Memorandum

To: Committee Members

From: Bob Burton

Date: 1/13/05

Re: Rule 8.2

Attached is a copy of Rule 8.2 as it currently reads in Utah. Attached also is a copy of ABA Model Rule 8.2.

After discussing the Rule at the last meeting and doing a little more research, I recommend that we do not propose changing the Utah Rule.

The Ethics 2000 Committee did not recommend any changes to the ABA Model Rule. In other words, the ABA Model Rule pre-dated the Ethics 2000 project. Therefore, if we propose changing the Utah Rule, we would not do so to align it with work done by the Ethics 2000 Committee, but we would simply change the Rule to comport with the earlier ABA Model Rule. I see no compelling reason to do this.

It would appear that the only states that have adopted ABA Model Rule 8.2 are Oklahoma, Vermont, Montana, Indiana, Colorado, West Virginia, and Alabama. Other states, although apparently aware of the ABA Model Rule, have chosen not to adopt it.

Were we to recommend adoption of the ABA Model Rule, we would obviously broaden Rule 8.2. Instead of referring to public statements, Rule 8.2 would refer to any statement. Additionally, instead of limiting the reach of Rule 8.2 to the judiciary, the Model Rule would broaden Rule 8.2 to apply to any public legal officer. The ABA Model Rule is not only broader than the Utah Rule, but, in my opinion, creates some ambiguity that does not exist in the current Utah Rule. Accordingly, I believe that we should not recommend any changes to our current Utah Rule.

Utah Rule

Rule 8.2. Judicial officials.

(a) A lawyer shall not make a public statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or of a candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment. — Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

ABA Model Rule

MAINTAINING THE INTEGRITY OF THE PROFESSION

Rule 8.2
Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

ANNOTATION

INTRODUCTION

• *Only "False" Criticism Prohibited*

The Model Rules of Professional Conduct, like the predecessor Model Code of Professional Responsibility, prohibit only "false" criticisms of the judiciary. Although the Code proscribed "knowingly" false statements (DR 8-102(B)), Model Rule 8.2 incorporates the standard of "knowledge or reckless disregard" developed in the libel context in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In practice, however, many courts had interpreted the Code's "knowingly" false standard to include the "reckless disregard" standard now explicit in Rule 8.2. *See* "'Knowledge or Reckless Disregard,'" *infra*.

Rec'd 12/21/04

David Nuffer

350 South Main Street, # 483
Salt Lake City, Utah 84101
801 524 6150
david@nuffer.us

December 17, 2004

Robert Burton
Supreme Court's Advisory Committee on the Rules of Professional Conduct
Burton Lumber & Hardware Co.
Legal Department
1170 South 4400 West
Salt Lake City, UT, 84104

Dear Bob:

I recommend a change be considered in Rule 1.8(c), Rules of Professional Conduct. The rule currently reads:

> (c) 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.

This rule operates a little differently than the expression of the same principle in the Restatement, which I believe takes into account the realities of situations that may arise, while preserving the public protections intended by the rule.

> (1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.
>
> (2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
> (a) the lawyer is a relative or other natural object of the client's generosity;
> (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
> (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

The Restatement deals with preparing instruments *and* accepting gifts, which is more broad than the current rule dealing only with instruments. Thus, it provides more protection. More importantly for my concerns, the rule recognizes that if a lawyer is a natural object of a client's generosity, the instrument or gift *may* be valid. The current rule flatly voids such instruments (and gifts or bequests pursuant to such instruments). This defeats a testator's intent.

In my brief exposure to this issue, I found an unfortunate example of the application of this rule. *In Attorney Grievance Commission of Maryland v. Brooke*, 374 Md. 155, 821 A.2d 414 (Md. Ct. App. 2003) just before entering the hospital, a long standing acquaintance asked an attorney friend about a will, was told the essentials of a holographic will, got frustrated attempting to write it, and asked the attorney to type up a will. The will was then executed. The trial court's findings of fact tell the story well:

> 1. That the [respondent] had performed legal services for the Testator prior to the events which gave rise to the complaint in this case.
> 2. That on September 8, 1999, the Testator visited [respondent's] office to discuss with the [respondent], the Testator's wishes to be buried at sea and to prepare a will.
> 3. That the [respondent] advised the Testator regarding the elements of a valid will under Maryland law.
> 4. That the [respondent] directed Catherine Lastner to write a will for the Testator naming the [respondent] the personal representative and sole heir.
> 5. That Catherine Lastner is a non-lawyer assistant of the [respondent].
> 6. That the [respondent] and the Testator were close social friends of many years standing.
> 7. That the [respondent] was not aware of the provisions of Rule 1.8.
> 8. That the [respondent] did not exercise undue influence upon the Testator.
> 9. That it was the unequivocal intent of the Testator to name the [respondent] as his sole heir.[1]

