

# 2003 FORMAL ETHICS OPINION 7

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### PREPARATION OF POWER OF ATTORNEY FOR PRINCIPAL UPON REQUEST OF PROSPECTIVE ATTORNEY-IN-FACT

*Adopted: January 16, 2004*

*Opinion rules that a lawyer may not prepare a power of attorney for the benefit of the principal at the request of another individual or third-party payer without consulting with, exercising independent professional judgment on behalf of, and obtaining consent from the principal.*

#### Inquiry #1:

Adult Child asks Attorney to prepare a durable power of attorney for her father to execute. No explanation is given as to why the father is not present to make the request. Adult Child has asked that specific powers be included in document, including the power to transfer to her, as Attorney-in-Fact, title to any of her father's assets. Adult Child asks that the document contain the condition that it will be effective upon its execution by her father. Adult Child will take the Power of Attorney to her father to execute. She does not want the document to contain provisions whereby witnesses can attest to either her father's capacity or whether he is under undue influence at the time he executes the document. Adult Child is ready to write out a check for the fee.

May Attorney draft the power of attorney?

#### Opinion #1:

Yes, but not based solely on the instructions of Adult Child. Attorney must clarify that she represents the father and, therefore, has certain duties to the father as a client. When a lawyer is engaged by a person to render legal services to another person, the lawyer may not allow the third party to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) provides that when a lawyer's services are being paid for by someone other than the client, the lawyer may not accept the compensation unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and confidential information relating to the representation of the client is protected. Competent representation of the father in this situation requires an independent consultation with the father to obtain his informed consent to the representation and to determine whether he wants or needs the power of attorney and, if so, who should be appointed attorney-in-fact and what powers should be granted to that person. For guidance on the representation of a client who may have diminished capacity, see Rule 1.14.

The situation described in this inquiry is distinguishable from a commercial or business transaction in which the lawyer is engaged by one person to prepare a power of attorney for execution by another person. Frequently, the power of attorney names the person requesting the legal services as the attorney-in-fact. If the document is being prepared to facilitate a specific task for the benefit of this person, such as the transfer of stock or real estate, the lawyer represents the person requesting the legal services and does not represent the signatory on the power of attorney. Thus, the purpose and goals of the engagement determine the identity of the client, not the signatory on the document prepared by the lawyer.

A lawyer may be asked by a client to prepare a document for the signature of a third party under circumstances that give rise to a reasonable belief that the client may be using the lawyer's services for an improper purpose such as actual or constructive fraud or the exertion of undue influence. If so, the lawyer may not assist the client and must decline or withdraw from the representation. Rule 1.2(d) and Rule 1.16(a)(1).

#### Inquiry #2 (facts are unrelated to facts in Inquiry #1):

Mom is elderly and, although she lives on her own, depends upon the assistance of Daughter, her adult child. Although Daughter believes Mom's mental and physical capacities are diminishing and that Mom can no longer care for herself in her own home, Mom's mental competency is not the immediate issue. Daughter contacts Attorney, stating that she is doing so "on Mom's behalf" to have Daughter appointed as Mom's attorney-in-fact and for assistance placing Mom in a nursing home. Daughter asked for a consultation at which Mom will not be present.

May Attorney meet with Daughter alone and, if so, who will be the client, Daughter or Mom?

Opinion #2:

Attorney may meet with Daughter alone to discuss the representation. However, because the purpose of the representation is to benefit Mom, Mom is the client. See Opinion #1. Attorney must explain to Daughter, in a timely and clear manner, that Attorney represents Mom and does not represent Daughter. Rule 4.3. Further, Attorney must inform Daughter that, in the event Mom and Daughter become antagonistic, Attorney will continue to represent only Mom and any information provided to Attorney by Daughter may be used to further the representation of Mom.

Inquiry #3:

May Attorney represent both Mom and Daughter?

Opinion #3:

Yes, however, because the representation of one of the clients may be materially limited by Attorney's responsibilities to the other client, Attorney must satisfy the conditions of Rule 1.7(b) before asking the clients to consent to the joint representation. In particular, Attorney must be able to make a reasonable determination that she can provide competent and diligent representation to each affected client and she must provide sufficient information about the potential conflict to obtain Mom's and Daughter's informed consents. Their consents must be confirmed in writing. Rule 1.7(b)(1) and (4).

In a family situation such as this, a lawyer may readily determine that the parties are working together for a common goal that is in the best interest of the elderly parent. However, these situations are fraught with the potential for abuse of the elderly client or conflicts between the relative's goal for the representation (e.g., putting Mom in a nursing home) and the parent's goal (e.g., independent living). In the current situation, for example, Attorney must advise Mom that she can choose anyone to be the attorney-in-fact and is not required to name Daughter.

Comment [29] to Rule 1.7 offers these cautionary words:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recriminations . . . Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.

Inquiry #4:

Would the following disclosure and consent form satisfy the requirements of Opinion #2? I, [Daughter], understand that Attorney does not represent me regarding issues that concern my mother. I understand that Attorney may be representing my mother after Attorney meets with her. I also understand that whatever I say to Attorney may be used against my interests by Attorney in her representation of my mother. I understand I could hire my own lawyer and I have chosen not to do so. I have read this document and understand its contents.

Opinion #4:

Yes.

Inquiry #5:

Daughter signs the disclosure form described in Inquiry #4. Mom refuses to move to a nursing home and Daughter brings a guardianship proceeding. May Daughter's statements to Attorney in the initial interview be used by Attorney to defend Mom's competency in the guardianship proceeding brought by Daughter?

Opinion #5:

Yes.