ATTORNEYS MAKING OUT LIKE BANDITS: IT IS LEGAL, BUT IS IT ETHICAL?
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A West Virginia attorney lost his license to practice law as a result of his participation in the preparation of three wills, among other things, where he named himself as executor of such wills. i

Attorney John Patrick Ball named himself as the executor in the wills of two clients and accepted $1.6 million in executor's commission. ii The two wills provided he be paid an usually large percentage (seven and one-half percent) of the gross estate as his commission as executor. iii Ball also drafted and named himself as the executor of Mr. Earle Elmore's will, who was 94 years old at the time the will was executed. iv In Elmore's will Ball provided that he was authorized to receive seven and one-half percent of the total gross estate, which was $1,388,579.00, for executor's compensation. v The court ultimately found that Ball's conduct violated the duty he owed to his clients by charging excessive fees, drafting wills which leave bequests for himself and his wife, and assisting in making his sons beneficiaries to the client's annuity. vi Ball provided for a commission in his clients' will that was outside the statutory default rate thus violating his fiduciary duty to his clients. This article would argue that even if an attorney, acting as executor of a will he or she drafted, accept the statutory rate of compensation he or she would still be putting the elderly client's best interest at stake.

This article explores whether Virginia statutes adequately protects the testator by allowing the drafting attorney of a will to be named as the executor of the will. This article will discuss how the statute implies and encourages a conflict of interest that harms the elderly client. Section I provides
background on the historical conflict that an attorney will face when he or she names himself or herself as the executor. Section II examines and explores the meaning behind the statutory language of “reasonable compensation” and how this language encourages a conflict of interest. Section III offers suggestions that can make this practice less controversial to the client and attorney alike.

Currently Virginia statutes do not provide adequate protection for the elderly who name their lawyers as the executor of their wills. Current application of statutory language allows an attorney to individually decide what percentage of commission to which he or she is entitled by clever use of language in the will, directly inhibiting the attorney to act as fiduciary for the elderly client. This financial conflict of interest drastically impairs the attorney's ability to render impartial legal advice to the elderly client.

I. In Whose Best Interest?

An elderly person may be unaware of the dilemma he or she creates when name his or her attorney acts as the executor of his or her will. The dual role of the attorney raises ethical concerns that the rules do not address. Virginia Code implies such a dilemma by declaring that the court, “may require a fiduciary to provide security in amount deemed sufficient for the protection of the estate” while such fiduciary is acting as the executor of the will. Attorneys who draft instruments that name him as the executors is not a new practice. In fact the legal community went from strictly prohibiting this practice to condoning it. The Model Code of Professional Responsibility adopted in 1969 provides, “a lawyer should not consciously influence a client to name him as executor, trustee or lawyer in such instrument.” In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.” This version of the code evolved into a far less informative section, which facilitates a routine practice of attorneys naming themselves as executors. When the Model Rules of Professional Conduct was adopted in 1983, the code failed to specifically address lawyers naming themselves as an executor in an instrument the attorney drafted.
for a client. The Model Code of Professional Responsibility adopted in 1969 made it clear that a lawyer could not solicit the position of executor in a client's will. However, Comment 8 to current Model Rule 1.8(c) provides, “[t]his Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position.” A reading of the comments in conjunction with a lack of guidance on the subject encourages lawyers to routinely participate is this unethical practice. Solicitation and practices of this sort call the attorney's motives and ethics into question. Ethical codes are meant to enforce professional norms and avoid harm to client; however the latest version of the code does not appear to protect the client.

An executor is a person named by the testator to carry out the provisions in the testator's will. An executor is a fiduciary to the testator and therefore must act for the benefit of the testator's interest alone. An attorney naming himself or herself as the executor in a will drafted for their client allows him as the drafting attorney to guarantee double compensation: first for the drafting of the instrument and second when the attorney acts as the named executor. Not only does the drafting attorney have the ability to guarantee double compensation but the attorney can drastically influence his compensation by inserting several key words into the language of the will. The current Model Rules and Virginia statutes allow these actions to be common practice while making it completely within the attorney's authority and discretion. Monitoring and enforcing the current rules are exacerbated by the fact that most of these clients are elderly when he or she name their lawyer as the executor, and fully trust their attorney's legal advice.

II: COMPENSATION: WORDS MATTER

Compensation to executors or fiduciaries originates by Virginia Code § 26-30. The statute allows for a fiduciary to collect reasonable expenses incurred and a reasonable compensation for services provided.
In *Swank v. Reherd*, 27 S.E.2d 191, 195 (Va. 1943), the Supreme Court of Virginia found that “reasonable compensation” as defined by the statute allows an attorney acting as an executor to collect both reasonable attorney fees and a reasonable commission for services provided. In *Swank*, the court addressed the issue of whether a lawyer could collect attorney fees for services provided when acting as an executor of a will. The court concluded that the lawyer had rendered services and was entitled to be paid a fair and reasonable compensation. In 1961 the Virginia Supreme Court addressed the issue of attorney fees for executors in the case of *Perrow v. Payne*, 121 S.E.2d 900, 909 (Va. 1961). The court found that the trial judge has judicial discretion to determine reasonable fees to be awarded to the lawyer based on services rendered. In *In re Estate of Yeatts*, 1994 Va. Cir. LEXIS 926, 9-10 (Va. Cir. Ct. 1994), the court considered the total size of the estate, the amount of work involved in selling and preparing real estate for sell, the work involved in distributing the funds between various estates, trusts, and beneficiaries to determine a fair and reasonable attorney fee for the executor. Allowing an attorney to collect reasonable attorney fees does not cause any inherent conflict of interest to the elderly client for whom the attorney is drafting the will. This is due to the fact that fees are determined by the conscience and discretion of the trial judge, not the attorney. A more controversial compensation directly relates to the attorney's drafting skills and discretion---“reasonable commission”---is ethically dangerous.

