

LEGAL ETHICS OPINION 1568

CONFIDENCES AND SECRETS —
CONFLICT OF INTEREST — FORMER
CLIENT: REPRESENTING PLAINTIFF
IN DENTAL MALPRACTICE CASE
AFTER HAVING REPRESENTED
DEFENDANT DENTIST IN EARLIER
CASE.

You have presented a hypothetical situation in which an attorney with Firm A has been asked to be co-counsel in a medical malpractice suit against a local dentist. Counsel for the dentist has contacted the attorney for Firm A and advised that he believes that it is a conflict of interest for this attorney to serve as co-counsel in the suit because the attorney for Firm A had previously represented the local dentist in a malpractice suit which involved complications arising after utilization of a certain procedure. Additionally, it is alleged that the attorney for Firm A prepared wills for the local dentist and his wife.

You have asked the committee to opine whether, under the facts of the inquiry, it is a conflict of interest for the attorney to serve as co-counsel in a malpractice action against a dentist when the attorney had previously defended the dentist in a malpractice action and prepared wills for both the dentist and his wife.

The appropriate and controlling Disciplinary Rules related to your inquiry are DR:4-101(B) which provides for the preservation of client confidences and secrets; and DR:5-105(D) which states 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.

The committee is of the opinion that the current representation is substantially related to the former representation of the dentist. Both the current and former representations involve the same dentist whose professional competence is at issue in both malpractice suits.

The committee is also of the view that the possession of confidential information may be imputed to the attorney in Firm A based upon his having earlier represented the dentist in a malpractice action and upon his having drawn wills for the dentist and his wife.

Thus, the committee opines that it would be improper for the attorney in Firm A to serve as co-counsel to the present client, absent consent of the former client after full disclosure, based upon the substantial relationship of the matters as well as upon the presumption that the attorney possesses confidential information which could be used to the disadvantage of the former client/dentist or to the advantage of the current client/patient. *See* LE Op. 1516.