

Ethics Opinion

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FACTS/QUESTIONS PRESENTED: Attorney is frequently asked by clients to serve as either primary or successor trustee and/or personal representative in their wills. If Attorney were to serve in any of these capacities would he violate the Rules of Professional Conduct, specifically Rule 1.8?

SHORT ANSWER: No.

DISCUSSION: Rule 1.8, Conflict of Interest: Prohibited Transactions, applies to the question presented here. The Rule provides, in pertinent part:

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

Rule 1.8 (c) establishes a general prohibition against a lawyer's drafting an instrument giving her or him or a close relative a substantial gift from a client. The primary concern is that the attorney drafting the instrument is well positioned to exert undue influence.

Notably, the rule only prohibits an attorney from drafting a will in which he or she is an unrelated or substantial beneficiary. Neither the rule itself nor any applicable commentary admits of a broader prohibition, except that EC 5-6, contained in the Model Code of Professional Responsibility, cautions attorneys to avoid "consciously influenc[ing] a client to name him as executor, trustee, or lawyer in an instrument." Thus, it is appropriate for an attorney, upon the client's request, to draft a will in which the attorney is named personal representative or trustee.

Of course, potential conflicts could arise; for example, if an attorney served as trustee of an estate and at the same time represented one of two heirs of the estate, where the heirs' interests were in conflict. See Opinion 1590 of the Virginia State Bar (April 11, 1994). However, such facts - or any others creating a potential conflict - are not before us. We have only been asked if, in general, an attorney may abide by his client's request to serve as personal representative or trustee in a will which the attorney drafts for that client. We answer in the affirmative.

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