Commission is a fee paid to an agent for a particular transaction, usually as a percentage of the money received from the transaction. If the executor has a right to sell property (real or intangible) as directed by the will, but the beneficiary prefers to take the property in kind the executor is entitled to a five percent commission based on the appraised value of the property. If under the same circumstances the beneficiary prefers to sell the property (both real and intangible) the executor is then entitled to a five percent commission of the sale price. In contrast if the executor is not entitled to sell the property, and must deliver the property in kind the executor is only entitled to a reasonable
compensation to be fixed by the commissioner or court, upon the proper proof of the expense incurred, the risk taken, and the services rendered in connection with the property so delivered to those entitled thereto. In *Perrow v. Payne* the court held that a commission of two and one-half percent of the appraised property that was delivered in kind without the right to sell was reasonable commission. The recognized exception, however exist when the will does not direct or allow the executor to sell but the beneficiary wants the executor to sell the property the executor is still entitled to a five percent commission on the sale price.

In Virginia there is no hard and fast rule for executor's commission. The amount of commission received by the executor is directly correlated with the specific language of the will. The nature of the law makes it very easy for a lawyer to draft an instrument for an elderly client that would greatly benefit the attorney. On the face of the instrument it would appear that the drafting attorney has outlined the elderly client's best interest or expressed desires. The drafter of the will could very drastically change the commission received from two and one half percent to five percent by simply “counseling” the elderly client to give the “executor” the “right or power” to sell property. The lawyer could craft an argument that this would give the beneficiary the choice to do as he or she pleases with the property, while at the same time ensuring a five percent commission of the appraised value, simply because the executor has a right to sell, regardless of whether the right to sell is exercised. Reasonable commission as applied to the executor is determined by the language the lawyer drafts in the will thus creating an inherit conflict of interest if the lawyer names himself or herself as the executor.

III. EDUCATION AND STATUTORY REFORM

Education and statutory reform will protect the elderly client and the lawyer. Providing education to elderly clients is one way to ensure that an attorney is not tempted to engage in this ethical dilemma. As a fiduciary to the client, the attorney should have no hesitation to fully describe the meaning, duties and responsibilities of executor to his or her client. Attorneys should fully disclose to
their clients that executors are entitled to “reasonable compensation.” In order to meet the requirement of full disclosure attorneys should explain what the courts have determined to be reasonable, to include a maximum of five percent of the value of their estate.

Statutory reform would further facilitate protection of both the elderly client and the drafting attorney. New York specifically enacted a statute in 1995 to address the problem of lawyers naming themselves as the executor under a client's will.\textsuperscript{xxvii} The New York statute requires attorneys to disclose to the client that he or she understand the options to name other eligible persons as executor, and executors are entitled to receive statutory commissions or to provide a commission less than the default statutory rate.\textsuperscript{xxviii} The attorney must execute a separate form in writing and witnessed which states they provided the testator with the proper disclosures.\textsuperscript{xxix} If the attorney fails to provide proper written disclosures, the attorney who serves as an executor shall be entitled to a commission of one-half of the commissions he or she would otherwise be entitled to receive under the statute.\textsuperscript{xxx}

Virginia should adopt a similar statute to discourage the practice of attorneys naming himself or herself as executors. If Virginia adopts such a statute it will cause deter lawyers from this practice and would allow the attorney to be a more effective fiduciary to his or her clients. Under the proposed statute attorneys would not be permitted to solicit the position of executor, the suggestion must arise from the testator. Attorneys would also be required to obtain a writing similar to the disclosure form that New York currently uses. The writing would require that the testator fully understands who may act as an executor, the compensation regulations and freedom to provide less compensation than the default rules. The disclosure must be signed by the testator and witnessed by a person other than the named executor. Virginia should further enact a statutory maximum of three percent commission, unless otherwise provided in writing by the testator. If the attorney does not strictly comply with the written disclosures, the attorney's commission would be reduced to a maximum of one and one half percentage, although discretion will be given to the trial judge to determine the exact amount of
commission to be awarded to the executor-attorney.
IV. CONCLUSION

There will be instances when it is in the elderly client's best interest or desire to name his or her attorney as executor. This practice, however this should not be the default rule or common practice. The current Virginia Code allows attorneys to ensure double compensation of by naming themselves as executor. The statute does not provide the lawyer or the elderly client with the confidence needed to ensure that the lawyer can effectively act as a non-partial counselor. If the current statutes are left unchanged, elderly clients will inadvertently be taken advantage of by his or her lawyer due to the lawyers' inability to remain impartial because of the financial interest in the execution of the will, which names the attorney as executor.

A drafting attorney cannot remain objective to his or her client's needs when there is an incentive for double compensation. Modification of the current practice will preserve the attorney/client relationship and ensure that the lawyer is acting for the benefit of the client rather than his or her own interest.

iii Id.
iv See Ball, 633 S.E.2d at 246.
v Id.
x Model Rules of Prof'l Conduct R. 1.8, Comment 8 (2011).
xii Black's Law Dictionary 651 (9th ed. 2006).
xiii Black's, supra note 8, at 651.
xvii Id.
xix Id.
xxi Black's, supra note 11, at 306.
xxii See Swank, 27 S.E.2d at 193.
See Perrow, 121 S.E.2d at 905.

Id. at 908.


DUKEMINIER, supra note 2, at 202.

NY CLS SCPA § 2307-a (2011).

Id.

Id.