The conclusions of law reflect the somewhat bizarre application of the rule:

> 1. That an attorney-client relationship existed between the [respondent] and the Testator with respect to the preparation of the [respondent's] Last Will and Testament.
> 2. That the [respondent] violated Rule 1.8 of the Rules of Professional Conduct.
> 3. That the [respondent] did not violate Rule 5.3.
> 4. That the [respondent's] violation of Rule 1.8 is professional misconduct under Rule 8.4.
> 5. That the violations of Rule 1.8 and Rule 8.4 merge.
> Notwithstanding these findings, the Court does not find that the [respondent's] actions were taken with the intent to take advantage of a confidential relationship or to unlawfully harm the Testator's heirs at law and that the [respondent] made extraordinary efforts to follow the Testator's wishes regarding his burial. The appropriate sanction is, of course, for the Court of Appeals to decide. However, after careful consideration, it is this Court's opinion that a reprimand, which would be publicly and formally recorded would be the appropriate sanction.[2]

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1 374 Md. at 164-65.

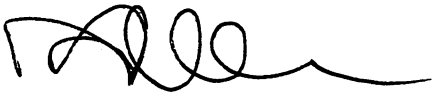
2 *Id.* at 165-66.

The appellate court was forced into an indefinite suspension of the lawyer, because "Rule 1.8(c) is absolute--an attorney may not prepare an instrument designating himself as legatee under the circumstances presented herein. Deterrence of such conduct and the public confidence in the legal profession can only be preserved by protecting against this behavior."[3] The court is wrong, however, in stating that deterrence and confidence "can only be preserved" by this rule. Deterrence and confidence are equally protected by the Restatement formulation.

The current rule defeats the undisputed intent of the testator for the sake of a general policy. The Restatement formulation accomplishes the testator's intent while providing public protection against potentially " negligent or infamous misconduct."[4]. I would recommend that Rule 1.8 be amended to read as the Restatement provides.

Thank you for your consideration of this suggestion.

Sincerely,



David Nuffer

DN

Encl: Restatement
Brooke

[3] *Id.* at 180.
[4] *Id.* at 179.

C

Restatement (Third) of The Law Governing Lawyers
Current through September 2004

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Chapter 8. Conflicts Of Interest
Topic 2. Conflicts Of Interest Between A Lawyer And A Client

§ 127. A Client Gift To A Lawyer

Link to Case Citations

(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:
(a) the lawyer is a relative or other natural object of the client's generosity;
(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or
(c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Comment:

a. Scope and cross-references. This Section is a specific application of the general prohibition of conflicts of interest in § 121. The conduct defined in this Section is presumed to have a material and adverse effect on the client. Consent under § 122 is ineffective if the lawyer's conduct violates this Section. The prohibition set forth in this Section is imputed to affiliated lawyers pursuant to § 123. That is, a lawyer may not receive a gift from a client of an affiliated lawyer (see § 123) in circumstances inconsistent with the standards in this Section.

Sanctions for violation of this rule include those in § 121, Comment *f*. A client can rescind a gift to the client's lawyer, for example, and a testamentary gift can be set aside as the product of undue influence. The lawyer might also be subject to the sanctions of professional discipline (see § 5) and fee forfeiture (see § 37).

The law of undue influence treats client gifts as presumptively fraudulent, so that the lawyer-donee bears a heavy burden of persuasion that the gift is fair and not the product of overreaching or otherwise an imposition upon the client. See Restatement Second, Trusts § 343, Comments *l* and *m* (voidability of gifts from beneficiary to trustee); cf. Restatement Second, Contracts § 177 (contracts voidable on ground of undue influence). This Section assumes, but does not restate fully, the law of undue influence. The Section is stricter than the general law of undue influence in some

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jurisdictions. For example, the Section prohibits a lawyer from accepting a gift from a client (apart from the three stated exceptions) even if the lawyer has not engaged in undue influence.

