Gifts and Bequests From Clients

In a previous column, we looked at the ethical considerations involved when we give gifts *to* clients.[1] But what of situations involving gifts *from* clients, including unsolicited testamentary bequests? An article appearing in ABA's January 2013 "e-news" offering[2] points out a number of ethical considerations and authorities in this area, all based on what we know as ER 1.8(c) of Arizona's Rules of Professional Conduct.[3] This is the rule that states a lawyer shall not solicit a "substantial" gift from a client, including a testamentary gift, or prepare an instrument on behalf of a client giving the lawyer or a person related to the lawyer any such gift unless the lawyer (or other recipient of the gift) is related to the client.

The bottom line here is that you cannot solicit a substantial gift from a client. Period.

The primary concern here is the presumption of undue influence that lawyers have over their clients, thereby potentially rendering voidable any gift or testamentary bequest to the lawyer.[4]

Note that the rule not only prohibits solicitation of a gift: it also prohibits the drafting of an instrument (like a will or trust) that gives the lawyer a gift—even if it's unsolicited—unless the lawyer is related to the client.

Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

A 2002 case from Ohio demonstrates the trouble even a well-meaning lawyer can get into unless the proscriptions of the rule are strictly observed.[5] There, a lawyer, at the client's request, drafted an amendment to a trust in which the lawyer was a trustee, leaving part of the client's estate to an adult care home in which the client was residing. The home was operated through a corporation that was wholly owned by the lawyer and her siblings, and the amendment effectively disinherited the client's children, who were originally named as the ultimate recipients of the trust assets. Seeing a potential conflict of interest, and in order to accomplish what her client wanted, the lawyer resigned her positions as an officer and director at the home, and surrendered her stock in the corporation through which the home was operated. When the client died and his children discovered what their father had done, they contested the validity of the bequest to the home. The lawyer, now seeing the problem, resigned as the trustee of the trust and the home disclaimed any interest in her client's estate.

This apparently satisfied the children but not the Toledo Bar Association, which proceeded to charge the lawyer with having violated pertinent provisions of Ohio's ethics code, essentially the same as Arizona's present rule. The lawyer was ultimately suspended for a year, even though the Ohio Supreme Court found that the client's children got everything they wanted, and that the lawyer had apologized, had stipulated to the misconduct and had cooperated with the Bar investigation.

Our State Bar's Committee on the Rules of Professional Conduct has weighed in several times on these issues. In a 1995 Opinion,[6] it was explained that a lawyer could accept a gift from a client consisting of proceeds from a settlement of the case, in addition to his fee for the representation, if he (1) complied with the requirements of ER 1.8(a), regarding business transactions with clients,[7] (2) was not the lawyer preparing the documents required to perfect the gift and (3) made sure the client was competent to form the requisite donative intent. The Opinion was careful to point out that these requirements were for when "substantial" gifts were involved, and not for incidental gifts such as when a client gives her lawyer a bottle of Scotch for Christmas. And, in a 1996 Opinion,[8] it was explained that a lawyer could draft a will or a trust for a client naming himself as trustee and/or personal representative without violating the gift prohibitions of ER 1.8(c). The Opinion cautioned, however, that the lawyer could not charge trustee or other fees in addition to legal fees he charged for the same work.

The bottom line here is that you cannot solicit a substantial gift from a client. Period. And if the client wants to make an unsolicited, substantial gift to you, have another lawyer advise the client and draft the document so providing. The only exception to these rules is when the client is a relative.

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endnotes

1. *Gifts and Referrals*, Ariz. Att'y (June 2003) at 10.
2. Susan J. Michmerhuizen, *Testamentary gifts: Even if there is a will, there may not be a way*, at www.americanbar.org//newsletter/publications/youraba/201301article02.html.
3. Rule 42, ARIZ.R.S.CT.
4. Comment [6] to ER 1.8.
5. *Toledo Bar Association v. Cook*, 778 N.E.2d 40 (Ohio 2002).
6. Ariz. Ethics Op. 95-05 (Gift; Personal Injury Representation) (April 1995).
7. ER 1.8(a) provides essentially that the transaction must be fair to the client and the terms transmitted in a writing that can be reasonably understood by the client, that the client be advised in writing of the desirability of seeking independent counsel, and that the client give informed consent, in a writing signed by the client, to the essential terms of the transaction.
8. Ariz. Ethics Op. 96-07 (Conflict of Interest; Lawyer as Trustee; Wills; Estates) (March 1996).