Lawyers as Executors and Trustees: Snakes and Ladders

by Edgar C. Gentle, III

It has been traditional for many lawyers and firms to engage in estate planning as a "loss leader," hoping to recoup their fee for drafting a client's will when the estate is filed. However, as shopping for a probate lawyer becomes popular, this practice may no longer make economic sense. An attorney therefore may be tempted to maintain the profitability of his or her trust and estate practice by naming himself or another member of the firm as executor or trustee. Following this course may be unwise, however, due to the many potential ethical, malpractice and economic pitfalls that may be encountered.

Ethically, there apparently is nothing improper *per se* in a lawyer's serving as the fiduciary representative for an estate or trust. See, for example, *7 A.B.A Real Property, Probate and Trust Journal* (1972), at 747-748. Possible disciplinary problems arise from the means by which an attorney obtains the appointment as estate fiduciary. In planning an estate, a lawyer must be careful not to suggest or insinuate to the testator that the lawyer should be appointed in a fiduciary capacity, lest he be found to have violated Alabama State Bar *Code of Professional Responsibility* Canon 5, requiring him to exercise independent professional judgment on his client's behalf and Disciplinary Rule 2-103, providing that he shall not recommend his employment to a nonlawyer who has not sought it. 57 A.L.R. 3d 703; *State v. Gulbenkian*, 196 N.W.2d 733 (Wis. 1972); and *Disciplinary Board v. Amundson*, 297 N.W. 2d 433 (N.D. 1980)

Moreover, if an attorney routinely is named a fiduciary in wills that he drafts, the appearance of solicitation will arise, which may be subject to discipline in and of itself. *State v. Gulbenkian, supra* Even being named a fiduciary in one will may prevent the will's admission to probate due to the presumption of undue influence if the will scrivener is named fiduciary with broad powers over estate assets. *Zeigler v. Coffin*, 218 Ala. 586, 123 So. 22 (1929)

Finally, even if the testator, unsolicited and without undue influence, asks the lawyer to serve in such a capacity, accepting the engagement without disclosing the resulting pitfalls for the estate may traduce Disciplinary Rule 5-101(A), which forbids a lawyer, without consent and after full disclosure, from representing a client in a matter in which their interests conflict. *Financial and Estate Planning Ideas and Trends in Summary*, April 10, 1986

Additional ethical considerations, as well as malpractice problems, arise when the lawyer actually serves as fiduciary of the estate or trust. Even if he lacks specified expertise as an investor, the lawyer may be held to a professional standard of care in managing an estate's assets comparable to that applied to a bank or trust company. *Trusts and Estates*, Jan. 1984, at 12 The Alabama "prudent man" rule with respect to estate asset management is discussed in *Birmingham Trust National Bank v. Henley*, 371 So.2d 883 (Ala. 1979); and *First Alabama Bank of Huntsville, N.A. v. Spragins*, 475 So.2d 512 (1985).

As estate fiduciary, the lawyer may be tempted to appoint himself or another member of his firm as the attorney for the estate. In so "wearing two hats," the lawyer or his firm is exposed to possible dual liability as fiduciary and estate attorney, with conflict of interest complications. Although the performance of an executor's or trustee's duties may not constitute the practice of law, serving as both fiduciary and estate lawyer does, in whole or part, exposing the lawyer-fiduciary or his firm to potential malpractice liability for the consequences of all actions taken on behalf of the estate.

Another legal malpractice complication may result when one lawyer in a firm represents a corporation in its securities matters and another lawyer in the firm is managing the same securities for an estate. Each consideration should be weighed before accepting an appointment as estate fiduciary and in choosing the estate's attorney.

Among the economic complications to be expected from serving as estate fiduciary are decreasing referrals from banks and trust companies, which traditionally are an estate planning lawyer's best source of business. A lawyer, therefore, may conclude that it is as imprudent for him to act as a professional executor or trustee as it is for a bank or trust company to draft wills or trusts to provide complete financial and estate planning services.