b. Rationale. A client's valuable gift to a lawyer invites suspicion that the lawyer overreached or used undue influence. It would be difficult to reach any other conclusion when a lawyer has solicited the gift. Testamentary gifts are a subject of particular concern, both because the client is often of advanced age at the time the will is written and because it will often be difficult to establish the client's true intentions after the client's death. At the same time, the client-lawyer relationship in which a gift is made is often extended and personal. A genuine feeling of gratitude and admiration can motivate a client to confer a gift on the lawyer. The rule of this Section respects such genuine wishes while guarding against overreaching by lawyers.

c. Gifts subject to this Section. For the purposes of this Section, a gift is any transfer by the client to the lawyer of a thing of value made without consideration (compare § 126). A client's gift to a member of the lawyer's family, or to a person or institution designated by the lawyer, is treated as a gift to the lawyer if it was made under circumstances manifesting an intent to evade the rule of this Section.

d. Solicitation of a client gift. Even with respect to a gift not otherwise in violation of the lawyer's duty to the client under Subsection (2), a lawyer may not improperly induce the gift to the lawyer or to a spouse, child, or similar beneficiary of the lawyer (see generally Restatement Second, Property (Donative Transfers) § 34.7). Even bargain exchanges between lawyer and client are subject to a high level of scrutiny (see § 126, Comment *b*); it follows that gratuitous transfers conferring benefits on the lawyer are at least as subject to scrutiny. Accordingly, a client may void the client's gift to a lawyer or to the lawyer's beneficiary, unless the lawyer can demonstrate that the gift was not improperly induced by undue influence or otherwise. A lawyer's suggestion that a client make a gift to a charity favored by a lawyer would not ordinarily be improper, so long as the lawyer informs the client that the lawyer favors the charity and employs no improper means such as misrepresentation or other means of overreaching. A lawyer's suggestion to a client that the client employ the lawyer's services in the future does not constitute the solicitation of a gift.

e. A lawyer as a relative or other natural object of a client-donor's generosity. The general prohibition against a lawyer's receipt of a gift from a client is subject to exception when the lawyer is so related to the client that the gift should not cause suspicion (Subsection (2)(a)). Thus, a client-parent's gift to a lawyer-child is permissible. Such gifts are permissible even in the absence of independent legal advice (compare Subsection (2)(c)). In many families, one of whose members is a lawyer, it would be thought unusual for a family member to go outside the family for legal advice, for example, to write a will or create a trust for a family member. That the lawyer receives a gift under such a will or trust would, in context, ordinarily not indicate overreaching. However, if the lawyer receives significantly more benefit from a donative transfer of the family-member client than others in the family who are similarly related to the client, in the event of a challenge the lawyer bears the burden of persuading the tribunal that the gift was not the product of overreaching.

Illustration:

1. Lawyer is one of Mother's five children. At Mother's instruction, Lawyer prepares her will leaving one-fifth of the estate to each of the children, including Lawyer. Lawyer's preparation of such an instrument is within the exceptions in s 127(2). However, if Lawyer received one-third of the estate, and the other four children each received one-sixth, in the event of a challenge, Lawyer would be required to persuade the tribunal that Lawyer did not overreach Mother.

f. Substantial gifts. In determining whether a gift to a lawyer is substantial within the meaning of Subsection (2)(b),

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the means of both the lawyer and the client must be considered. To a poor client, a gift of $100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer's overreaching. To a wealthy client, a gift of $1,000 might seem insubstantial in relation to the client's assets, but if substantial in relation to the lawyer's assets, it suggests a motivation on the part of the lawyer to overreach the client-donor, or at least not to have fully advised the client of the client's rights and interests. Under either set of circumstances, the lawyer violates the client's rights by accepting such a gift.

Illustration:

2. Client, who has a longstanding professional relationship with Lawyer, presents Lawyer with an antique locket, with a market value of under $50, that had belonged to Client's deceased sister. "My sister always wanted to be a lawyer," Client says to Lawyer, "but that was difficult in her generation. I like to think she would have been as good a lawyer as you now are, and I think she would like you to have this." Lawyer may accept the Client's gift.

g. The effect of the client's opportunity to obtain independent advice. When a competent and independent person other than the lawyer-donee acts as the client's adviser with respect to a particular gift, there is less reason to be concerned with overreaching by the lawyer. A lawyer's encouragement to a client to seek independent advice also evidences concern for fairness on the lawyer's part. Whether the **lawyer** may prepare an **instrument** effecting the **gift** from the client to the **lawyer** is determined by Subsection (1), under which independent advice is irrelevant. If the **lawyer** does not prepare such an **instrument**, the **lawyer** is not precluded from receiving a **gift** subject to the limitations of Subsection (2)(c), including that of independent advice. Such a gift also remains subject to invalidation if the circumstances warrant under the law of fraud, duress, undue influence, or mistake (see Restatement Second, Trusts § 141 & s 343, Comments *l* & *m*).

