. [1 Current Reports] *Law. Man. on Prof. Conduct* (ABA/BNA) 855 (July 10, 1985).

187. Of course, one of the problems with establishing uniform rules in the professional responsibility or probate area is that regulation of both fields is a matter of state, rather than federal, law. To a certain extent, then, it is nearly impossible to have complete uniformity among the jurisdictions.

The Model Rule at issue, however, does not go far enough. The logical endpoint of the transition process from probate considerations to ethical concerns points inevitably towards a clearcut solution to the problem. Thus, the rule of choice should mandate that under no circumstances may an attorney draft a will for a client in which the attorney is named as a beneficiary, without exception.[188] Furthermore, if the client still wishes to proceed with the gift, the rule should require that a truly independent attorney draft the instrument. Thus, a will or provision thereof drawn in violation of the rule would be considered void and not probatable.

A blanket rule such as the one described has many advantages. Without such a rule, attorneys will be forever suspect in the eyes of the public, no matter how scrupulously the transactions are handled, for even good faith drafting favors can invite disaster for the image of the profession by engendering lengthy and expensive will contests. Lawyers belong to one of the last of the honored professions, and they should strive to uphold that honor. Moreover, by forcing the attorney to send her client to another lawyer of the client's own choosing, the client has a greater opportunity to obtain truly meaningful and disinterested counsel and insight into the planned disposition, ensuring that the client's testamentary intent remains steadfast despite possible outside influences. Were it otherwise, no one could ever be relatively certain of the testator's true intent. The rule should be the same even for members of the attorney's own family, especially considering the propensity for sibling and parental rivalry and jealousy following the death of a loved one. In addition, the lawyer cannot possibly give her undivided loyalty to her client if she is to be the recipient of a testamentary gift from a family member-client under a will which she is drafting. Even token testamentary gifts to the attorney-scrivener should be prohibited, for "token" is as difficult to define as "substantial," varying greatly in meaning, depending on the context. After all, whether an antique pocket watch or a classic car is a token gift depends entirely on circumstance.

Part of the need for a blanket rule is the overwhelming appearance of impropriety which exists whenever an attorney receives payment for drafting a testamentary instrument for a client which names the attorney as beneficiary. The practice places the attorney in a very difficult conflict of interest situation. As the Model Code rightly pointed out in EC 5-2: "A lawyer should not accept proffered employment if his personal interests . . . will, or there is a reasonable probability that

188. Interestingly, the original version of the Model Rules contained just such an absolute prohibition. *See* Johnston, *supra* note 179, at 80-82, who also considers such a rule, but only within the context of other possible rules, and not as an advocate for any one particular position. *See also* Comment, *Considerations of Professional Responsibility in Probate Matters*, 51 NEB. L. REV. 456, 471-73 (1972).

they will, affect adversely the advice to be given or services to be rendered the prospective client."[189] Disciplinary Rule 5-101(A), entitled "Refusing Employment When the Interests of the Lawyer May Impair His Independent Judgment," went on to state: "[A] lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial . . . or personal interests."[190] Along the same lines, the Model Rules later noted, in Rule 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer's own interests . . . ."[191]

More to the point, the Model Rules recognize that lawyers should give truly independent advice to their clients.[192] However, such advice often necessarily includes notions of morality as well as legality. As one commentator has noted, lawyers must assume personal moral responsibility for the consequences of their professional actions.[193] Perhaps with this in mind, Rule 2.1 states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, . . . factors, that may be relevant to the client's situation."[194] The comment to Rule 2.1 goes on to point out: "[A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."[195] The Model Rules, then, at least tacitly lend support for such a blanket rule.

In the final analysis, however, the practice of an attorney drafting a will for a client in which the attorney is named as a beneficiary should not be tolerated in any form because it is an easily avoidable problem. The inconvenience to the client in consulting another attorney is so small as compared to the benefits achieved that such a rule simply makes good, practical sense. Nor would economic considerations often be a serious problem for the client, considering the current availability of legal assistance services and the relatively low cost of having a will drafted. As for the client who at first refuses to consult another attorney, he simply will have no other choice but to acquiesce if he desires

189. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-2 (1969).
190. *Id.* DR 5-101(A).
191. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1983).
192. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).
193. Rhode, *Ethical Perspectives on Legal Practice*, 37 STANFORD L. REV. 589, 643 (1985).
194. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).
195. The Model Code advised lawyers similarly. EC 7-8 states, in relevant part:
> Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

competent legal drafting and advice. Given the choice between no advice and sound advice, most, if not all, clients will choose the latter. Besides, lawyers have a responsibility to give sound advice to their clients, no matter how annoying or distasteful it may be. Whether such an ironclad rule will eventually gain acceptance, however, remains up to courts and legislatures, and, ultimately, attorneys themselves.