

LEGAL ETHICS OPINION 1494

CONFLICT OF INTEREST:
REPRESENTING LENDER AND
TRUSTEE WHILE LENDER AND
BORROWER ARE ENGAGED IN
ADVERSARY PROCEEDING.

You have presented a hypothetical situation in which Law Firm A represents a noteholder at closing on a property of Borrower [B]. One year later, Borrower files for bankruptcy. Law Firm A represents the noteholder in B's bankruptcy and brings a successful lift stay motion to permit foreclosure on B's property secured by the note. Law Firm A also undertakes representation of Trustee under the Deed of Trust note without B's knowledge or consent.

B files an action in Circuit Court seeking to avoid foreclosure. One of the issues before the Circuit Court is whether Trustee should sell a portion of the property separately to obtain a better price by taking advantage of a favorable zoning variance, obtained by B, which would be lost if the property were sold at auction. Noteholder opposes the partial sale.

You have asked the Committee to opine whether, under the facts of the inquiry, Law Firm A may ethically represent both the Trustee and the noteholder in the Circuit Court action.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105(B) and (C) which state that a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except if it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effect of the representation on the exercise of his independent professional judgment on behalf of each.

The Committee is of the view that there is an actual conflict between the firm's two clients, the noteholder and the trustee, since the noteholder opposes the partial sale. The Committee recognizes that the trustee, however, has a fiduciary duty toward both the noteholder and the notemaker (Borrower). Since the facts indicate that a better price may be obtained by partial sale rather than by sale of the entire property at auction it appears that a partial sale may be in the best interests of the borrower.

The Committee believes that the firm's representation of both the trustee and the noteholder is violative of DRs 5-105(B) and (C) [DR:5-105] since the interests of the clients have already matured into actual adverse interests and since it is not obvious that the law firm can adequately represent the interest of each. Thus, since the threshold test of obvious adequate representation cannot be crossed, disclosure and consent to the representation will not be sufficient to cure the impropriety and, therefore, Law Firm A must withdraw from representation of both the trustee and the noteholder. See LE Op. 1428.