Illustration:

3. Client has come to Lawyer for preparation of Client's will. "I do not have living relatives and you have been my trusted friend and adviser for most of my adult life," Client tells Lawyer. "I want you to have a bequest of $50,000 from my estate." Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying "I do not want anyone else to know my business." Lawyer may not draft Client's will containing the proposed gift to Lawyer.

4. The same facts as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a $50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. **Lawyer** may accept the inter vivos **gift** of $50,000 from Client, so long as **Lawyer** did not solicit the **gift** or prepare an **instrument** effecting the **gift** from Client.

5. On behalf of Client, a corporation assisted in the matter by Inside Legal Counsel, Lawyer has obtained satisfaction of a judgment in an amount significantly surpassing what Client and Inside Legal Counsel thought possible. Lawyer receives payment of Lawyer's final statement with a covering letter from Inside Legal Counsel stating that Client, on the recommendation of Inside Legal Counsel, was also enclosing an additional check in a substantial amount in gratitude for the outstanding result obtained by Lawyer. Lawyer may accept the gift of the additional check, reasonably assuming that Client has been appropriately advised in the matter by Inside Legal Counsel.

The recommendation of independent advice must be more than perfunctory. The independent adviser may not be affiliated with the lawyer-donee. It is not necessary that the person consulted as adviser be a lawyer. Any person qualifies who is mature and appropriately experienced in personal financial matters, trusted by the client, not a beneficiary of the

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gift, and not selected by or affiliated with the lawyer.

A lawyer-donee bears the burden of showing that reasonable effort was made to persuade the client to obtain independent advice and that the lawyer did not otherwise unduly influence or overreach the client. If the lawyer-donee has tried but failed to persuade the client to seek such help, or if the client rejects the independent adviser's counsel, the presumption of overreaching can be overcome and the gift upheld.

REPORTER'S NOTE

Comment b. Rationale. See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:400 (2d ed.1990); C. Wolfram, Modern Legal Ethics § 8.12 (1986).

The general prohibition against client gifts to lawyers is clear and of long standing. Ethical Consideration 5-5 of the ABA Model Code of Professional Responsibility (1969) provided:

> 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 overreached 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.

This Section follows generally Rule 1.8(c) of the ABA Model Rules of Professional Conduct (1983), which provides a stricter rule prohibiting most substantial **gifts:**

> 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.

Comment ¶[2] to ABA Model Rule 1.8 ("A lawyer may accept a gift from a client, if the transaction meets general standards of fairness.") suggests that the fair-and-reasonable standard of ABA Model Rule 1.8(a), which relates to business transactions and adverse-property acquisitions, also applies to client gifts. It is noteworthy that, under both the ABA Model Code and the ABA Model Rules, there is no exception for informed client consent, even on the part of a sophisticated client. See In re Gillingham, 896 P.2d 656 (Wash.1995).

The rule of voidability is well settled and has been applied to both testamentary and inter vivos gifts. E.g., In re Schuyler, 434 N.E.2d 1137 (Ill.1982) (lawyer accepted $10,000 inter vivos gift from elderly client in nursing home); In re Saladino, 375 N.E.2d 102 (Ill.1978) (lawyer took title to client's house and was named sole residuary legatee in her will); Committee on Professional Ethics & Conduct v. Morrison, 320 N.W.2d 564 (Iowa 1982) (lawyer put provision in will for fees to be paid to him in addition to those to be awarded by court); Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1979) (lawyer sole beneficiary in will); In re Putnam, 177 N.E. 399 (N.Y.1931) (gift to attorney-draftsman is presumed to be the result of undue influence); In re Theodosen, 303 N.W.2d 104 (S.D.1981) (lawyer made sole beneficiary in client's will). See also McFail v. Braden, 166 N.E.2d 46 (Ill.1960) (unsuccessful attempt to avoid rule by conveyances to lawyer's relatives); Laspy v. Anderson, 361 §.W.2d 680 (Mo.1962) (same).

