

LEGAL ETHICS OPINION 1534

CONFLICT OF INTEREST - PERSONAL  
INTEREST AFFECTING  
REPRESENTATION - BUSINESS  
TRANSACTIONS WITH CLIENT:  
ATTORNEY DRAFTS WILL FOR  
GODMOTHER AND IS NAMED  
ULTIMATE BENEFICIARY.

You have presented a hypothetical situation in which an attorney provided estate planning advice to her terminally ill godmother. In 1992, at godmother's request, the attorney drafted a will which creates a residuary trust for the benefit of the godmother's surviving spouse, who is the attorney's godfather. You state that the will requires the trustee to pay the net income of the trust in quarterly, or more frequently, installments to the surviving spouse for his lifetime. You also indicate that the will requires the trustee to pay the surviving spouse so much, or all, of the principal of the trust as the trustee, in the liberal exercise of discretion, considers appropriate for the surviving spouse's support or health.

You state that the godmother requested that the attorney be named as executor, trustee, and an ultimate beneficiary of any trust proceeds remaining after the death of the surviving spouse. Further, attorney's sister, also a goddaughter of the godmother, is also named as an ultimate beneficiary, the attorney and her sister being the only named ultimate beneficiaries.

Finally, you indicate that the attorney and the godmother were not blood relatives; however they maintained a mother/daughter-like relationship for nearly thirty years and your facts indicate that the godmother trusted the attorney completely. Following the godmother's death, the attorney/goddaughter began serving as executor and trustee.

You have asked the committee to opine whether, under the facts of the inquiry, (1) the attorney's preparation of the will was a violation of the Code of Professional Responsibility and, if so, what remedial action may be taken by the attorney; and (2) whether the attorney's service as trustee and/or executor is an impermissible conflict of interest and, if so, what remedial action may be taken by the attorney.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-101(A) which states that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances; and DR:5-104(B) which provides that a lawyer shall not prepare an instrument giving the lawyer or a member of the lawyer's family any gift from a client, including a testamentary gift, except where the client is a relative of the donee.

The committee has previously opined that it is improper for a lawyer to prepare a will for a client naming the lawyer as a beneficiary. See LE Op. 1100. The committee is of the

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opinion that, as used within the relevant Disciplinary Rule, the term "relative" does not include a godparent. /1 Thus, the committee opines that the attorney's preparation of the godmother's will, naming her and her sister as ultimate beneficiaries, was in violation of that provision of the Code of Professional Responsibility.

As to whether any remedial action may now be taken by the attorney, the committee is of the opinion that although the testator's death may have rendered that question moot, the necessity for any further action to correct the situation raises a legal question beyond the purview of the committee.

Regarding your second question, the committee has recently considered the propriety of an attorney/draftsman serving as an executor/trustee. See LE Op. 1515, formerly LE Op. 1358. In that Opinion, the committee concluded that the total lack of any pre-existing lawyer/client relationship greatly enhances the potential for a finding of undue influence in the instance in which an attorney/draftsman also serves as executor or trustee. In the facts you present, the committee is of the opinion that it was not per se improper, at the time of the will's drafting, for the attorney/goddaughter to serve as executor or trustee, provided consent was received from the testator/godmother/client after full disclosure, as outlined in LE Op. 1515. Thus, if consent was received from the client at the time of the will's drafting, after appropriate disclosure, it would not now be per se improper for the attorney to serve as executor or trustee.

**Legal Ethics Committee Notes.** – Under Rule 1.10(a), this disqualification is imputed to the lawyer's entire firm.

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