



Committee on Professional Ethics

Opinion #350 - 6/21/74 (10-74)

Topic: Conflict of Interest

Digest: The factual situation determines whether it is proper for a lawyer who represents a bank for matters originating at a particular branch to represent a borrower from another branch of the same bank, even with the borrower's informed consent.

Code: Canon 5
EC 5-14, 5-15, 5-17
DR 5-105(A) and (C)

QUESTION

May an attorney, who currently represents a bank for matters originating at a particular branch, represent a borrower in a transaction with another branch of the same bank, where the latter is independently represented?

OPINION

DR 5-105(A) provides:

"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)."

[The underlined portion is an amendment adopted by the American Bar Association effective March 1, 1974. The New York State Bar Association has not yet acted on this amendment. The adoption of the amendment would require no change in this opinion.]

DR 5-105(C) provides:

"In the situation 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."

In this particular instance the lawyer is not representing multiple clients in the same transaction, but the standard expressed by Canon 5, that a lawyer should exercise independent professional judgment on behalf of a client, governs, and the ECs and DRs thereunder are valid guides.

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It would be proper for the lawyer to represent the borrower with the borrower's informed consent after full disclosure of the nature of the lawyer's relationship with the bank, provided also that the lawyer can in his considered opinion satisfy himself that his exercise of independent professional judgment on behalf of the borrower will not be adversely affected by his relationship with the bank. The lawyer should be scrupulous in answering this question and any doubt should be resolved against the representation. EC 5-14. Cf. EC 5-15.

The answer to the question will depend on the facts of each situation. EC 5-14, 5-17. Factors to be considered by the lawyer would include:

a) The nature of the relationship with the bank. Casual representation of the other branch might dictate a different answer than if the representation is continuous and exclusive;

b) The value of the retainer from the bank, e.g. whether a substantial or minor source of the lawyer's professional earnings;

c) The nature of the service to be performed, e.g. whether considerable arms length negotiations will be called for, or merely insuring that terms previously agreed upon by the bank and borrower, which terms are not unduly burdensome to the borrower, are satisfied at the closing.

For further guidance reference should be had to ABA Inf. 643 (1963), ABA Inf. 886 (1965), N.Y. State 8 (1965); N.Y. State 162 (1970), N.Y. State 191 (1971) and N.Y. State 303 (1973). See also, Drinker, Legal Ethics 103 et seq. (1953).

Since the lawyer would not be representing the bank in this transaction, its consent is not required unless the use of confidential information would be involved. The lawyer should, however, promptly advise the branch which is making the loan of his attorney-client relationships with the bank for other matters.

Some members of the Committee dissent from this opinion insofar as it does not also require the consent of the bank.
