

## **BBA ETHICS COMMITTEE OPINIONS**

### **BBA Ethics Opinion 93-3**

#### Summary:

A lawyer is asked to represent a firm company in a business transaction in which the firm company will be making a loan to or an equity investment in a second company which the lawyer or the lawyer's firm also represents in other matters. The lawyer may undertake the representation only upon satisfying all of the following conditions: (1) the lawyer is personally satisfied and it is objectively apparent that the lawyer's independent professional judgment and that of his colleagues on behalf of either company will not be adversely affected by the concurrent representation of the other company in other matters, (2) both companies consent after full disclosure of the ways in which their interests may be adversely affected by the representation, including disclosure of the possibility that the lawyer may be forced to withdraw during the course of the negotiations should irreconcilable actual conflicts arise; and (3) the lawyer reviews with each client and obtains the consent of each to any use or disclosure of secrets or confidences of one Client to the other.

#### Facts:

The inquiring lawyer has been asked to represent company X in a transaction with company Y in which X will make a loan to and/or an equity investment in Y. The lawyer was formerly general counsel to X and he and his partners continue to represent X. In addition the lawyer was formerly general counsel to Y and his firm continues to represent Y in certain litigation matters.

The lawyer wishes to undertake the proposed representation of X while he or other lawyer in his firm continue to represent Y in other matters. He reports that Y has had the opportunity to consult with its own counsel and is agreeable to this arrangement. The lawyer will be called upon to conduct a "due diligence" examination of Y's business affairs and records on behalf of X. The lawyer already has some familiarity with Y and its business as a result of his representation of Y. Indeed, one of the reasons both X and Y are willing to have the lawyer represent X is that he can do so more efficiently and less expensively because of this familiarity.

He has discussed with Y his use of confidences and secrets of Y that he obtained during the course of his representation of Y. He has advised Y that if he discloses to X privileged communications he had with Y, the attorney-client privilege that protects such communications might be deemed waived and he might be compelled to disclose such communications in other settings, such as the litigation that W firm is handling on behalf of Y. Y has indicated that it is not willing to consent to disclosures that might waive the attorney-client privilege, but is prepared to consent to the lawyer's use of that information on behalf of Y.

The lawyer asks what disclosures he must make and what waivers he must receive in order to go forward with the representation of X.

#### Questions Presented:

1. Under what, if any, circumstances may a lawyer represent one client in a business transaction with another party that the lawyer or other attorneys in the lawyer's firm represent in unrelated matters?

2. If such simultaneous representation is not per se prohibited, what disclosures must the lawyer make in order to obtain the consent required in order to go forward with such a representation?

Discussion:

The question raised by the inquiring attorney concerns the ability of a lawyer to represent one client in a business transaction with another current client. It is an important question. It is often the case that parties considering a business arrangement make use of the services of the same law firm or even the same individual attorney. For example, it is not uncommon for a lawyer to represent a borrower in a loan transaction even though the borrower's lawyer or his firm represents the bank on other unrelated matters with the consent of both the borrower and the bank. Conflict waivers are often sought and obtained in transactional settings. Given the high cost of legal services, many clients expect their lawyers to consider creative ways to achieve efficiencies and avoid redundancies. The situation presented by the inquiring lawyer involves such a request.

Nevertheless, such situations are inherently problematic. The lawyer's ability to represent his client with single-minded zeal may be adversely affected by concerns that by pursuing negotiations aggressively he might displease his other client and thereby jeopardize his standing with that other client. The client whom the lawyer represents in such a transaction may not always be in a good position to determine whether the lawyer is "pulling his punches". Even after the transaction is consummated, if problems arise during the course of the parties' subsequent business relationship and the lawyer's client finds that the contract documents place it in a disadvantageous position, the client may wonder whether the lawyer failed adequately to protect the client's rights because of the conflict.

The starting place for the analysis in Massachusetts is DR 5-105 which provides in relevant part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of

his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer associated with him or his firm may accept or continue such employment....