Comment d. Solicitation of a client gift. See generally Restatement Second, Property (Donative Transfers) § 34.7, Reporter's Note; Restatement Second, Trusts § 216(2)(c) & Comment *n* thereto; C. Wolfram, Modern Legal Ethics § 8.12.2 (1986), and authorities cited; ABA Model Code of Professional Responsibility, EC 5-5 (1969) ("a lawyer should not suggest to his client that a gift be made to himself or for his benefit."); see also, e.g., Calif. R. Prof. Conduct, Rule

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4-400 (1989): "A [lawyer] shall not induce a client to make a substantial gift, including a testamentary gift, to the [lawyer] or to the [lawyer's] parent, child, sibling, or spouse, except where the client is related to the [lawyer]." The California rule differs from ABA Model Rule 1.8(c) in prohibiting inducement specifically, rather than inferentially. It is less strict than the ABA Model Rule in that it permits a **lawyer** to prepare an **instrument** effectuating a **gift** if the **lawyer** did not induce the **gift**. See id. Comment. In the latter respect, the Section follows the approach of the ABA Model Rules.

E.g., Klaskin v. Klepak, 534 N.E.2d 971 (Ill.1989) (in action by administrator of client's estate to avoid gift of condominium to lawyer, burden on lawyer to overcome presumption of undue influence by clear and convincing evidence); In re Smith, 572 N.E.2d 1280 (Ind.1991) (rule that client-lawyer gift transactions are presumptively invalid as product of undue influence applied in disciplinary proceeding involving gifts of large sums to lawyer, and lawyer's son, secretary, and law firm from elderly client incompetent to give consent); In re Delorey, 529 N.Y.S.2d 153 (N.Y.App.Div.1988) (in "Putnam hearing" under In re Putnam, 177 N.E. 399 (N.Y.1931), testimony of lawyer-beneficiary of client's will and subscribing witnesses that lawyer had drafted will but totally disassociated himself from its execution insufficient to rebut inference of undue influence); In re Sherbunt, 520 N.Y.S.2d 885 (N.Y.App.Div.1987) (gift of $45,000 from elderly client to lawyer who handled all her financial affairs adversely reflects on lawyer's fitness to practice law). The general rule is that the presumption of undue influence is not overcome merely by a showing that the lawyer did not actively procure the gift. See In re Estate of Mapes, 738 §.W.2d 853 (Mo.1987) (action by heirs to set aside gift to lawyer of joint bank deposits).

Comment e. A lawyer as a relative or other natural object of a client-donor's generosity. See ABA Model Rules of Professional Conduct, Rule 1.8(c) (1983) (prohibition against client gifts to lawyer or lawyer's relative, "except where the client is related to the donee"). The family-relationship exception to the general rule against client gifts to their lawyers is described in State v. Horan, 123 N.W.2d 488, 492 (Wis.1963) (dictum) (will drawn for close friend and long-time client not within "family" exception).

Comment g. The effect of the client's opportunity to obtain independent advice. On the requirement that the lawyer attempt to persuade the client to seek independent advice see, e.g., In re Anderson, 287 N.E.2d 682 (Ill.1972) (discipline imposed and presumption of undue influence found where lawyer established joint tenancies with client in lieu of will); Radin v. Opperman, 407 N.Y.S.2d 303 (N.Y.App.Div.1978) (where no evidence of independent counsel overcomes presumption of undue influence, lawyer forced to give up Totten Trust accounts opened by client for lawyer's benefit). The adviser must be truly independent of the donee-lawyer and must take the responsibility seriously. See People v. Berge, 620 P.2d 23 (Colo.1980) (second lawyer shared office space with lawyer receiving gift, made no significant inquiry into client's wishes, and suggested no changes in deed of gift given to him by first lawyer).

On upholding gifts by clients not independently advised after the lawyer-donee made a reasonable effort to persuade the client to do so, see, e.g., In re Barrick, 429 N.E.2d 842 (Ill.1981) (in discipline case, client, sophisticated in financial matters and in full possession of mental powers, rejected lawyer's urging to seek independent counsel out of strongly stated concerns that independent counsel might disclose which charities were benefited under client's will); Disciplinary Bd. v. Amundson, 297 N.W.2d 433 (N.D.1980) (no disciplinary violation under exceptional circumstance that lawyer did all he could to persuade client to go to independent lawyer).

Research References

1. Digest System Key Numbers

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West's Key No. Digests, Attorney and Client ⚿ 44, 63.

2. A.L.R. Annotations

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.

Wills: undue influence in gift to testator's attorney. 19 A.L.R.3d 575.

Undue influence in nontestamentary gift from client to attorney. 24 A.L.R.2d 1288.

