Proposed Changes to the Rules of Professional Conduct Regarding Testamentary Documents

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Submitted to: **Law Society of Upper Canada**

Submitted by**: Ontario Bar Association, Trust and Estates Section**

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") appreciates the invitation to consult on the proposed changes to the *Rules of Professional Conduct*. We are pleased with the work that has been done to address the issues raised by the Canadian Bar Association ("CBA") on the Federation of Law Societies' *Model Code of Professional Conduct*. The OBA endorses the CBA's comments on those general issues and we do not propose to cover the same ground in this submission. We have instead provided narrow comments that relate to a distinct practice area.

Rules to be Addressed

This submission will address only those rules related exclusively to Estates practice, specifically:

> **Testamentary Instruments and Gifts**
>
> **2.04 (37)** A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.
>
> **2.04 (38)** Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.
>
> **2.04 (39)** A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

We appreciate that the Law Society has worked, and will continue to work, with the Canadian Bar Association and its members on more general issues with respect to the entire package of reforms. We intend only to provide expert input on the effect of, and necessary changes to, these particular rules (referred to as the "Proposed Rules").

The OBA

(a) General Background

As the largest voluntary legal organization in the province, the OBA represents approximately 18,000 lawyers, judges, law professors and students in Ontario. OBA members are on the frontlines of our justice system in no fewer than 37 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists government, the Law Society of Upper Canada (the "Law Society") and other decision-makers with several policy initiatives each year –in the interests of both the administration of justice and the public.

(b) The OBA Trusts and Estates Section

The Trust and Estates Section of the Ontario Bar Association has approximately 900 members, including the leading practitioners in the field. This submission was formulated by the section's long-standing Statutory Review Committee, which consists of practitioners from small, medium and large firms as well as in-house counsel. The submission has had the benefit of review by the full executive of the OBA Trusts and Estates Section and the OBA Board of Directors.

Sub-Rule 2.04(37)

(a) Effect of the Proposed Rule

Sub-rules 2.04(37) would restrict a testator's ability to communicate wishes concerning his or her choice of counsel to administer his estate.

In the preparation and administration of wills, clients (the testator and the trustees[1]) are advantaged by continuity – the ability to receive advice from a lawyer who is already familiar with the assets, family dynamics and other background issues that may be relevant. These proposed sub-rules would make clients' ability to leverage that advantage more difficult.

(b) Absence of Evidenced or Articulated Public Protection Rationale

Neither the Law Society's Consultation document nor the extensive front-line experience of the members of the Statutory Review Committee (including those who work in-house at financial institutions) reveals any public policy rationale for these rules. There does not appear to be any mischief to be remedied or any public protection gap that necessitates the Propose Rules. There is no indication that clients' interests are ill-served by allowing for choice and continuity of counsel. There is no indication that there is abuse or any realistic risk of abuse.

(c) Public Policy Weighing Against Adoption of the Proposed Rule

The lack of any apparent, realistic need to adopt the new rules is heavily out-weighed by important public policy considerations that speak against their adoption. These include:

(i) Testamentary Freedom;
(ii) The value to the client of choice and continuity; and
(iii) The existing desirable balance between the testator being able to express his or her desires as to which lawyer will assist in carrying out his or her wishes and the flexibility for trustees to choose different counsel where necessary or desirable.

[1] References in this submission to a "trustee" includes an executor and estate trustee with a will.

(i) Testamentary Freedom

In Ontario and across the common-law world, people are generally free to use their will to arrange for the distribution and operation of their estate in any way they wish. This freedom is only restricted where clear, demonstrable public policy issues justify interference, such as where the provisions of a will are racist, create a perpetual uncertainty about ownership or fail to provide appropriately for dependants. People are also free to retain the counsel of their choice. The Proposed Rules would mean that at least one of these choices is eliminated for some clients - they are not free both to make arrangements in their will as to which lawyer will assist in the administration of their estate and to retain that same lawyer to draft the will. In the absence of a clear public policy imperative, restrictions on client freedoms are inappropriate.

(ii) The Value of Continuity

Allowing the drafter of a document to assist in executing it according to the intentions of the testator is not a moral hazard, it is a desirable route to accessing better, more affordable advice. Sub-rule 2.04(37) would put the following undesirable choice to clients:

(a) If a testator must find alternative counsel to draft his or her will, a testator with a long-standing lawyer/client relationship would be forced to incur the expense of bringing a new lawyer up to speed on his or her assets and other relevant information (some of which he or she may fail to pass on as he or she does not recognize the relevance). He or she will be forced to forego the comfort of the long relationship of trust with existing counsel; or

(b) If the drafting lawyer cannot be identified to the trustees as the desired lawyer to advise on the administration of the estate, the testator would be forced to forego the comfort of believing a trusted counsel will be assisting in carrying out his or her wishes. Trustees of the estate will be forced to forego the significant value of the drafting lawyer's background knowledge and understanding of the testator, his or her assets, his or her intentions and the family history.

