

You have presented the following hypothetical facts. Several years prior to her death, Decedent had her family attorney ("Attorney") prepare her will, dividing her estate into two trusts. At the time of her death, Decedent's property consisted primarily of stock in a family corporation which owned only real property and partnership shares in a partnership which also owned only real property. You indicate that the value of the real property in the corporation and in the partnership is quite substantial, is primarily non-income producing, and has been in Decedent's family for many years.

You advise that, under the terms of the will, there are two trusts, one for Decedent's daughter with income to the daughter for life and the remainder at her death to daughter's children, and the other for Decedent's son with income to the son for life and the remainder at his death to his sister's children. Son is unmarried and approximately sixty years old. Each of the respective trusts are to be funded by one half of the partnership and stock interests of Decedent's estate, and each of the trusts has the same trustee, i.e., the son, the daughter, one of the daughter's children, and the attorney who drafted the will together with attorney's wife (who is also an attorney in his firm).

You further advise that, after Decedent's death, Daughter immediately approached Attorney and requested that he represent the estate; Son, because he believed that Attorney had the interests of the sister at heart, objected to Attorney acting on behalf of the estate. Daughter, at the suggestion of Attorney, sought outside counsel ("Outside Counsel") who, with the help of Attorney, commenced a suit against son to have him removed as executor, alleging failure of Son to cooperate in the administration. Son filed his answer, denying failure to cooperate, alleging that he had been excluded from participation in decisions related to the estate, and further alleging a conflict of interest on the part of Attorney.

When the suit was settled by agreement prior to trial, the litigation was terminated with prejudice. Among the terms of the written settlement agreement were that Outside Counsel representing Daughter would take over the representation of the estate and that Attorney would assume representation of Daughter. Also, it was agreed that "The parties waive any conflicts - attorney or outside counsel - have as a result of prior representation".

Following the termination of the litigation, Outside Counsel took over representation of the estate and many meetings were held with Outside Counsel and all the executors present. At every meeting, Daughter was accompanied by, and represented by, Attorney. At most of the meetings, the primary conflict between Daughter and Son was related to Daughter's desire to retain, rather than dispose of, the property of which Decedent died seised and possessed, and Son's desire to maximize income, which would require disposition of much of the property. At some meetings, Outside Counsel suggested a solution of funding Son's trust with some stock or partnership interests and retaining in Daughter's trust the majority of the interest in one parcel of which Daughter was particularly fond. Attorney objected to this compromise and has also made statements that the testator would not have wanted the disposition of the property, if possible, and that it was the purpose of the executors and trustees to carry out her intent.

You indicate that the estate's final accounting, qualification of trustees, and funding of trusts are now imminent.

Finally, you indicate that Son has strongly objected to Attorney and Attorney's wife qualifying and subsequently acting as trustees since Son believes that Attorney and his wife are biased by reason of their representation of Daughter, whose interest in preserving non-income producing property is adverse to Son's interest in maximizing income for the life of his trust.

You have asked the committee to opine whether, under the facts of the inquiry, it would be proper for Attorney and Attorney's wife to qualify and act as trustees of Decedent's trusts, after having represented Daughter in disputes, yet unresolved, as to the disposition of the estate.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(A), which states that a lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR:5-105(C); and DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

The committee has previously opined that DR:1-102(A)(4) applies to an attorney's conduct when acting in a fiduciary capacity. See LE Op. 1325. The committee is of the opinion that there is an actual conflict between Daughter and Son since Daughter's interest is in preserving the non-income producing property while Son's interest is in maximizing income for the life of his trust. The committee recognizes also that the attorney, as trustee, has a fiduciary duty towards both beneficiaries, Daughter and Son. See LE Op. 1494.

In light of Attorney's ongoing representation of Daughter in disputes with Son which are as yet unresolved, the committee believes it is improper for Attorney and Attorney's wife to qualify and act as trustees under DR:5-105(A).

Committee Opinion
April 11, 1994