

You advise that Attorney X was retained by Client A to pursue a wrongful death action for her husband's death in a head-on collision. After having Client A execute an employment agreement, Attorney X planned to have his client qualified as administratrix of the estate of her deceased husband. In discussing the matter with Client A, Attorney X learned that the decedent's uncle, whom he knew professionally, had information about the collision. Later, during a conversation with decedent's uncle, Attorney X learned that the uncle had petitioned the court to be appointed as trustee for Client A's infant daughter, whereupon Attorney X decided to defer Client A's qualification as administratrix until he knew more about the situation. That afternoon, decedent's uncle came to Attorney X's office and stated that the Department of Social Service was investigating allegations of child abuse by Client A against her infant daughter. Decedent's uncle made it clear that his sole interest was to protect the child and the child's share of any recovery from the wrongful death action which could be misused by Client A. The following day, Attorney X went to the clerk's office to ascertain whether decedent's uncle had been appointed as administrator of the estate of Client A's deceased husband. Upon discovering that the uncle had been qualified, Attorney X notified Client A that he could not longer represent her in the wrongful death matter since the cause of action belonged solely to the personal representative.

Subsequently, Client A released Attorney X and his firm from representing her. Attorney X was then approached by decedent's uncle to represent him as administrator in wrongful death action.

In addition, you indicate that there is animosity between Client A and decedent's uncle and that Client A has retained another attorney to represent her in a petition to the court to remove decedent's uncle as administrator.

You wish to know whether it is ethically permissible for Attorney X to represent decedent's uncle in the wrongful death case, if he retains the status of personal representative, after having previously been retained by Client A in the same action. You believe that the subsequent representation of decedent's uncle would not be in violation of Disciplinary Rule 5-105 since there is parity between the interests of the administrator and Client A and both wish to recover as much as possible from the wrongful death case. The amount awarded to the beneficiaries obviously would be determined by the court or a jury.

The Committee would direct your attention to DR:5-105(D), which is the appropriate and controlling rule relative to your inquiry. The rule provides that a lawyer who has represented a client in the matter shall not thereafter represent another in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of the former client, unless the former client consents after full and adequate disclosure.

The Committee is of the view that while both Client A and the administrator share a common interest of recovering the maximum amount of damages from the wrongful death action, it is obvious that they have potential differing interests. Since Client A is

also a beneficiary of the estate, Attorney X's representation of the administrator who, as you have stated, is solely protecting the interests of the child beneficiary would be adverse to interests of Client A. Thus, without consent from Client A, Attorney X's representation of the uncle would be improper.

Furthermore, the Committee is of the view that the information gained from decedent's uncle during the Attorney's representation of Client A and concerning the child abuse allegations for which Client A is the subject of an investigation may constitute a secret, as it is likely that disclosure of such information would be embarrassing and detrimental to Client A. The Committee would admonish against revealing a confidence or secret of a client or using the same to the disadvantage of the client or to one's own advantage or a third person's advantage, unless the client consents after full disclosure. (See DR:4-101(A), (B))

The Committee opines that the mere representation of a client whose interests are adverse to a former client does not warrant automatic disqualification on ethical grounds. Where Attorney X has obtained Client A's informed consent thereto after full disclosure under the circumstances, and provided that Attorney X does not reveal or use the confidences or secrets protected by the attorney/client relationship, representation would not be improper. (See LE Op. 718 and LE Op. 1039)

Committee Opinion  
April 26, 1989