

You have indicated that following the death of the testator, a last will and testament was probated in the appropriate Circuit Court. All of the decedent's estate was divided among two trusts of which his wife is the income beneficiary for her lifetime and, following her death, the property in each of the trusts is to be divided among the decedent's three children [X, Y, Z] who are named as [co-]Executors and [co-]Trustees of each of the trusts.

You further indicate that the three children qualified as Executors (but not Trustees) shortly after the death of the testator and tension among the three Executors developed almost immediately. You advise that Executor X contacted Lawyer A of law firm F for representation in connection with the estate and further that legal counsel was also engaged by Executor Y and by the income beneficiary [decedent's wife]. Shortly thereafter, each of the Executors and the income beneficiary agreed that Lawyer A would represent the interest of the estate. Subsequently, Executor X acknowledged that Lawyer A no longer represented him as Executor and X retained separate counsel to represent him. You indicate that, by that time, each Executor and the income beneficiary had separate counsel. Shortly after the parties agreed that Lawyer A of law firm F would represent the estate, Lawyer A requested that Lawyer B of the same firm assist him in the matter and Lawyer B essentially took over the matter from Lawyer A.

You advise that, during the course of the administration of the estate, Lawyer B communicated to each of the three Executors, their attorneys and the income beneficiary and her attorney, his advice on what needed to be done on tax matters, marshalling estate assets, characterizing receipts as income and principal, preparation of accountings, and similar matters.

The facts you provide indicate that, while there was agreement among the Executors on some issues, there was disagreement on others which usually reflected a division between two of the Executors [Y and Z] agreeing with Lawyer B's advice and Executor X disagreeing. Although there was litigation on two questions during the administration of the estate, you indicate that substantially all of the issues pertaining to the administration of the estate were resolved approximately eighteen months after the death of the testator and Lawyer B advised each of the Executors that it was then appropriate for the trusts to be funded and for the three to qualify as Trustees.

Owing to the dissension among the three, there was discussion as to use of alternative Trustees, but the three Executors and Trustees could not agree to an alternative course. At that time, Executor X indicated verbally that he did not intend to qualify as Trustee, but neither he nor his counsel responded to a request that he confirm his position in writing so that Executors/Trustees Y and Z might qualify as Trustees. Upon notice that a court time had been set for those wishing to qualify as Trustee to do so, Y and Z appeared and

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qualified, but X did not appear. You indicate that, subsequent to the qualification of Y and Z, counsel for X advised that X wished to qualify as well and commenced an action before the Circuit Court to seek court approval for X to qualify as Trustee. Lawyer B did not represent Y and Z in that proceeding, but appeared as a witness testifying as to the substance of his conversations with X's counsel. The Court subsequently allowed X to qualify and he did so.

Finally, you advise that it is likely that the dissension among X, Y and Z will continue and that, should adversity arise between X on one hand and Y and Z on the other, it appears unlikely that X will consent to Lawyer B's representation of Y and Z as Trustees. Lawyer B is not aware of any information imparted to him in confidence by any of the Executors and he has tried to advise all Executors of the positions taken by each and the response thereto.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for Lawyer B to continue to represent Executors Y and Z as Trustees in the event that they become adverse to Executor/Trustee X and X refuses to consent to that representation.

The appropriate and controlling disciplinary rule relative to your inquiry is DR:5-105(D) which mandates that 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 interest of that person is *adverse* in any material respect to the interest of the former client *unless the former client consents after disclosure*. [emphasis added]

The Committee has previously opined that an attorney engaged to represent an estate enjoys an attorney/client relationship with the personal representative [i.e., Executor] since that individual "assumes the legal status as the agent of the decedent and is the only available conduit of information between the entity [i.e., the estate] and the attorney". LE Op. 1452. In the facts you present, wherein three individuals serve as co-Executors of an estate and an attorney has represented the estate, the Committee is of the opinion that the attorney/client relationship on behalf of the estate exists simultaneously with each of the co-Executors. The Committee is of the further opinion that the fact that each Executor has separate independent counsel does not alter the conclusion that the client(s) is not the estate, but the three Executors.

As stated in DR:5-105(D), the question of whether subsequent representation of a client conflicts with the prior representation of a former client turns on the questions of whether the matters are "the same or substantially related" and whether there is adversity between the current and former clients. In the facts you present, the Committee is of the view that the issues involved in the establishment and administration of the trusts evolve from the same set of facts, i.e., from a single document of the same decedent, as does the estate administration. Therefore, the Committee is of the belief that the matters are substantially related. *See* LE Op. 1139. The Committee is of the opinion that the adverse interests among the three Executors/Trustees requires Lawyer B to obtain consent of all three in

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order to continue to represent two of the three Executors/Trustees; and, in the absence of said consent, Lawyer B may not continue such representation.

The Committee is of the further opinion that where the earlier and present matters are substantially related, the attorney's non-receipt of secret or confidential information is irrelevant.