
E-75-3 Attorney named as trustee-executor

Facts

Mr. X is a close personal friend of Attorney Y, their friendship dating back some 25 years. Attorney Y's law firm has represented Mr. X and his family for at least as long as he has been practicing law. Mr. X was usually billed for services but frequently at minimal rates.

Mr. X has now approached Attorney Y with a request for estate planning assistance. Attorney Y had drafted wills for Mr. X in the past and now concluded that Mr. X should have an inter vivos revocable trust, that he should name the trust as beneficiary of his insurance policies and that he should make a will which, after disposing of certain personal property, pours the remainder into the trust. The potential value of the estate could approach \$180,000.

Mr. X expressed a desire that Attorney Y act as co-trustee of the trust, as counsel for both the trust and the estate and draft all the documents presently necessary to effectuate his estate plan.

Attorney Y has reviewed each of these requests with Mr. X in detail in light of the available alternative, and it appears that Mr. X has carefully thought the matter through and has substantial reasons for his decision with respect to both participation of Attorney Y in decisions of the trust and his acting as attorney for both the trust and the estate.

Mr. X argues, in respect to the drafting of the documents, that the employment of another attorney would be essentially a sham since he would not execute any documents without Attorney Y's approval; that any other such attorney would be a scrivener for Attorney Y's ideas. Attorney Y would be saddled with primary responsibility for the content regardless of whether or not s/he drafted it.

Issues

Under the facts presented above, to what extent can Attorney Y comply with Mr. X's wishes? Can s/he draft all of the documents and include her/his firm in these documents as mandatory attorney for both the estate and the trust? Can

s/he, additionally, appoint herself/himself co-trustee or appoint a single corporate trustee, but require that the corporate trustee exercise no discretion without the advice and consent of her/his law firm?

Opinion

This is a rare case where a client, because of the exceptional knowledge which his attorney possesses of his business and family matters (which transcends the ordinary attorney-client relationship), has asked his attorney to act as personal representative under his will; to draft his will; wishes the will to provide for the employment of his attorney to probate his estate; and has asked that his attorney be named in the will, which will be drafted by his attorney, as co-trustee or given a power to participate in all discretionary decisions of the trust. The client further insists that his attorney or his attorney's law firm should serve as attorneys for the estate and for the trust.

We believe the primary considerations rest with Canon 2 and DR 2-103, as well as Ethical Consideration 5-6. Further consideration must be given the interpretation of the Canons of Ethics and the Code of Professional Responsibility by the Wisconsin Supreme Court in *State v. Gulbankian*, 54 Wis. 2d 605 (1972).

It is the opinion of the Ethics Committee, based on all the facts set forth above, that the situation clearly fits the paragraph in *Gulbankian* beginning at the bottom of page 611:

In those fairly rare cases where a client, because of the unusual familiarity of the attorney with the testator's business or family problems or because of a relationship which transcends the ordinary client-attorney relationship, asks his attorney to act as executor or to provide for his employment to probate the estate, there is no solicitation.

In other words, under the facts, the proposed drafting of the will, trusts, etc., would not be in violation of either the Code or the Disciplinary Rules of the State Bar of Wisconsin.

We urge, however, that this be done in a manner so as to avoid even "the appearance of impropriety." This can be done through careful use of language in the Will and Trust Agreement, as well as retaining a copy of this opinion in

the client's file. Further, a letter from the client in his own handwriting confirming all of the facts surrounding the situations could prove to be valuable.