No Good Deed Goes Unpunished: What to Do When Your Client Wants to Make A Bequest to Your Favorite Charity

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32 Law. Man. Prof. Conduct 751
Lawyer-Client Relationship

Serving on the board of a charity or other not-for profit institution may be one of the most rewarding experiences a lawyer—or anyone—may have, but lawyers should be aware that their charitable work can raise ethical concerns when that work intersects with their legal practice. Consider the following hypothetical:

Laura, a tax and trusts and estates attorney, is a trustee of Save-A-Life Hospital, a not-for-profit medical facility specializing in treating children's diseases. In addition to fees for services, the hospital raises money through galas and other fundraising events and actively seeks bequests. Laura has been on the board for 10 years and has been intimately involved with Save-A-Life's operations and fundraising. She has occasionally provided legal services to the hospital on a pro bono basis, mainly in connection with its tax-exempt status, but also occasionally in connection with the documentation of charitable gifts. Other board members regularly refer clients to Laura, and she considers her membership on the board not only a satisfying way of giving back but also an excellent business development tool.

A major part of Laura's practice involves advising wealthy individuals and families on estate-planning issues. Several of her clients were referred to her by Save-A-Life after they had indicated to the hospital that they wanted to make a charitable bequest to the hospital in their Wills. She has also recommended bequests to the hospital to clients who were not familiar with Save-A-Life. In a number of engagements, the hospital has paid Laura's fees based on a percentage of the bequest.

Recently Laura asked Save-A-Life to advise all potential donors that she will provide a discount to any clients who include a gift to Save-A-Life in their Wills or other estate-planning. Thus far, three clients have retained Laura as a result of this suggestion. Save-A-Life has asked Laura if she will represent the hospital as well in negotiations with any donors who take advantage of this offer.

Is Laura Breaking Any Rules?

ABA Model Rule 1.8 (c) provides that:
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.
But what are the rules when the object of the bequest is not the lawyer but a charitable organization on whose board the lawyer serves? Such an organization is not included in those

deemed to be "related to the lawyer" in Rule 1.8(c), but are there pitfalls for Laura as she considers these relationships? The answer is clearly "yes." What is not always clear is what those considerations are.

The rationale underlying Rule 1.8 (c) is that a client should not be subjected to undue influence in making a testamentary or other gift. *See* Rule 1.8, Comment [6] ("[A] gift may be voidable by the client, under the doctrine of undue influence, which treats client gifts as presumptively fraudulent."). The same issue lurks where a lawyer is involved in drafting an instrument that benefits a charity with which she has a relationship. Was the gift the client's decision or did the lawyer improperly influence the decision?

Other Rules may provide some guidance. For example:

- Rule 1.4 (a) requires a lawyer, among other things, to "(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules."
- Rule 1.6(a) provides that a lawyer "shall not reveal information relating to the representation of a client."
- Rule 1.7(a)(2) provides that a lawyer shall not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."
- Rule 1.8(f) provides that "[a] lawyer shall not accept compensation for representing a client from one other than the client unless … (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."
- Rule 2.1 requires that "[A] lawyer shall exercise independent professional judgment and render candid advice…."
- Rule 7.2(b) provides that "[A] lawyer shall not give anything of value to a person for recommending the lawyer's services …."

As discussed below, there are also a number of ethics committee opinions addressing various aspects of the dilemma Laura faces.

Can Laura Represent a Client Who Wishes to Make a Bequest to Save-A-Life?

