



ISBA Professional Conduct Advisory Opinion

Opinion No. 18-04
May 2018

Subject: Conflict of interest; Conflict of Interest – Personal Interests; Imputed Disqualification

Digest: The Illinois Rules of Professional Conduct do not prohibit a lawyer from accepting a testamentary gift from a client the lawyer is not related to so long as the lawyer does not solicit the gift or prepare the testamentary document making the gift. The Illinois Rules of Professional Conduct do not prohibit the lawyer from referring the client to another unaffiliated lawyer to advise the client and prepare the testamentary documents.

References: Illinois Rules of Professional Conduct, Rule 1.8(c)
Illinois Rules of Professional Conduct, Rule 1.8(k)
DeHart v. DeHart, 2013 IL 114137, ¶ 30
In re Peebles, 297 S.C. 36 (1988)

FACTS

A lawyer previously prepared estate planning documents for a client (“Client”). Client, who is 45 years older than the lawyer, is also the lawyer’s neighbor and a close personal friend. In estate planning documents that the lawyer had previously prepared, Client’s longtime partner (“Partner”) was the named beneficiary. In addition, the lawyer was named as a contingent agent in Client’s power of attorney for health care. Subsequently, Partner died and Client, who has no children, now wishes to execute new estate planning documents that will name his friends, including the lawyer, as beneficiaries. Because the lawyer lives next door to Client, is much younger than Client, and is good friends with Client, he’s concerned about the propriety of Client’s proposed testamentary gift.

QUESTIONS PRESENTED

- 1) May the lawyer accept a testamentary gift from Client if the lawyer does not prepare the new estate planning documents?

- 2) If the lawyer is going to be named as a beneficiary in the new estate planning documents, may the lawyer refer the Client to a new lawyer to prepare the new documents?
- 3) Does the lawyer and the Client's preexisting friendship raise any ethical issues related to referring Client to a new lawyer?

OPINION

Illinois Rule of Professional Conduct 1.8(c) prohibits a lawyer from soliciting a gift from a client the lawyer is not related to and from preparing estate planning documents that leave a gift to the lawyer:

A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

IRPC 1.8(c). Thus, so long as the lawyer does not solicit the gift from Client, or prepare the documents making the gift, the lawyer may accept a testamentary gift from Client.

In fact, given the longstanding close friendship between the lawyer and Client, the prohibitions of Illinois Rule of Professional Conduct 1.8(c) may not apply to the fact pattern presented at all if the relationship between the lawyer and Client is "close" and "familial." "[C]lose, familial" relationships are not limited to traditional family relationships. For example, in *In re Peebles*, 297 S.C. 36 (1988), the Supreme Court of South Carolina held that an attorney had maintained a "close familial relationship" with a testator where, among other things, the testator, a client, had become a "very close friend" of respondent, had lived near respondent for a period of time, had regarded the lawyer's daughters as her grandchildren, and the lawyer had moved the testator to a nursing home and assumed responsibility for payment of the testator's expenses. However, the inquiry surrounding the "close, familial" exception to the prohibition of IRPC 1.8(c) is highly fact specific and the safer course is for the lawyer to avoid soliciting the gift or preparing the testamentary documents.

No Illinois Rule of Professional Conduct prohibits a lawyer from referring a current or past client to another lawyer to prepare estate planning documents that the original lawyer is prohibited from preparing by a Rule of Professional Conduct or statute. This is the case whether or not the lawyer's relationship with the current or past client is more expansive than just a traditional attorney-client relationship and also includes a close friendship. However, the two lawyers must be unaffiliated, *see* IRPC 1.8(k); and, the second lawyer must advise Client, not just prepare documents at the original lawyer's direction.

While it is not an ethical concern, and thus a detailed discussion is beyond the scope of this ethics opinion, receiving a testamentary gift from a client may give rise to a presumption of undue

influence, even where the lawyer does not prepare the documents. Relevant considerations may include the lawyer's existing or past attorney-client relationship, status as agent under a power of attorney document, friendship with Client, and referral of Client to a new lawyer. *See DeHart v. DeHart*, 2013 IL 114137, ¶ 30. And the lawyer who ultimately prepares the documents also should consider whether to take any special precautions to protect against a court finding the Client's estate planning documents invalid because of undue influence.

In conclusion, the lawyer may accept a testamentary gift from Client if the lawyer does not solicit the gift and does not prepare the testamentary instrument. No rule of professional conduct prohibits the lawyer from referring Client to another lawyer to advise Client and prepare the documents so long as the two lawyers are unaffiliated and the referring lawyer does not direct the preparation of the documents.

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