

LOS ANGELES COUNTY BAR ASSOCIATION

ETHICS COMMITTEE

FORMAL OPINION NO. 462

PREPARATION OF A WILL IN WHICH THE ATTORNEY ACQUIRES AN  
INTEREST:

An attorney may be subject to discipline for undue influence for drafting or amending a will in which the attorney receives a substantial gift if the client has not received independent advice regarding the drafting or amending of the will. If the client refuses to seek independent advice, the attorney may not draft or amend the will. In addition, the possibility of challenges of undue influence raises serious concerns about the competence of the representation.

AUTHORITIES CITED:

Magee v. State Bar, 58 Cal.2d 423, 374 P.2d 807, 24 Cal.

Rptr. 839 (1962)

California Rule of Professional Conduct 3-110

California Rule of Professional Conduct 3-700(B)(2)

California Rule of Professional Conduct 4-400

I. FACTS AND ISSUES

Several years ago, an attorney drafted a will for a client in which the client left her entire estate in trust for the benefit of her son. The terms of the testamentary trust called for a fixed monthly distribution to the son. The will appointed the attorney as trustee and left any remainder of the trust to the attorney. We assume that the amount of the estate is substantial. We also assume that the client is not related to the attorney.

The client now wishes to change the terms of the will to lower the amount of the monthly distribution to the son. The client also wishes to provide the attorney, as trustee, with the discretion to distribute a greater amount to the son when the need arises.

The attorney requests the Committee's opinion concerning the propriety of the attorney's preparation of the original will and the requested revision of the will.

We believe these facts raise the following issues:

- (1) Whether the attorney's conduct is subject to challenges of undue influence.
- (2) Whether the possibility of undue influence prevents the attorney from competently representing the client.

## II. DISCUSSION

### 1. Undue Influence

An attorney may not induce a client to make a gift to the attorney. California Rule of Professional Conduct 4-400 provides:

"A member shall not induce a client to make a substantial gift, including a testamentary gift, to the member . . . except where the client is related to the member."

Under California law, a presumption of undue influence arises when an attorney drafts a will for a client unrelated to him or her in which the attorney receives more than a modest gift. Magee v. State Bar, 58 Cal.2d 423, 429-30, 24 Cal. Rptr. 839, 842-43, 374 P.2d 807 (1962).

In Magee, the attorney drafted a will for a client in which the attorney received the bulk of the client's estate. The attorney was not related to the client, and they did not have a close personal relationship. The court held that the attorney rebutted the presumption of undue influence by showing evidence that his client had received independent advice. The independent attorney in Magee read the will drafted by Magee to the client paragraph by paragraph, questioned the client about her intentions, and explained to the client the nature of the gift to the drafting attorney. 58 Cal.2d at 430; 24 Cal.Rptr. at 843.

The Magee court cautioned that "attorneys take a grave risk in drawing wills in which they receive more than a modest gift in keeping with the nature of the relationship

they have with the client." 58 Cal.2d at 433; 24 Cal.Rpt. at 845. Therefore, the attorney "should send the client to another lawyer when the circumstances would support an inference of wrongdoing." Id.

In the present inquiry, the attorney has drafted a will in which the attorney is likely to receive a substantial gift. Such a gift supports an inference of wrongdoing. Moreover, the requested revision, which would provide the attorney with the discretion to determine the payments to the trust beneficiary and thereby increase the amount the attorney will ultimately receive from the remainder, only increases the risk of wrongdoing. Under Magee, these circumstances require that the attorney send the client to another lawyer for independent advice.

Here, the client has received no independent advice. Under Magee, the attorney's conduct would subject the attorney to disciplinary action. The attorney must direct the client to seek independent advice for review of the present will, for the requested revisions and for any further representation in connection with the will. For purposes of undue influence analysis, if the client refuses to seek such advice, the attorney must not make the revisions requested by the client, or, if the attorney has already been retained, the attorney must withdraw under California Rule of Professional Conduct 3-700(B)(2).

## 2. Competence

This inquiry also raises serious concerns about the competence of the representation. California Rule of Professional Conduct 3-110 provides that an attorney "may not intentionally, or with reckless disregard, or repeatedly fail to perform legal services competently." The Rule provides that to perform legal services competently means "diligently to apply the learning and skill necessary to perform the member's duties arising from employment or representation."

The Magee court did not address the question of whether an attorney's drafting of a will subject to undue influence challenges is guilty of failing competently to represent the client. When the drafting attorney receives a substantial gift under a client's will, it is likely that the will may be contested on grounds of undue influence. Ultimately, the will may be denied probate. The Committee questions whether an attorney can be acting competently when he or she drafts a will with the actual or imputed knowledge that the attorney's acts can result in the will being invalidated. Thus, the Committee seriously questions whether an attorney is performing competently if he or she drafts or amends a will in which he or she receives a gift under circumstances reasonably suggestive of undue influence. Whether independent representation will cure any ethical violation with respect to the original will and trust is not an issue reached by the Committee.

In conclusion, the Committee believes an appropriate course of action would be for the attorney to decline to modify the will on behalf of the testator and to immediately refer the testator to independent counsel for a review of the will and for all further advice with respect to it.

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and the opinions are based only on the facts set forth and the questions presented.