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# Legal Ethics - Drafter of Will Who Serves as Executor

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requires that a blank space be left only in the event that the name of a duly nominated candidate does not appear on the ballot. Such new legislation would promote fair elections in West Virginia, and put an end to the ambiguities presently existing in this area of the law.

*James H. McCune*

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### Legal Ethics — Drafter of a Will Who Serves as Executor

Defendants, Gulbank Gulbankian and Vartak Gulbankian, were Armenian immigrants who practiced law as partners in an area of Wisconsin populated mainly by people originally from eastern and southern Europe. Throughout a period of approximately sixteen years, they drafted and filed for probate 135 wills. The majority of these contained a provision that one or the other of these attorneys be appointed to serve as attorney for the probate of the testator's estate or that one of the defendants, Vartak Gulbankian, serve as executrix.

The Board of State Bar Commissioners of Wisconsin sought to discipline the defendants by filing a complaint with the Supreme Court of Wisconsin. They claimed the large percentage of wills directing or requesting the employment of the defendants raised a necessary inference that the attorneys had solicited or suggested to their clients they be employed as attorneys for probate of the estates. Because of language and ethnic kinship, the defendants claimed to have a closer relationship with their clients than most attorneys. They further maintained their clients voluntarily asked them to serve as executrix or attorney for probate.

A referee found no solicitation but expressed concern that the defendants' actions might give the appearance of solicitation to laymen who were not aware of the peculiar circumstances involved in the case. *Held*, affirmed. Although an attorney cannot solicit or suggest to a testator that he be named executor or be employed as attorney for probate, the court determined it was not compelled to draw an inference of solicitation in this case. *State v. Gulbankian*, 196 N.W.2d 733 (Wis. 1972).

This allegation of solicitation was decided after the Supreme Court of Wisconsin had adopted the American Bar Association's new Code of Professional Responsibility, which replaces the Canons of

Professional Ethics.<sup>1</sup> The case was one of first impression in Wisconsin. In stating that solicitation is both unprofessional and proscribed, the court cited both the old Canon 27 of the Canons of Professional Ethics<sup>2</sup> and Disciplinary Rule 2-103 [hereinafter referred to as DR 2-103] of the current Code of Professional Responsibility.<sup>3</sup> Presumably, this was done for the sake of transition. DR 2-103(A) strictly prohibits an attorney from recommending his own employment to laymen who have not asked for his advice on that subject.

Another relevant section of the Code of Professional Responsibility, which was not mentioned in the opinion, is Ethical Consideration 5-6 [hereinafter referred to as EC 5-6]. It states that an attorney should not consciously influence a client into naming that attorney trustee, executor, or lawyer in an instrument. If the client voluntarily desires the attorney to serve in one of these capacities, a cautionary sentence is included to the effect that the attorney should be careful to prevent even the appearance of professional impropriety.<sup>4</sup>

Only the Disciplinary Rules of the Code of Professional Responsibility are penal in nature. They are the minimum, mandatory levels of conduct an attorney must observe to avoid the possibility of disciplinary action.<sup>5</sup> Conversely, the Ethical Considerations are aspirational in tone and reflect ideals that every attorney should attempt to emulate.<sup>6</sup> An attorney will not be exposed to disciplinary proceedings if he chooses a course of action other than that recommended by an Ethical Consideration.<sup>7</sup> With DR 2-103 and EC 5-6 the difference is that solicitation by requesting a client to name the attorney in the client's will might result in disciplinary action — consciously influencing the client to do the same thing will not. But the Code does not define solicitation, conscious influence, and their ramifications; nor does it contain instances in which each applies. It is therefore unfortunate

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<sup>1</sup> The Code was adopted by order dated December 16, 1969, to take effect on January 1, 1970. The court did not adopt the notes that were included in the American Bar Association's version of the Code. 43 Wis. 2d 1xxvi (1970).

<sup>2</sup> *State v. Gulbankian*, 196 N.W.2d 733, 735 (Wis. 1972); ABA CANONS OF PROFESSIONAL ETHICS No. 27. "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations."

<sup>3</sup> 196 N.W.2d at 735, citing ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-103(A).

<sup>4</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-6.

<sup>5</sup> ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE AND PRELIMINARY STATEMENT.

<sup>6</sup> *Id.*

<sup>7</sup> Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 258 (1970).

that the court did not comment on the range of activities covered by EC 5-6 and how they compare to conduct controlled by the solicitation prohibition of DR 2-103. They both apply when an attorney is named as executor or recommended as attorney for probate in wills that he has drafted. Without delineation of the respective spheres of EC 5-6 and DR 2-103, attorneys may be forced to answer future complaints and face possible punishment in situations where the machinery of the professional disciplinary proceeding should not have been set in motion. For example, in *Gulbankian* the complaint was instituted on a quantitative basis. The number of wills in which the two attorneys were named raised a necessary inference of solicitation. But a given number of wills in which an attorney is named could also raise an inference of conscious influence. In that event a complaint should not be instituted.

