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Be Careful What You Wish For– Gifts to Drafting Attorneys

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You spent your entire career striving to make the "right" choices and decisions – doing your best to practice with professionalism and integrity. Your mind races back to that fateful day several years ago when your long time client (who is not related to you) with a net worth in excess of $5 million stated that, in addition to other significant changes to be made to her will, she wished to leave you a $10,000 cash bequest. You are aware that the Florida Rules of Professional Conduct Rule 4-1.8(c) provides, in pertinent part, that, "a lawyer shall not 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 client" ("Rule 4-1.8(c)"), but, in this instance, with this particular client, you thought, "what's the harm?"

Now that the client has died and her will probated, the bequest to you has come into question. The other beneficiaries under the will are claiming that you procured the gift through undue influence or by breaching your fiduciary duties. Your integrity is being questioned and with your ticket to practice law on the line, all you have left is a litany of excuses.

"She insisted! I knew her for over 30 years! She had no children of her own. Her spouse passed away almost 20 years ago. She was like family! She spent holidays at my home. She loved my wife and kids! It's just a small gift really– a token in such a large estate! I told her to get separate counsel to prepare the document; but she wouldn't listen!"

You disclaim the gift thinking that the disclaimer will stop the undeserved attacks on your character. Unfortunately, the family still questions the validity of the document you prepared and your motives. You now find yourself defending a bar grievance filed against you. Your thoughts of "what's the harm?" seem like a distant memory. Your mind is now filled with "How did I let this happen? It wasn't worth it! I should have just said no. If only I had thought about the consequences!"

The reality is that once you prepare a testamentary instrument for a client under which you, the drafting attorney, are a beneficiary, it may be impossible to pretend that it never happened. Like Pandora's Box, it may be impossible to reseal the box and, more importantly, to keep the potential trouble lurking inside from wreaking havoc.

I believe that most lawyers reading this article are aware of the ethical implications of soliciting a substantial gift from an unrelated client or preparing an instrument making a substantial gift to the lawyer or the lawyer's family and would chose not to solicit such gift or draft said instrument. However, over the past two years, I have had the pleasure of serving as Chair of the Ad Hoc Estate Planning Conflicts Committee for the Real Property Probate and Trust Law Section of the Florida Bar. During this time, our Committee met with counsel for The Florida Bar to discuss the issue of lawyers drafting testamentary documents in which they are named as beneficiaries. We were surprised to learn that this is indeed a problem and that a growing number of lawyers every year are subject to disciplinary proceedings for violating Rule 4-1.8(c).

In most instances, the lawyers argue that they have done nothing wrong. They raise the above-referenced defenses and excuses. In many instances, the gift to the lawyer is not unnatural given the length and depth of the relationship between the lawyer and the client. The key problem for the lawyer is that the transaction is potentially tainted by a conflict of interest.

The issue of whether an attorney may draft a will in which he or she is named as a beneficiary is not a new or novel question. As explained by the Honorable Judge Lauren C. Laughlin in *Estate of Virginia Murphy,* Case 06-6744ES-4 (Fla. Cir. Ct. for Pinellas County, August 1, 2008), the prohibition on the scrivener of a will inheriting under it dates back to Roman law.[1] Rule 4-1.8(c) follows this historic proscription. Given the nature of the confidential relationship between a lawyer and a client, Rule 4-1.8(c) serves the important purpose of protecting the client from potential overreaching and impropriety by the lawyer by prohibiting the lawyer from preparing the instrument making the gift.[2]

Florida courts have determined that the violation of this Rule, however, does not render the gift to the lawyer void as a matter of law. As a consequence, a lawyer may violate this Rule, be disciplined accordingly and, under certain circumstances, is still entitled to retain the gift or bequest. In *Agee v. Brown*, 73 So.3d 882 (Fla. 4th Dist. Ct. App. 2011), the 4th District Court of Appeals reversed the trial court which had found that a gift to a drafting lawyer under a will was void as a matter of law because it violated Rule 4-1.8(c) and public policy. The *Agee* court held that the trial court had improperly "incorporated Rule 4–1.8(c) … into the statutory framework of the probate code," and that such an interpretation was erroneous as "[i]t is a well-established tenet of statutory construction that courts are not at liberty to add words to the statute that were not placed there by the Legislature."[3] The court further noted that the "best way to protect the public from unethical attorneys in the drafting of wills . . . is entirely within the province of the Florida Legislature."[4]

The end result is that the allure of a potential gift for a client places the lawyer in an ethical dilemma, referred to in the *Murphy* decision as the "South Indian Monkey Trap."[5] As explained in *Murphy*:

The "South Indian Monkey Trap" was developed by

villagers to catch the ever-present and numerous small monkeys in that part of the world. It involves a hollowed-out coconut chained to a stake. The coconut has some rice inside which can be seen through the small hole. The hole is just big enough so that the monkey can put his hand in, but too small for his fist to come out after he has grabbed the rice. Tempted by the rice, the monkey reached in and is suddenly trapped. He is not able to see that it his own fist that traps him, his own desire for the rice. He rigidly holds on to the rice, because he values it."[6]

Tempted by the value of the bequest, the lawyer is placed in the position of potentially violating the ethical rule or ultimately letting go of the bequest.[7] The lawyer's dilemma is further complicated by the fact that Rule 4-1.8(c) only prohibits the lawyer from preparing a document which makes a "substantial" gift. What is not apparent is the meaning of the word "substantial;" does "substantial" depend on the net worth of the individual making the gift, the size of the gift to the lawyer in relation to other gifts in the plan, whether it is substantial to the lawyer, or some other standard? Is a $100,000 gift in the context of a $10,000,000 estate substantial? How about a $10,000 gift? By negative inference, Rule 4-1.8(c) would seemingly authorize non-substantial gifts to the drafting attorney, so in understanding said Rule, a meaning of "substantial" must be ascertained. The comments to said Rule do not provide significant guidance on the intended meaning of "substantial" beyond providing that "simple gifts" given at holidays or as tokens of appreciation are not prohibited.[8] The seemingly generic use of the word "substantial" can potentially create defenses in instances where attorneys have arguably engaged in overreaching. More importantly, it can entice a lawyer into thinking that, without fully considering all of the consequences, perhaps, for this client, in this instance, there is nothing wrong with a bequest to himself or herself.

In most situations, it is the beneficiaries who will challenge the gift to the lawyer based upon standard allegations of fraud, undue influence, and duress. This is precisely what happened in *Murphy*. In that case, the decedent's heir-at-law challenged gifts to the lawyer who drafted the decedent's will and the lawyer's legal assistant. The lawyer and the legal assistant were the sole residuary beneficiaries of the client's estate.

Like *Agee*, the *Murphy* court refused to find the gift void as a matter of law. Instead, the decedent's heir-at-law was forced to rely upon a claim for undue influence. The court noted the difficulties of proof which a contestant can face in such cases:

> The nature of the attorney-client relationship in matters testamentary is a particularly circumspect matter for the courts. The decisions that go into the drafting of a testamentary instrument are inherently private. Because the testator will not be available to correct any errors that the attorney may have made when the will is offered for probate, a client is especially dependent upon an attorney's advice and professional skill when they consult an attorney to have a will drawn. A client's dependence upon, and trust in, an attorney's skills, disinterested advice, and ethical conduct exceeds the trust and confidence found in most fiduciary relationships. Seldom is the client's dependence upon, and trust in, his attorney greater than when, contemplating his own mortality, he seeks the attorney's advice, guidance and drafting skill in the preparation of a will to dispose of his estate after death. These consultations are among the most private to take place between an attorney and his client. 'The client is dealing with his innermost thoughts and feelings, which he may not wish to share with his spouse, children and other next of kin'.[9]

These difficulties of proof and the nature of the confidential relationship between a lawyer and client have caused courts and commentators to conclude that the lawyer must prove that the gift was free of undue influence by clear and convincing evidence.[10]

The trial court in *Murphy* ultimately set aside a series of wills benefitting the lawyer and paralegal notwithstanding the fact that Mrs. Murphy met with independent counsel each time that a new will was prepared increasing the share to her longtime counsel; in doing so, the court was not convinced that Mrs. Murphy understood the size of the gift that she was making to her lawyer, and, further, the court was troubled by the fact that the lawyer and paralegal seemed to have recognized that they were engaging in questionable behavior.[11] They had entered into an agreement which contained a "self-serving" statement that they had not breached their fiduciary duties and which provided that they would not sue each other for conflicts of interest in connection with Mrs. Murphy's estate planning, which the court called a document which "reeks of a consciousness of fraud" and compelling evidence that the perpetrators knew all of the elements of undue influence were present.[12]

One of the most interesting, as well as troubling, aspects of *Murphy* from the drafting lawyer's perspective is that the lawyer in *Murphy* likely believed that he was fulfilling his ethical obligations. Although the lawyer's office prepared and retained each of the client's wills, an independent lawyer met with Mrs. Murphy on each occasion when a new will was signed. This procedure seemingly satisfies a provision in the "Gift To Lawyers" comment to Rule 4-1.8, which provides, in general, that a lawyer may accept a substantial gift from a client under a testamentary instrument if the client is represented by independent counsel.

However, the facts and circumstances in the *Murphy* case were such that the court determined that the lawyer had still acted with a conflict of interest and breached his fiduciary duties to his elderly client. The court voided the bequest to the drafting attorney (who, as a result, was ultimately disbarred).[13] Beyond losing the gift, the lawyer's name and career were forever tagged with an asterisk.

