



Committee on Professional Ethics

Opinion 849 (1/19/11)

Topic: Conflicts analysis of concurrent representation of a bank and an equipment manufacturer in a vendor equipment financing program

Digest: A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in such a program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

Rules: 1.0(f), 1.7

FACTS

1. The inquiring lawyer represents a bank (the "Bank") in connection with an equipment vendor financing program. In this program, the Bank agrees with an equipment supplier to provide equipment lease financing for the supplier's customers to enable the customers to acquire the supplier's equipment. Among the documents in the program is a lease in which the supplier is the lessor and the supplier's customer is the lessee. If, among other things, the customer satisfies the Bank's credit standards, then the supplier sells the lease to the Bank for an amount approximating the cost of the financed equipment.

2. The Bank retained the inquirer several years ago to advise it in connection with its program with a particular equipment supplier (the "Supplier"), which had provided the form lease documents. The inquirer reviewed these lease documents to ensure they were purchase-worthy from the Bank's perspective, and advised the Bank on certain modifications that the inquirer considered appropriate.

3. The Supplier has not previously engaged the inquirer to perform legal work. Rather, the Supplier's in-house finance and legal staff conduct the negotiations over the lease with the Supplier's customers and draft the lease documents, with occasional input from inquirer (in his capacity as the Bank's counsel) and from the Bank's finance personnel. The Supplier's staff is not experienced in this negotiation and drafting, so the Supplier has asked the inquirer whether he would be available to represent the Supplier to perform various tasks.

QUESTIONS

4. May the inquiring lawyer represent the Supplier in any or all of the following activities while continuing to represent the Bank in unrelated matters?

Taking over from the Supplier's in-house staff the negotiation and drafting of new leases with the Supplier's customers. These new leases would be sold to the Bank or possibly used in similar financing programs that the Supplier establishes with other lenders.

Assisting the Supplier in organizing an efficient lease documentation process and educating its staff on equipment financing.

Representing the Supplier in various transactions (other than its financing program with the Bank).

5. If the inquirer agrees to represent the Supplier in this matter, he anticipates amicably ending his representation of the Bank with respect to the Supplier's program while continuing to represent the Bank from time to time on other, unrelated matters. The inquirer asks whether agreeing to represent the Supplier as requested would raise any conflict issues. We conclude that certain of the representations would give rise to conflict issues, and these issues turn on the same analysis whether the inquirer continues to represent the Bank in unrelated matters (and thus remains inquirer's current client) or ceases to represent the Bank (and thus becomes the inquirer's former client) while continuing to work on the financing program for the Supplier.

OPINION

6. Rule 1.7 of the New York Rules of Professional Conduct (the "Rules") governs concurrent conflicts of interest. Rule 1.7 says, in summary, that a conflict of interest arises if a reasonable lawyer would conclude that (i) the representation of one client will involve the lawyer in representing differing *client* interests or (ii) there is a significant risk that the lawyer's own interests will adversely affect the exercise of the lawyer's professional judgment on a client's behalf. If either type of conflict exists, then the lawyer may proceed only if the lawyer reasonably believes the lawyer can provide

competent and diligent representation to each affected client and the lawyer obtains each affected client's informed consent, confirmed in writing.

7. Rule 1.9 governs conflicts of interest with former clients. Rule 1.9 says, in applicable part, that a lawyer who has formerly represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the subsequent client's interests are materially adverse to the first client's interests unless the subsequent client gives informed consent, confirmed in writing.

8. According to the inquirer's plan, the Bank will remain a current client on matters unrelated to the Supplier's financing program and become a former client on the substantially related matter of the Supplier's financing program. Whether the inquirer's proposed representation of the Supplier constitutes a conflict of interest depends on whether the Bank's interests will differ from those of the Supplier in any of the three assignments the Supplier has suggested, as well as on whether a significant risk exists that the lawyer's own interests (for instance, the importance of his ongoing relationship with the Bank to his law practice) will adversely affect the lawyer's professional judgment on behalf of either the Supplier or the Bank. We analyze in turn each task that the Supplier has asked the inquirer to perform.