DR 5-105 applies to "situation since the inquiring lawyer is plainly considering the representation of "differing interests." This is true even though the lawyer is not being asked to represent the differing interests in the same transaction. The provisions of the rule apply whenever a lawyer is asked to represent one client in a matter in which another client is directly involved, even though the lawyer does not seek to represent the other client in that matter.

The inquiring lawyer appears to assume that he may go forward with the representation of X so long as both X and Y give their informed consent. It is not as simple as that, however. There are some conflicts that are so acute that consent cannot obviate them. *In re Pike*, 408 Mass. 740, 745 (1990); *Haddocks v. Ricker*, 403 Mass. 592, 597 (1988). This is frequently the case when a lawyer is asked to represent one client against another in litigation. See MMA Committee on Professional Ethics Op. No. 80-10.

Initially, the lawyer must ask himself whether his "independent professional judgment" in behalf of either X or Y "will be or is likely to be adversely affected" by his undertaking to represent X against Y. Since every situation is unique, there are no firm rules that apply in such situations. Among the questions that we consider relevant are the following:

1. How sophisticated are the parties? Will X, for example, depend heavily on the lawyer for both business and legal advice in connection with the transaction or are the officers of X sophisticated business people who are generally capable of looking out for their own interests.
2. Will either X or Y have the benefit of independent legal advice from another lawyer, perhaps in-house counsel, who can guard against the possibility of the inquiring lawyer's being influenced, consciously or unconsciously, by the conflicting interests of two clients? Will Y be represented by independent counsel in connection with the X-Y transaction? We understand that this will be the case. We believe that there are few, if any, circumstances in which the lawyer would be able to represent X in a significant transaction with Y where Y was represented by counsel, because of the likelihood that Y would expect the lawyer to look out for Y's interests despite adequate disclosure of the lawyer's duty of loyalty to X.
3. How difficult or contentious are the negotiations likely to be? Have the business terms of the transaction already been worked out or are there many difficult issues that remain unresolved? Is there likely to be much negotiation by the attorneys over the terms of the contemplated arrangement? It is easier to justify a lawyer's representing a prospective home buyer seeking a garden-variety residential mortgage from a bank the lawyer also represents than simultaneous representation of the prospective parties to a more complex business transaction because the majority of the terms of the residential mortgage are not likely to be the subject of negotiation. See MBA Committee on Professional Ethics Op. No. 90-3.

4. How significant is the legal business of X or Y to the lawyer or his firm? If, for example, Y represented a significant portion of the annual billings of the inquiring lawyer's firm, it is unlikely that the lawyer would not be influenced by that fact. Cf. DR 5-101(A) ("Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.").

There may be many other considerations that may affect the lawyer's judgment. No one of them determines the outcome of the analysis. In light of all the circumstances- including the likelihood of difficult situations that might arise during the course of the representation - the lawyer must candidly assess whether he can represent X without "pulling his punches" because of his relationship with Y. <sup>1</sup>

If the attorney is personally satisfied that by undertaking the representation of X in the X-Y transaction his independent professional judgment will not be adversely affected, DR 5-105 provides that he may not go forward unless it is "obvious" that he can represent both X and Y adequately. While the case law does not define this requirement with any specificity, in our view this requirement is an objective one. See *Wellman v. Willis*, 400 Mass. 494, 501-02 (1987) (citing *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1348 n.12 (9th Cir. 1981)). In other words, even if the lawyer in good faith believes that he can adequately represent X in the transaction while he and his colleagues represent Y on unrelated matters, if it would not be obvious to an objective observer that this is the case, the representation may not go forward.

The factors which bear on this "obvious adequacy" requirement are the same factors that bear on the "independent professional judgment" inquiry, as outlined above. The former requirement, with its emphasis on an objective analysis, serves to underscore the caution which lawyers must exercise in concluding that they can overcome the conflicts in particular situations, particularly in light of the lawyer's economic interest in maximizing the number of matters he can handle.

