

You advise that you represent a bondholder on a bond which was executed by the bondholder's son (who is now deceased) and his wife. In 1981, prior to the execution of the demand bond and deed of trust, the bondholder sent her son to your office so that you might help him recover a tractor/trailer rig which had been repossessed. At that time, you made one or two phone calls on behalf of the deceased son. The son hired other counsel after you were unable to secure the release of the tractor/trailer. The son died in the spring of 1984 after executing the deed of trust and bond in December of 1983. In November of 1984, the daughter-in-law hired an attorney to seek to have the deed of trust and bond set aside for lack of consideration. At that time, your client, the bondholder, requested your assistance. You substituted yourself as trustee and commenced to make demands of payment in full or to proceed to foreclosure. In April of 1985, the daughter-in-law instituted a suit to set aside the deed of trust.

During discovery, it was determined that part of the debt which made up the bond, which was secured by the deed of trust, was money paid by the bondholder (your client) and the bondholder's late husband to get the tractor/trailer out of repossession and to make payments guaranteed by the bondholder for six months thereafter.

You advise that neither you nor your firm participated in the arrangements for getting the tractor/trailer out of repossession or prepared the deed of trust or the demand bond. At a final hearing for compelling discovery, the daughter-in-law informed her attorney that she recognized you because her husband had sought your advice in 1981. As a result, the judge suggested that you not represent the bondholder at trial even though the daughter-in-law made no objections to your remaining as counsel.

The court ruled that the deed of trust and bond were valid and enforceable in January 1988.

You wish to know whether or not you may serve as trustee to foreclose on the parcel of land.

Disciplinary Rule 5-105(B) states, "A lawyer who has represented a client in a matter shall not thereafter represent another person in the same or substantially related matter if the interests of that person is adverse in any material respect to the interest of the former client unless the former client consents after disclosure." In that situation, however, it appears that the only manner in which these two matters are related is the manner in which the funds were used. You state that part of the money secured by the note and deed of trust were paid to stop the foreclosure on the tractor/trailer. The Committee opines that DR:5-105(B) would not be violated in this situation.

Committee Opinion  
March 16, 1988