

Title

In a matter involving the internal affairs of a trust may trust counsel simultaneously represent not only the trustee but also any otherwise unrepresented beneficiaries?

Text

Legal ethicists use the Warren Trust controversy as a case study when debating such issues as whom trust counsel represents, whether trust counsel ethically can be a lawyer for a “family” or a “situation,” and what constitutes adequate informed consent to a trust counsel’s representation of persons whose interests are in conflict. The Warren Trust controversy is the subject of §8.38 of *Loring and Rounds: A Trustee’s Handbook* (2022), which section is reproduced in the appendix below. The Handbook is available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>.

Appendix

§8.38 The Warren Trust (a.k.a. The Mills Trust) [from *Loring and Rounds: A Trustee’s Handbook* (2022), available for purchase at <https://law-store.wolterskluwer.com/s/product/loring-rounds-a-trustees-handbook-2022e-misb/01t4R00000OVWE4QAP>].

It was the Warren fortune that funded the Boston Museum of Fine Arts with its classical antiquities collection, Dennison House, Harvard Yard, Harvard’s great oriental book series, the restoration of Shakerton, and the Tahanto commune in Harvard township—all reflections of the Warren children’s diverse interests.... The Warren children’s deep but individualistic engagement in the arts and politics as well as their social standing involved them with the notable figures of their day: Oscar Wilde, Louis Brandeis, Henry Adams, Bernard Berenson, Rudyard Kipling, the Cabots, the Lowells, Oliver Wendell Holmes—directly or indirectly, all integral characters in Green’s account.¹

Samuel D. Warren, Sr., owned and operated S. D. Warren & Co. The company, which he acquired in the 1850s, owned paper mills and Maine real estate. He died in 1888, leaving one-third of the enterprise outright to his widow and two-thirds outright to his five children: Sam, Jr., Henry, Ned, Fiske, and Cornelia. Louis Brandeis—later to become a member of the U.S. Supreme Court—was a law partner of Sam, Jr., in Boston.

The widow and the five children elected in 1889 to transfer the mills and the real estate to Sam, Jr., the widow, and one Mortimer Mason, as trustees, for the benefit of the widow and the five children (the Trust). “It was also understood at the time the Mills property was conveyed to the Trust that the Trust would in turn lease the Mills Property to a firm also to be called S. D. Warren & Co..., that the Firm would operate the manufacturing facility and share profits therefrom with the Trust, and that the principals of the Firm

¹Martin Green, *The Mount Vernon Street Warrens: A Boston Story, 1860–1910* (dust jacket blurb) (1989).

would be Sam, Fiske, and Mortimer Mason.”² Brandeis represented all parties to the series of transactions.

The Trust, which was irrevocable, was to last for thirty-three years. The compensation of the principals of the firm was tied to the firm’s profits. The principals controlled whether profits were distributed to the Trust or ploughed back into the firm. Capital improvements were chargeable to the Trust while repairs were chargeable to the firm. The principals controlled the characterization and allocation of these expenditures.

In 1909, Ned filed suit against Sam, Jr., and others alleging certain breaches of the duty of loyalty in their stewardship of the properties of the Trust. In 1910, the matter became a local cause célèbre when Sam, Jr., shot himself. The case was settled shortly thereafter when Ned’s interest was bought out by the other family members.

The matter became a national cause célèbre when opponents of Brandeis suggested in his 1916 confirmation hearings for the U. S. Supreme Court that he had engaged in unethical conduct in simultaneously representing persons with conflicting interests, namely, the trust beneficiaries and the principals of the firm.

Today, legal ethicists use the Warren Trust as a case study when debating such issues as whom trust counsel represents,³ whether one ethically can be a lawyer for a “family” or a “situation,”⁴ and what constitutes adequate informed consent to a lawyer’s representation of persons whose interests are in conflict.⁵

²Richard W. Painter, *Contracting Around Conflicts in a Family Representation: Louis Brandeis and the Warren Trust*, 8 U. Chi. L. Sch. Roundtable 353, 360 (2001).

³See §8.8 of this handbook (whom do the trust’s scrivener and trust counsel represent?).

⁴See, e.g., Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 Yale L.J. 1445 (1996); John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 Stan. L. Rev. 683 (1965).

⁵See, e.g., Richard W. Painter, *Contracting Around Conflicts in a Family Representation: Louis Brandeis and the Warren Trust*, 8 U. Chi. L. Sch. Roundtable 353, 373–377 (2001).