On the assumption that the lawyer is satisfied, both subjectively and from the vantage of an objective third party, that the conflict between the interests of X and Y in connection with the contemplated transaction will not adversely affect his ability to represent X and Y in the transaction with Y, we turn to the question of consent. DR 5-105(C) requires the lawyer to disclose to each client the "possible effect of [the representation of the other client] on the exercise of his independent professional judgment." As a practical matter, he must identify the ways in which he or the other lawyers in his firm might be tempted to "pull their punches" even though he reasonably does not anticipate that they will succumb to such temptations. The point is that the client is entitled to reach an independent, informed judgment concerning the risks it would run by consenting.

So, for example, the inquiring lawyer should advise X that since he has an ongoing attorney-client relationship with Y, he may be less aggressive in the negotiations than he might otherwise be. Similarly, the inquiring lawyer should attempt to anticipate any way in which the negotiations over the X-Y transaction might affect or be affected by the conduct of the litigation on behalf of Y and to bring those ways to Y's attention. The lawyer should also emphasize to Y that his loyalty in the X-Y transaction will run solely to X and that Y must look to its own

counsel to protect its interests. Whatever may be material to the clients' making an informed assessment of the extent to which the lawyer's independent professional judgment on behalf of each may be adversely affected by the representation of the other ought to be discussed. The burden will be on the lawyer to demonstrate that he has made sufficient disclosure to satisfy the requirements of the rule.

One of the matters that must specifically be addressed is the effect of the simultaneous representation of X and Y on the lawyer's confidentiality obligations. As counsel to Y, he and his colleagues may have learned confidential information concerning Y and its business. <sup>2</sup> Indeed, it appears that the lawyer's extensive familiarity with Y is one of the factors which makes him particularly suited to represent X in a cost-effective fashion, a goal shared by both X and Y. <sup>3</sup>

Under DR 4-101, the lawyer may not reveal "confidences" and "secrets" of Y, except as provided by DR 4-101(C). While the term "confidences" is limited to information covered by the attorney-client privilege, "secrets" includes any other information gained in the professional relationship the disclosure of which may be embarrassing or detrimental to the client. We assume that the inquiring lawyer is in possession of much information that constitutes "confidences" or "secrets" of Y.

The lawyer may reveal confidences or secrets of Y to X if Y consents, "but only after a full disclosure" to Y of the consequences of such revelation. DR 4-101(C)(1). Accordingly, the lawyer must advise Y what confidential information will be or is likely to be disclosed to X so that Y can make an informed waiver of its confidentiality rights. Given the extent of the lawyer's representation of Y, it may be difficult to identify every specific item, but he should identify as many categories of information as possible and any sensitive items that he may have learned as Y's attorney in the event that Y's management may have forgotten or overlooked them.

The attorney must also analyze the extent to which his use or disclosure of Y's confidences may constitute a waiver of the attorney-client, attorney work product or some other evidentiary privilege. (The Committee expresses no view concerning these substantive law matters.) The attorney needs to advise Y concerning the risk of waiver. The lawyer should explain to Y, if he concludes that it is true as a substantive matter, that if Y authorizes disclosure of its confidences to X, it may waive privileges it might otherwise have with respect to communications with the lawyer or his colleagues. Moreover, that waiver might be enforceable by third parties other than X.

The inquiring lawyer reports that he has reviewed this issue with Y and that Y is willing to consent to his use of its confidences and secrets in connection with his representation of X (and thus, for example, to his request for particular representations and warranties from Y based on his knowledge), but not to his disclosure to X of any confidences that might result in a waiver of the attorney-client privilege. DR 4-101(B) distinguishes between lawyers' revealing client confidences and using them, and so it may be possible in theory for Y to consent to one but not the other. The lawyer may not go forward on this basis, however, unless at a minimum X gives its informed consent to the limitation placed on the lawyer's representation.

As a practical matter, however, we do not believe that the attorney can undertake the

representation of X unless Y agrees that all information material to that representation can be conveyed to Y. The lawyer may well not be able to assess the significance to X of certain confidences or secrets of Y without consulting X with respect to the information. On other issues, the joint conclusions of Y and its counsel on certain legal matters may themselves be material. For example, if the litigation that the inquiring lawyer's firm is handling for Y is material to the X-Y transactions, X may legitimately require the opinion of Y's counsel concerning the likelihood of a material adverse result and the prospects for settlement. We believe it would be imprudent for the lawyer to represent X where the lawyer is unable to review with X all information material to X's decision even if X were willing to give its consent. While it may be possible to arrange for the transmission of such information to X in ways which might preserve the privileged character of the communications between Y and the lawyer—perhaps by having Y transmit the information directly to X—in our view X ought to have the opportunity to make its own assessment of its significance.