Although dismissing the complaint, the court in *Gulbankian* announced, for future reference, some guidelines and standards pertinent to the situation of having the draftsman of a will also serving as executor or attorney for probate. First, a draftsman of a will has the duty to explain to the testator the necessity of having an executor named, what the position of executor entails, and the right of the testator to request a particular attorney to assist the executor in probate.<sup>8</sup> This explanation, however, must be given without any direct or indirect suggestion or solicitation that the draftsman himself should serve in one of these capacities.<sup>9</sup> Next, the submission to the testator of a form will in which the draftsman is named in one of these capacities, explaining to the testator that this inclusion is part of the standard form, is prohibited.<sup>10</sup> Finally, the court disapproved of attorneys safekeeping wills for their clients.<sup>11</sup> Such guidelines should not be lightly dismissed as dicta. The courts of the individual states maintain the jurisdiction to regulate lawyers on the theory that it is an inherent power of the judiciary,<sup>12</sup> and they will presumably follow any recom-

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<sup>8</sup> 196 N.W.2d at 736. The attorney needs to know the name of the executor in drafting the will, and the testator probably is not sure what the exact duties of an executor are.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* The court stated that most people today have repositories for valuable papers. If they do not, a state statute allows the testator to give the will to the register in probate for safekeeping. It should be noted that the warning the court gave against attorneys safekeeping their clients' will could produce confusion. The American Bar Association's Standing Committee on Professional Ethics has decided in one of its informal opinions that no question of ethics is involved in this type of situation. See ABA COMM. ON PROFESSIONAL ETHICS, No. 981 (1967).

<sup>12</sup> See, e.g., *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109

mendations or standards pertaining to the practice of law announced in earlier disciplinary cases.

The guidelines announced in *Gulbankian* will not supply completely adequate guidance to the practicing attorney who is concerned about the ethical question of being named executor, trustee, or attorney for probate in his clients' wills. The court took the position that from an ethical standpoint the number of times an attorney's name appears in wills that he has drafted should be few in comparison to the total.<sup>13</sup> The court failed to consider, however, that the family attorney with a substantial estate practice might be asked by many of his clients to serve in one of these capacities since he is more cognizant than anyone else of their families, business affairs, and real and personal property.<sup>14</sup>

Assuming all ethical considerations have been satisfied, an attorney should be equally concerned to avoid even the appearance of solicitation or undue influence. If he feels his employment as executor, trustee, or attorney for probate will create possible questions of solicitation, conscious influence, or the appearance of such questions, he could follow one authority's advice and have his clients state, to a disinterested witness, their voluntary intentions to appoint the attorney.<sup>15</sup> Alternatively, he could have the appointments of himself drafted in codicils by another lawyer.<sup>16</sup> With a concern for the conservation of time, the simplest approach would allow the attorney in drafting the will to note the appointment of himself as executor or request for himself to serve as attorney for probate, and immediately thereafter to include a sentence to the effect that the appointment or request was unilaterally and independently made by the testator with no suggestion from the attorney.

Before the Supreme Court of Appeals of West Virginia adopted the Canons of Professional Ethics in 1947,<sup>17</sup> it treated complaints of solicitation grudgingly. In addition to the requirement that all charges for violation of professional ethics be sustained by the full, clear, and

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S.E.2d 420 (1959). The court presented an exhaustive treatment of the subject, tracing the jurisdiction of the West Virginia Supreme Court of Appeals on such matters as the control and regulation of the legal profession in West Virginia from W. VA. CONST. art. VIII, §1.

<sup>13</sup> 196 N.W.2d at 737.

<sup>14</sup> McCown, *Ethical Problems in Probate Matters*, 39 NEB. L. REV. 343, 344 (1960). The author believes that more day-to-day ethical problems arise in probate matters than in any other field of practice.

<sup>15</sup> H. DRINKER, *LEGAL ETHICS* 94 n.43 (1953).

<sup>16</sup> *Id.* at 94.

<sup>17</sup> See W. VA. CODE append. at 379 (Michie 1966).

preponderating measure of proof,<sup>18</sup> the court once held, without additional comment, that a complaint of solicitation generally could not be maintained without showing the particular act occurred in a dishonorable or disreputable manner.<sup>19</sup> Theoretically, this type of allegation in a complaint today would not be necessary. Any violation of the minimum standards of the Disciplinary Rules of the Code of Professional Responsibility should be considered disreputable or dishonorable.