It could be argued that, based on the rule as drafted, this unfortunate choice could be avoided if a testator were to communicate his or her desires regarding choice of administration counsel through means other than the will. However, rather than justifying the rule, this fact potentially creates additional problems. If there is no public policy against generally communicating these wishes, it is unjustifiable to prevent the testator from using his or her will to make that communication. The will is a safe, well-preserved way of providing guidance to the trustees when it is most relevant. Letters or oral notice do not necessarily have these qualities. What is more, the two-witness requirement and other protections inherent in will-making would not apply to these other methods of communicating the testator's intentions.

(iii) The Current Balance

As the matter now stands, a testator is able to give guidance to his or her trustees about who he or she trusts to provide advice on carrying out his or her wishes. However, that guidance is precatory - it is not binding on the trustees. If the trustees choose to retain other counsel despite the wishes of the testator, they can. So, the current scheme allows for the best of both worlds: (i) the testator can effectively communicate his or her wishes in a safe document that he or she knows will be seen by the trustees at the time they are making decisions about the estate; and (ii) the trustees have the flexibility to make different decisions about counsel if they choose.

Rule 2.04(38)

(a) The Effect of the Proposed Rule

It is not clear whether sub-rule 2.04(38) is designed only to prohibit a drafting solicitor from accepting bequests under a will. Existing law already restricts this and prohibits taking gifts that were made in inappropriate circumstances. However, the overly broad language of the proposed sub-rule could lead to wider, possibly unintended, interpretations. By providing that:

> … a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate …*a benefit* from the client (emphasis added)

the sub-rule may be interpreted to prohibit a lawyer from drafting a will under which the testator wishes to appoint the lawyer as executor. While acting as an executor is not a benefit in the nature of a gift (it involves remuneration only in exchange for services), such an appointment could still be broadly interpreted as a "benefit." Such a prohibition would go well beyond the comprehensive statutory and common-law scheme that currently outlines the limits on one taking under a will where he or she is a solicitor: whether or not that solicitor participated in the drafting or execution process. This is a fundamental change.

(b) Public Policy Weighing Against Adoption of the Proposed Rule

This broad potential interpretation would make the rule subject to the same comments concerning the lack of rationale and disadvantages to clients that were outlined above in respect of sub-rule 2.04(37). In fact, it would restrict a client's freedom even further since the will is the only document in which a testator can express his or her choice of executor. So, where a lawyer is a client's long-time trusted advisor, the client will be put to the choice of either foregoing the comfort of having that lawyer act as an executor (despite his or her wish to appoint him or her) or going to a less trusted drafting lawyer who is less knowledgeable about the testator's personal assets, family dynamics and estate-planning goals.

The language of this proposed sub-rule should be tightened to prohibit receiving a bequest under a will that the lawyer drafted.

Placement of Sub-Rule 2.04(39)

The OBA takes no issue with the substance of this sub-rule. However, as the rule appears to relate to gifts *inter vivos*,[2] it would be equally applicable to those acting outside the context of testamentary-document preparation. Including this sub-rule in the testamentary section may cause confusion.

Suggested Changes to the Proposed Rules

For the reasons outlined above, it is suggested that sub-rule 2.04(37) be eliminated. If there is significant, objective evidence of mischief or abuses to be remedied and clear, articulated reasons to over-ride testamentary freedom and other significant rights, we would appreciate further consultation on this sub-rule.

If there were evidenced problems to be remedied, they may be resolved by informing trustees that they have the flexibility to choose counsel other than the one stipulated in the will.

The following are the suggested changes:

> **Testamentary Instruments and Gifts**
>
> ~~**2.04 (37)** A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.~~
>
> or, if there is a evidence that a rule of this nature is necessary
>
> 2.04(37) If a testator has included in a will a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is precatory and the trustees can decide to retain other counsel.
>
> **2.04 (38)** Unless the client and lawyer are "related persons" (as that term is defined in ss. 251 (2) of the *Income Tax Act* (Canada)) , a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift ~~or benefit~~ from the client, including a testamentary gift.

[2] If it is meant to relate to testamentary gifts, it is a duplication of 2.04(38).

[move to more appropriate section] **2.04 (39)** A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Timing and Transition

We assume that any rules that are adopted in this regard will have prospective application only. Retroactively or retrospectively applying rules to existing wills would have disastrous consequences for clients and the profession, as, among other things, wills would have to be reopened.

Conclusion

The OBA appreciates the Law Society consulting broadly on the proposed *Rules of Professional Conduct* changes and we look forward to further dialogue as your process continues.