In addition, the lawyer must review with both X and Y the possibility that circumstances may change in ways that may require the lawyer to withdraw from the representation of X in the X-Y transaction. For example, if the lawyer or one of his colleagues learns new confidential adverse information concerning Y that the lawyer believes that X should know, and Y is unwilling to consent (or revokes its consent) to his using or disclosing that information, the lawyer may be required to withdraw entirely from the transaction. That withdrawal will almost certainly alert X to the existence of a serious problem, even though the lawyer may not be able to identify what that problem is, with the predictable result that the transaction will be jeopardized.

The parties might also find that what they had thought would be a simple, "friendly" deal turns into something far more contentious. What if Y suffers business reverses that prompt X to insist on personal guarantees from Y's principals or more restrictive covenants than would otherwise have been required? The lawyer might find that his good faith reasonable judgment that he could adequately represent X while representing Y on other matters has turned out to have been mistaken. Both X and Y must understand that under such circumstances, the lawyer may be compelled to withdraw with the likely effect of delaying the transaction and causing one or both parties to incur unnecessary additional legal expenses.

While the rules do not require that a client's consent be in writing, in a matter such as this it is normally good practice to obtain each client's written consent. Setting forth the required disclosures in a writing that the client signs will, particularly with relatively unsophisticated clients, emphasize the seriousness of the issue and avoid disputes later on concerning the content of the lawyer's disclosure. Moreover, it is also good practice to raise with each client the advisability of the client's seeking the advice of independent counsel in connection with the decision to consent to the inquiring lawyer's simultaneous representation. A lawyer should be reluctant to undertake such simultaneous representation where unsophisticated clients are acting without such independent counsel.

In many situations like the one presented here, one or both clients faced with the kind of disclosure that the inquiring lawyer must make will choose not to consent. Under the rules, both must consent for the representation to be permissible. In many other instances, the lawyer himself should conclude that the risks are too significant or unpredictable to justify going

forward and will decline to represent X even if both X and Y indicate a willingness to consent. Where the transaction is a significant one for one or both parties and where the lawyer possesses confidences and secrets of the client he does not represent which are material to the transaction in question, it is our sense that it will be the relatively rare situation in which the requirements of DR 5-105 will be satisfied.

We are unwilling, however, to conclude that such a representation is never proper. Some business transactions really are friendly and/or routine, involve sophisticated business clients with the benefit of independent counsel, and present opportunities for real cost savings upon the waiver of technical conflicts. If the inquiring lawyer, after following the process set forth in this opinion and obtaining the required consents, concludes that this is such a situation, in our opinion he may undertake the representation of X.

#### **ENDNOTES**

<sup>1</sup> Although the risks of disloyalty are primarily borne by X in this situation, the lawyer must also consider the ways in which his representation of X in the X-Y transaction may affect his or his colleagues' representation of Y. The lawyer or his firm may be influenced by X's interests to recommend a settlement (or not recommend a settlement) of the litigation the firm is handling for Y. The analysis of the effect of the simultaneous representation must be made separately for both X and Y.

<sup>2</sup> Of course, the lawyer has the obligation to maintain X's confidences and secrets as well. We focus on confidences because X, as the lender/investor, is much more likely to have a need to learn information about Y in the course of the transaction than Y will need to learn about X. To the extent that Y needs information about X, the considerations discussed in this opinion apply in both directions.

<sup>3</sup> It is not uncommon, particularly in many lending transactions, for the borrower to be obliged to pay the fees of the lender's attorney. In such transactions, the borrower might well see an advantage in having a lawyer already familiar with the borrower's business conduct the "due diligence" examination in the hope that less time will need to be spent, at the borrower's expense, on that examination.