If he serves as both executor and attorney for an estate, the attorney may expect to have his total estate administration fee disputed by the will beneficiaries. He would be hard put to justify receiving both the maximum percentage fee allowed executors under *Code of Alabama* 1975, § 43-2-681, and payment for all of the time devoted to the estate under the guise of an attorneys' fee, although this

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is apparently the practice in New York. 7 A.B.A *Real Property, Probate and Trust Journal* (1972), at 764 The prospect of having a will beneficiary disgruntled with the lawyer-fiduciary's total fee may preclude a final settlement of the estate by consent. *Code of Alabama* 1975, §§ 43-2-502 and 43-2-682 In petitioning for a fee as lawyer-fiduciary at the final settlement hearing or in negotiating the fee with the will beneficiaries in an attempt to settle the estate by consent, conflict may be minimized by requesting only a reasonable overall fee for the total services rendered to the estate. Such a fee should take into account the time expended in providing the services and the fact that malpractice liability increases with the size of the estate. 10 A.B.A *Real Property, Probate and Trust Journal* (1975), at 262

Note, however, that in *Clark v. Knox*, 70 Ala. 607, at 617 (1881), the Supreme Court of Alabama held that a lawyer-fiduciary's legal fee for professional services rendered to an estate should not be based on "the usual professional charges for such service, but a compensation fixed and determined by the inquiry, what is fair and reasonable in view of all the circumstances of the estate."

Of course, this fee dispute pitfall may be avoided if the attorney discloses to the testator appointing him executor what his total fee as executor and attorney could be and that he (the testator) has a right to bargain with the attorney concerning the level of the fee and if the result of the bargain is recorded in the will itself. Based on the foregoing considerations, serving as estate fiduciary to make an estate practice profitable may not be worth the gamble. The simple alternative is to charge an economic rate for estate planning services. However, if the client, unsolicited, engages the estate planning attorney to be the estate fiduciary, and the attorney agrees to the appointment despite the risks, the following procedures are recommended to minimize the adverse consequences of receiving and carrying out the appointment.

(1) Prepare a standard fiduciary engagement letter, to be signed by the testator at the will closing, reciting that (a) the testator requested that the lawyer serve as fiduciary without the suggestion, influence or inducement of the lawyer; (b) the lawyer explained the potential problems for the estate resulting from such an appointment (which the letter should describe in detail) and the testator requested that the lawyer serve as fiduciary nonetheless; (c) the lawyer described the total fees which he may receive as executor or trustee (and also as estate attorney if the attorney will serve in such a dual capacity) and explained to the testator that he may bargain with the lawyer concerning the total amount of the fee; and (d) the lawyer and the testator agreed to a fee set forth in the letter or the will.

(2) In memorializing the fee agreement in the fiduciary engagement letter (in which case the letter would be incorporated in the will by reference) or the will, the terms of compensation should not be in fixed monetary amounts, but self-adjusting for inflation, in order to avoid negotiating a second fee agreement with the will beneficiaries. For example, a reasonable fee agreement may be based on the lawyer's receipt of the lesser of a fee equal to a certain percentage of the fair market value of the probate estate at death or a fee based on the lawyer's standard hourly rate charged for providing legal services during the time covered by the administration of the estate.

(3) The will should name a contingent fiduciary to serve if the attorney is unwilling or unable to do so. Upon the testator's death, and prior to probating the will, the attorney should share the estate engagement letter with all will beneficiaries, and have them confirm in writing that they consent to his serving as fiduciary under the terms in the letter (and as attorney for the estate, if he intends to do so). If, however, this consent is not obtained, the attorney then will be apprised of potential exposure and may wish to submit a letter of fiduciary resignation to the contingent fiduciary, who then would probate the will and serve as its executor or manage the testamentary trust, as the case may be.

(4) Serving as both fiduciary and lawyer for the estate should not be practiced absent consent following complete disclosure to the testator, the will beneficiaries and all members of the attorney's firm, and a careful consideration of the resulting risks and benefits. ■