

You have indicated that Attorney prepared a will for Client A before A's death and also advised beneficiaries of the will, in regard to the will, after A's death. Further, you indicate that, prior to A's death, a Deed of Trust was placed on A's real property and the note securing the Deed of Trust was not paid. Attorney has contracted with B to serve as substitute trustee in foreclosures on notes held by B, and B now requests that A foreclose on the Deed of Trust executed by A before his death. Finally, you indicate that Attorney never represented A in regard to the Deed of Trust nor gave any advice as to the Deed of Trust or related matters.

You have requested that the Committee opine as to the propriety of Attorney acting as substitute trustee under the present circumstances.

The appropriate and controlling disciplinary rule to the question you raise is DR:5-105(D), which requires that a lawyer not represent a new client in a matter which is the same or which is substantially related to a matter in which he represented a former client, if the new client's interest is adverse in any material respect to the interest of the former client, unless the former client consents after disclosure.

The Committee has earlier opined, in general, that the mere fact that a lawyer has formerly represented a person, who is now the adverse party in a suit brought by the lawyer on behalf of another client, is not sufficient to create an incurable conflict unless the lawyer possesses confidential information which he obtained from the first client. LE Op. 441; see also LE Op. 622. In addition, the Committee has specifically opined that, even where a lawyer serves simultaneously as counsel for a borrower and as trustee on the underlying deed of trust, the lawyer may foreclose on the deed of trust without first obtaining consent of the borrower if two conditions are satisfied: (1) the attorney must not have counseled the borrower as to the terms or conditions contained in the note or deed of trust; and (2) following closing, the attorney must not have continued a relationship with the borrower which could be deemed to have been representation in the same or a substantially related matter. LE Op. 824, LE Op. 1153.

The Committee is of the opinion that it would not be improper for the Attorney to act as substitute trustee on the Deed of Trust executed by client A before his death, since, under the facts you have presented, no representation had been provided to A by Attorney with regard to the real property which is the subject of the foreclosure. The Committee is of the view, however, that, if the advice provided by Attorney to the beneficiaries under the will involved matters related to the property or to the note securing the Deed of Trust, it would be incumbent upon the Attorney to secure the consent of the beneficiaries, as required by DR:5-105(D), prior to foreclosing.

Committee Opinion
January 14, 1991