There is no per se prohibition on a lawyer representing a client who wishes to make a bequest to a charity in which the lawyer is involved either as a director or otherwise, and courts have upheld Wills in which the lawyer played such a role. *See, e.g.*, *In re Estate of Edel*, 182 Misc. 2d 878, 700 N.Y.S.2d 664 (N.Y. Surr. Ct. 1999); *Alden v. Lewis*, 160 So. 2d 181 (Miss. 1964). Nevertheless, each potential representation is fact-specific, and lawyers need to consider (1) whether they have a conflict that may prevent them from engaging in the representation; (2) if so, whether the conflict can be waived; and (3) the nature of the disclosure they must provide both to the donor client and to the charity before they proceed.

a. 'Representing' vs. 'Advising'

There is a difference between Laura drafting the Will of a client who knows precisely how he plans to distribute his estate, versus advising a client who has never heard of Save-A-Life to include a bequest to it in his Will. In the former case, the lawyer is not "unduly influencing" the client who knows what he wants. In the latter situation, the advice may be "materially limited" by the lawyer's personal interest.

For example, as a trustee of the charity, the lawyer may have a personal interest in obtaining the largest gift possible, which may conflict with her client's best interest. Rule 1.7(a)(2). *Compare* Maryland Ethics Op. 2003-08 (2003) (impermissible for attorney on church's legacy committee to volunteer to represent persons who may not have decided on charity as beneficiary because lawyer may "be affected by considerations relating to [charity's] financial needs), *with* Maryland Ethics Op. 2015-02 (2015) (attorney-trustee's representation of client with specific bequests in mind prior to retention presents waivable conflict, provided full disclosure). Unless the client has already made a decision to include Save-A-Life in his Will, Laura should refrain from recommending Save-A-Life unless it is part of a list of charities her client may consider, and only with the full disclosure described below.

b. Can This Conflict Be Waived?

There may be other considerations that give rise to a conflict even where Laura's client knows he wants to make the bequest before he meets Laura. Laura may not consider this bequest in a vacuum. She may have a duty to counsel the client on the wisdom of the size of the bequest, its effect on other beneficiaries, the tax consequences, and perhaps negotiate with the hospital as to how it will use the gift.

But, as a trustee of Save-A-Life, Laura's main interest is in raising funds for the hospital, so the larger (and more unrestricted) the bequest the better. Laura must consider whether she can set aside her desire to maximize fundraising in order to provide competent and unconflicted advice to the client. That may well be impossible. *See* ABA Informal Ethics Op. 1288 ("[The lawyer] may find it proper to tell his client that the gift is too large in relationship to the size of the estate and obligations to others or that the gift is unwise for other reasons" … but "would be reluctant to seem disloyal to the church which has recommended him by recommending against a gift where such advice would be in the best interest of the testator.").

c. Duty of Disclosure

Regardless of the circumstances of the representation, Laura needs to disclose to the client "any decision or circumstance with respect to which the client's informed consent … is required." Rule 1.4(a). The decision to hire Laura is one that requires informed consent. So Laura must provide the client "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e).

If Laura believes that she can represent the client without being conflicted, then she needs to advise the client in writing of her relationship with Save-A-Life, both as a trustee and as its occasional lawyer, her involvement with fundraising, if any, and that, although she believes that she will not be influenced by these relationships, she has an interest that could be adverse to the interests of the client. It would also be wise for Laura to advise the client to consider obtaining the advice of independent counsel before proceeding with the representation. Laura

should obtain a consent from the hospital as well. *See* Oregon Formal Ethics Op. 2005-116 (2005).

d. Duty of Confidentiality

Laura must balance her duty of disclosure to the new client against her duty of confidentiality to Save-A-Life, which may be implicated here. Assume that Laura learned through her representation of Save-A-Life that the hospital is in serious financial distress or faces some other difficulty that threatens its survival. Rule 1.6(a) prohibits disclosure of this information without the hospital's consent. Even if she learned this information in her capacity as a trustee, she still has a duty to keep the hospital's information confidential. Yet this is precisely the type of information her individual client needs to make an informed decision concerning the representation. It is hard to see how Laura would be able to fulfill her obligation to communicate with her individual client under Rule 1.4(a) and at the same time her duty of confidentiality to Save-A-Life under Rule 1.6(a). *See* Nevada Ethics Op. 47 (2011).

Can Laura Represent the Hospital and the Donor in the Same Transaction?