The West Virginia Supreme Court of Appeals has not disciplined any attorneys for solicitation since it adopted the American Bar Association's Code of Professional Responsibility in 1970.<sup>20</sup> In 1971, the court did affirm several charges against an attorney originally brought under the Canons of Professional Ethics by the Committee on Legal Ethics of the West Virginia State Bar, but dismissed a solicitation charge for lack of proof.<sup>21</sup> Language used by the court in this case, however, indicated it will not announce any guidelines or suggestions concerning types of conduct that may expose an attorney to disciplinary action. This is in contrast to the technique used in *Gulbankian*.<sup>22</sup>

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<sup>18</sup> Committee on Legal Ethics of the W. Va. State Bar v. Pietranton, 143 W. Va. 11, 99 S.E.2d 15 (1957); *In re* Marcum, 135 W. Va. 126, 62 S.E.2d 705 (1950); *In re* Damron, 131 W. Va. 66, 45 S.E.2d 741 (1947); *State v. Smith*, 84 W. Va. 59, 99 S.E. 332 (1919); *State v. Stiles*, 48 W. Va. 425, 37 S.E. 620 (1900); *State v. Shumate*, 48 W. Va. 359, 37 S.E. 618 (1900). Whether courts will alter their standards of proof in disciplinary proceedings in light of the more detailed Disciplinary Rules of the Code of Professional Responsibility is still unsettled. Wisconsin has apparently not changed. *Compare* *State v. Preston*, 38 Wis. 2d 582, 157 N.W.2d 615 (1968); *State v. Treis*, 245 Wis. 479, 15 N.W.2d 309 (1944) (decided before Wisconsin adopted the Code of Professional Responsibility), *with* *State v. Stumph*, 53 Wis. 2d 690, 193 N.W.2d 842 (1972) (decided after adoption). All of these cases require the measure of clear and satisfactory evidence to carry the burden of proof.

<sup>19</sup> *State v. Smith*, 84 W. Va. 59, 99 S.E. 332 (1919).

<sup>20</sup> The Code was adopted by order dated June 9, 1970, to take effect on July 1, 1970. Both the Code and the notes to it were adopted. 153 W. Va. xiii (1970). The Code of Professional Responsibility can be found in W. VA. CODE append. at 207 (Michie Supp. 1972).

<sup>21</sup> *In re* Hendricks, 185 S.E.2d 336 (W. Va. 1971). The Committee on Legal Ethics reported seventeen charges against Hendricks to the court involving violations of Canons 4, 8, 11, 21, 27, 28, and 44 of the Canons of Professional Ethics. The charges ranged from detaining money in a professional and fiduciary capacity to conduct involving fraud and deceit. Two charges were dismissed by the Committee and the court dismissed the solicitation charge. The court held that two of the other charges, one for not exerting his best efforts for an indigent client, and the other, for failure to appear without excuse at a number of Workmen's Compensation Commission hearings at which he was to represent claimants, warranted a reprimand or suspension only. Each of the other charges was held to have set forth grave professional misconduct that justified the court's annulment of his license to practice law in West Virginia.

<sup>22</sup> *In re* Hendricks, 185 S.E.2d 336, 342 (W. Va. 1971):

Although the immediate issue of *Gulbankian* concerned only one area of legal ethics, the case is indicative of problems that occur when courts act in their role as disciplinarian of the legal profession. First, the courts must remain cognizant that attorneys receive guidance for their professional conduct from the American Bar Association, through its published opinions, as well as from the courts themselves. Also, courts that have adopted the Code of Professional Responsibility should explain and supplement it whenever the need and opportunity arise. This technique is preferable to the course of conduct adopted by the West Virginia Supreme Court of Appeals. Although the Code of Professional Responsibility is less skeletal than its predecessor, it is a new body of law with little judicial interpretation of its provisions. The court in *Gulbankian* attempted to establish needed guidelines for the bench and bar. It neglected, however, to define clearly the important concepts of solicitation and conscious influencing. Finally, attorneys can avoid some problems of misapplication of the Code by appropriate preventive action. The attorneys in *Gulbankian* might have prevented the whole question of impropriety, with all its damaging effects on their professional stature, by having their clients manifest in one of several manners their voluntary intentions to have the attorneys serve as attorney for probate or executrix.

*Bert Michael Whorton*

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### Taxation — Requirement for Business Bad Debt Deductions

Taxpayer owned 44 percent of the stock in a construction corporation that he founded jointly with his son-in-law and in which he held the position of president at a salary of \$12,000 per year. His total yearly income from the corporation and other sources amounted to approximately \$40,000. Taxpayer claimed \$162,000 as a business bad debt deduction on his 1962 income tax return. He had paid this amount as indemnity to a casualty company that fulfilled bid and performance bonds when the construction corporation defaulted on its contracts. The resulting debt of the corporation to taxpayer became worthless when the corporation went into receivership. The Internal

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[I]t should be clearly understood that in disciplinary proceedings for disbarment or suspending or annulling the license of an attorney at law the action taken must depend upon the facts and circumstances in each particular case and it is not intended by the decision in this proceeding to establish any uniform or particular type of disciplinary action for any given case.