



THE REGULATION OF WILL DRAFTING

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Drafting a will has often been regarded as a relatively straightforward exercise with work delegated to more junior staff. Wills are offered at a discounted price as a loss leader to secure the storage of the will and hopefully a more lucrative instruction at a later date to administer the estate and sell the family home.

The SRA does not however appear to share the same view. This article contains a reminder of the pitfalls that can arise and a quick glance at the future for this type of work.

APPOINTMENT OF FIRM AS EXECUTOR

A request by a client to appoint your firm or fee earner within your firm as executor is welcome news. It provides a long term link with the firm. However, the SRA's ethics guidance on this issue is far from encouraging. Solicitors are reminded not to exploit a client's lack of knowledge to their own advantage by *"leading the client to believe that appointing a solicitor is essential or the norm"*. Clients should not be persuaded to appoint the firm as a professional executor unless it is clearly in the client's best interests to do so (Principle 4) – for example where affairs are complex or there is likely to be a family dispute or all beneficiaries are minors – because of the additional costs involved.

The final requirement is that you should ensure that the client is making a decision on a fully informed basis; that you explain all the options and that you document the decision.

GIFTS TO YOU OR SOMEONE IN YOUR FIRM

If a client wishes to make a gift of significant value to you or to a member of your family or a member of your firm or their family, firms must insist that a client takes independent legal advice (I.B (1.9)) in relation to that gift. Otherwise there is a risk of breaching Outcome 1.1 (you treat your clients fairly) and becoming involved in an *"own interest"* conflict (Outcome 3.4) where your interests conflict with those of the client.

A contentious issue here is the definition of *"significant value"*. There are no guidelines provided by the SRA or the Law Society. The 2007 Code of Conduct states that anything more than a *"token gift"* would be regarded as *"significant"*. It is therefore left to the individual solicitor's judgment. The larger the gift, the riskier it becomes to avoid allegations of conflicts, undue influence and taking advantage of the client's vulnerability especially if the client is elderly.

The only safe option is to cease acting if the client refuses to seek independent legal advice on the proposed gift.

MANAGEMENT SYSTEMS

Firms are reminded of their duties under Chapter 7 of the Code that they need adequate procedures in place to ensure that

clients have the necessary testamentary capacity; to check for undue influence and fraud especially where the service is provided online. Systems to check for improper execution of wills and maintain adequate records of client's assets and family members are also recommended.

STORAGE OF WILLS

Attempts to maintain a long term relationship with clients by the storage of wills is also discouraged by the SRA. It suggests in its guidance that clients might find it preferable to store their wills with a *"low cost"* central official service such as The Probate Service rather than with their own solicitor in order that it is more convenient for executors. The SRA does not seem to be aware that many solicitors still offer a free storage service for wills.

THE FUTURE

Will writing is not a reserved legal activity. It can be offered as a commercial service by any unqualified member of the public. The SRA regulates will writing as part of its regulation of the activities of the solicitors' profession not as an activity in its own right.

Whilst one must always strive to act in the best interests of one's clients, the banks who have historically charged a great deal more than solicitors to act as professional executors and the unregulated will making companies are not constrained in any way by such rules. Later this year the SRA is planning to relax the separate business rule to enable solicitors to operate separate businesses which are not regulated by the SRA. Whilst we must await the detail of these changes one can anticipate many solicitors setting up separate businesses through which will making and other services such as will storage can be offered and which would not be subject to the demands of the Code of Conduct. It may well be an attractive option from a business perspective. ■



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