No. In addition to the fact that Laura as trustee has interests that could materially limit the representation of her client, Rule 1.7(a)(2), Rule 1.7(a)(1) prohibits representation of a client where the "representation of one client will be directly adverse to another client." Even though the hospital and the donor believe they have the same goal, i.e., to benefit the hospital, they still have differing interests, and negotiation of the terms of the gift may be contentious. This conflict is not waivable. *See, e.g.*, Oregon Formal Ethics Op. 2005-116.

Can Laura Discount Her Fees? Provide Her Services Pro Bono? Donate Her Fees? Be Paid a Percentage of the Bequest?

Model Rule 7.2 (c) prohibits an attorney from giving someone anything of value for recommending the lawyer's services. There is no prohibition on Laura discounting her fees on an individual case-by-case basis for a client who is making a bequest to Save-A-Life. But were Laura to make an agreement with Save-A-Life to charge a reduced fee to donors who agree to make a bequest, this could be the type of arrangement that has been found to violate Rule 7.2(c) on the theory that the lawyer is facilitating a bequest in exchange for the recommendation. Kentucky Ethics Op. KBA E-391 (1996).

On the same theory, a Michigan State Bar ethics committee concluded that a lawyer could offer a discount to members of an organization, but could not let the organization use this discount as an incentive to attract new members. Michigan Ethics Op. RI-147 (1992). A New York ethics committee concluded that a lawyer could not participate in a charity-sponsored program in which his services would be offered at no charge if the client made a bequest to the charity. New York County Ethics Op. 656 (1980).

On the other hand, the Michigan State Bar ethics committee concluded that a lawyer could be included on a list of lawyers who agreed to offer special rates to church members who wanted

to leave a bequest to the church, as long as the church was knowledgeable about the lawyer's services, the lawyer exercised independent judgement in counseling the donor clients, and the lawyer gave nothing of value in exchange for the listing. Michigan Ethics Op. RI-229 (1995). In separate opinions, the Michigan committee also concluded that a lawyer may provide her services at no charge to a client who wishes to leave a bequest to a charity with which the lawyer is associated provided that the charity is not advertising that fact (Michigan Ethics Op. RI-164) (1993), and permit a charity to advertise that the lawyer will donate to the charity a portion of her fees from the representation of the donor. Michigan Ethics Op. RI-163 (1993). The South Carolina Ethics Advisory Committee concluded that it was permissible for a charity to pay a lawyer for representing a donor, provided there was full disclosure and the charity exercised no control over the representation in accordance with Rule 1.8(f)(2). South Carolina Ethics Op. 04-03; *accord* South Carolina Ethics Op. 13-04 (2013) (emphasizing lawyer's duty to ensure no interference from third party payor). The committee found, however, that it would be improper for the fee to be based on a percentage of the bequest. South Carolina Ethics Op. 04-03. The committee noted that a fee must be reasonable, Rule 1.5, and that a fee based on a percentage of the bequest may not be. In addition, such an arrangement put the lawyer's interests directly in conflict with those of the client.

So What is Laura to Do?

Although there is some guidance for Laura, there are murky areas that can trip up even a well-intentioned lawyer. In deciding whether to take on a particular client or matter, Laura should consider not only whether she has a conflict and whether it can be waived but also, and perhaps as important, how the representation will appear to others with the benefit of hindsight.

As is the case with many conflicts, the question of whether a representation is proper will in all likelihood only arise when things go wrong—for example, if the Will is challenged. Whether there is a conflict "always is reviewed after the fact, when something has gone wrong, by a disinterested lawyer and **not** through the subjective lens and belief of the lawyer actually making the initial decision to proceed with the representation." New Hampshire Ethics Op. 2011-12/7 (2012) (describing New Hampshire's "harsh reality" analysis) (emphasis in original). Thus, in addition to reviewing the Rules and the analyses set forth in the ethics opinions that have addressed this issue, Laura should ask whether, even if she has adhered to their teaching, she would be comfortable with her actions if they are challenged in the future. If her answer is anything other than a resounding "yes," she should advise the client to find another lawyer.