Case Citations

Case Citations through June 2003

Case Citations through June 2003:

S.D.2002. Subsecs. (1) and (2) quot. in sup. After disciplinary board recommended that attorney be suspended from the practice of law for three years, trial court recommended that attorney be disciplined by public censure. This court concluded that two-year suspension was appropriate. The alleged gift of over $325,000 to attorney and his wife from attorney's uncle in a short period of time, which changed uncle's longstanding testamentary scheme and was highly disproportionate to uncle's other heirs, clearly did not meet any general standard of fairness and thus did not constitute simple gift or gifts. The court stated that Rule 1.8(c) could not be used to excuse substantial gifts that were facially disproportionate to gifts made to other relatives in the same class. In re Discipline of Mattson, 2002 SD 112, 651 N.W.2d 278, 288.

(2000)

REST 3d LGOVL § 127
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Robert A. Burton
Attorney at Law
P.O. Box 27206
Salt Lake City, Utah 84127-0206
Phone: (801) 952-3732
Fax: (801) 952-3734

February 1, 2005

The Honorable David Nuffer
350 South Main Street, #483
Salt Lake City, Utah 84101

RE: Rule 1.8(c)

Dear Judge Nuffer:

Thank you for your letter of December 17, 2004, and the enclosures which accompanied that letter. I distributed copies of the letter and the Restatement to all lawyers on the Rules of Professional Conduct Committee. We discussed the matter at our meeting on January 24, 2005.

The Committee agreed with you that the Utah Rule, as it is presently written, is not ideal. However, the Committee concluded that the verbiage contained in the ABA Model Rule is preferable to what is contained in the Restatement. Accordingly, the Committee voted to recommend to the Supreme Court that 1.8(c) be modified to coincide with the new ABA Model Rule. That Rule reads as follows:

> (c) 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, familiar relationship.

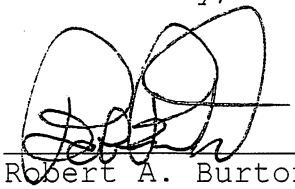
The Committee was concerned with the fuzzy nature of the Restatement language "or other natural object of the client's generosity." The Committee felt that this language may perhaps

provide an excuse to unscrupulous lawyers who have taken advantage of their clients. Those lawyers could attempt to shield their unethical conduct by arguing that they were "other natural objects of the client's generosity." The Committee felt that the Restatement formulation of the Rule was lacking because the Restatement does not define what "other natural object of a client's generosity" means outside of a family setting. The illustration given by the Restatement deals with a family situation – a situation that is adequately covered by the ABA Model Rule.

Although the facts in the Brooke case seem compelling, the Committee concluded that similar facts would occur rarely. Moreover, if the lawyer confronted with such a fact pattern were aware of the provisions of Rule 1.8 – the lawyer in Brooke was not aware of the Rule – the lawyer could make appropriate arrangements to have another lawyer prepare a will that leaves a substantial bequest to the first lawyer. Indeed, regardless of the presence or lack of any ethical prohibition, it would seem that a careful lawyer would never want to prepare a will that would leave him or her the bulk of a descendant's estate unless that lawyer were a parent, spouse, son or daughter, or grandchild of the descendant.

Please let me know if you have any questions or any additional input. Thank you again for bringing this matter to the attention of the Committee.

Yours truly,



Robert A. Burton

RAB/ls
cc: Matty Branch

Received 2-10-05

David Nuffer
350 South Main Street, # 483
Salt Lake City, Utah 84101
801 524 6150
david@nuffer.us

February 7, 2005

Robert Burton
Supreme Court's Advisory Committee on the Rules of Professional Conduct
P O Box 27206
Salt Lake City, UT, 84127-0206

Dear Bob:

Thank you very much for your letter of February 1, 2005, regarding the Committee's action regarding Rule 1.8 (c), Rules of Professional Conduct. It took me a little while to understand the reformulation but I think it meets the circumstances well. I was a little confused, because the final sentence defining "related persons" defines both the group of potential beneficiaries as to whom the prohibition could apply, as well the circle of clients for whom the prohibition would not apply. If I understand it correctly, if a licensed attorney drafts a document for a long-standing neighbor or close friend in which the lawyer – or a close personal friend of the lawyer - is a beneficiary, then the prohibition would not apply. The personal relationship would take precedence over the prohibition. I think this goes a long way to making lawyers normal human beings, able to help friends. Otherwise, the very act of drafting (even without a fee) makes a client out of a friend who may have never been a client, and invokes the prohibition.

Thank you for your consideration of this suggestion and the carefully considered solution.

Sincerely,

David Nuffer

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