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Indeed, Judge Laughlin was placed in the unenviable position of meting out justice against an attorney who had, up to that point, served our profession honorably. The Order setting aside the Last Will placed a solemn epitaph on the lawyer's career:

> "[T]he attorney whose bequests are at issue in this case was himself sixty-eight years old and retired at the time of the [disputed] will. This court must acknowledge that [the attorney] has had an exemplary career in the legal profession. He enjoys a reputation as an honest professional and a civic-minded citizen of great integrity. For this reason, deciding the facts and issues in this case has been especially painful and troubling. The court cannot help but speculate on whether the lawyer made a cost/benefit analysis, weighing the risks of being charged with a disciplinary infraction (having no intention of continuing to practice law) against the economic benefits to be derived from the conduct."[14]

It is important to note that under Rules Regulating the Florida Bar, Rule 4-1.8(k), the prohibition on bequests to drafting lawyers extends to other lawyers in the same firm. Thus, a lawyer cannot avoid the conflict simply by requesting that his or her partner to prepare the document. In addition, as previously stated, Rule 4-1.8(c) applies to gifts by a client to persons "related to the lawyer," which it defines as, "…a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship."

There are countless situations where a gift to the drafting lawyer or the lawyer's family may appear natural given the nature or extent of the relationship. For example, beyond the situation of a longtime client of the lawyer, the lawyer or lawyer's spouse may have a life-long friend who wishes to provide them with a substantial testamentary gift. There is no ethical rule or statute in Florida prohibiting a lawyer from accepting an unsolicited inter-vivos or testamentary gift or which prohibits the client from making such a gift. However, regardless of the situation, it is important to be mindful of the ethical rule and the potential consequences of violating it. If an instrument must be prepared to effectuate a "substantial" gift to the client's attorney, Rule 4-1.8(c) requires the client to have independent counsel. Yet, even with independent counsel, the *Murphy* decision teaches us that the drafting lawyer may still be placed in the uncomfortable position of having to defend claims of undue influence and breach of fiduciary duty, to which the drafting lawyer must ask himself or herself whether any gift (regardless of whether inter-vivos or testamentary) is worth risking your livelihood and having your integrity questioned.

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Endnotes:

1 *Murphy*, at 7 (citing Dig. 48.15 supplement to the lex cornelia ordered in edict by Emperor Claudius).

2 There have been a number of reported decisions wherein lawyers have been sanctioned for violating Rule 4-1.8(c). See, e.g., *The Florida Bar v. Poe,* 786 So.2d 1164 (Fla. 2001) (wherein a lawyer was disbarred for preparing a will that included a $15,000 bequest to the lawyer and named the lawyer as personal representative of the estate); *The Florida Bar v. Anderson,* 638 So. 2d 29 (Fla. 1994) (wherein an attorney with a perfect disciplinary record received a 91 day suspension for drafting numerous wills for the same client over a period of years which contained bequests for the attorney or his wife).

3 *Agee* at 886.

4 *Id*. The Agee decision is particularly interesting because the lawyer in that case was the one contesting the last will of the decedent in the hopes of reinstating a bequest to the lawyer and his wife under a prior will of his former client (and friend). The beneficiaries successfully convinced the trial court to dismiss the will contest on the basis that the lawyer lacked standing to contest the validity of the last will because the gift to the lawyer and his wife violated the ethical rule. The 4th District Court of Appeals dismissed the trial court decision and, on remand, the personal representative and beneficiaries will be forced to defend the validity of the decedent's last will against a challenge by said lawyer.

5 *Murphy*, at 22.

6 *Id*., fn 2 (*citing* Robert M. Pirsig, Zen and the Art of Motorcycle Maintenance: An Inquiry Into Values Ch. 26 (William Morrow & Co., ed. 1974).

7 *See Id.*

8 The comment to Rule 4-1.8(c) provides that "a simple gift such as a present given at a holiday or as token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence." R. Regulating Fla. Bar 4-1.8, comment "Gifts to Lawyers."

9 Murphy, at 8 (quoting *Kirschbaum v. Dillon*, 567 N.E. 2d 1291, 1296 (Ohio 1991)).

10 *See* Rohan Kelley, Probate Litigation, PRACTICE UNDER FLORIDA PROBATE CODE §21.17 (Fla. Bar CLE 2010) *citing Ritter v. Shamas,* 452 So. 2d 1057 (Fla. 3rd DCA 1984); *Zinnser v. Gregory,* 77 So. 2d 611 (Fla. 1955); *Nelson v. Walden,* 186 So. 2d 517 (Fla. 2nd DCA 1966); *In re Estate of Reid,* 138 So. 2d 342 (Fla. 3rd DCA 1962).

11 *Murphy*, at 19.

12 *Id.* at 22.

13 *The Florida Bar v. Carey,* 46 So.3d 48 (Fla. 2010).

14 *Murphy*, at 26.