9. ***Taking over the negotiation and drafting currently done by the Supplier's in-house staff.*** Although lease negotiations are between the Supplier and its customer as counterparties, the lease transaction is in contemplation of the Bank's acquisition of the lease. In some situations, the Bank's involvement as a lender or other participant in a transaction in which the inquirer (who is still the Bank's lawyer on other matters) represents another party may give rise to a conflict of interest, and in other instances it may not. This is a case-by-case determination.

10. In the circumstances here, we believe that the particular interests of the Bank and the Supplier will involve the lawyer in representing "differing interests" within the meaning of Rule 1.7(a)(1) and Rule 1.0(f) (defining "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest"). While the Bank and the Supplier appear to be broadly aligned in interest in the proposed transactions with the Supplier's customers, the interests of the Bank and the Supplier may be "differing" within the meaning of the Rule with respect to the issues that are likely to arise in negotiation of the lease terms. In particular, the Supplier will likely be primarily interested in closing an equipment leasing deal, while the Bank is likely to be primarily interested in ensuring that the Supplier's customer satisfies the Bank's credit standards.

11. These divergent goals are sufficient to implicate the concerns of Rule 1.7(a) regarding the representation of differing interests. See Rule 1.7, cmt. [7] ("Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client); N.Y. City

2001-2 (law firm may represent client whose interests in transaction are adverse to those of a current client in a separate matter if a disinterested lawyer would believe that the law firm can competently represent the interests of each client). The divergent goals also sufficient to implicate the concerns of Rule 1.9(a) in barring a lawyer from representing a new client (the Supplier) whose interests are “materially adverse” to the interests of a former client (the Bank) in a matter substantially related to the lawyer’s work for the former client (the lawyer’s work on behalf of the Bank regarding the Supplier’s equipment financing program).

12. Nevertheless, we do not believe that the circumstances necessarily create a conflict beyond the capacity of informed consent to cure. If the inquirer reasonably believes that he will be able to “provide competent and diligent representation” to the Supplier in this matter and to the Bank in the unrelated matters – *i.e.*, that he will neither “pull his punches” in representing the Supplier’s interests as a lessor in order to serve the Bank’s interests as a lender, nor diminish his vigor in representing the Bank in unrelated matters – and if both clients give informed consent, confirmed in writing, then the inquirer is ethically permitted to take on the negotiations with the Supplier’s customers regarding leases while continuing to represent the Bank in unrelated matters. See Rule 1.7(b)(1), (4).

13. ***Assisting Supplier in organization and education.*** The same is true with respect to the second of the requested assignments, assisting the Supplier’s with education and organization. Although these activities could be said to be in the Bank’s interests in minimizing the Bank’s transaction costs, the main point of the exercise is to affect the negotiations between the Supplier and the Supplier’s customers, which could give rise to the same differing interests with the Bank as the actual negotiation and drafting of the lease documents. For instance, when training the Supplier’s employees, the lawyer would have to decide whether to instruct employees to negotiate credit terms aggressively (for the Bank’s benefit) or to relax credit terms to obtain the customer’s prompt acceptance (for the Supplier’s benefit). Yet here, too, we do not believe that the conflict is necessarily non-consentable. As before, if inquirer reasonably believes that inquirer will be able to “provide competent and diligent representation” to the Supplier in this matter and to the Bank in unrelated matters, and if both clients give informed consent confirmed in writing, the inquirer is ethically permitted to provide this assistance to Supplier while continuing to represent the Bank in other matters.

14. ***Working on Supplier transactions outside of Bank program.*** The inquirer’s representation of the Supplier in matters not involving the Bank would not raise any special conflict issues apart from those we discuss above. To the extent that inquirer needs to obtain the Bank’s consent to conflicts arising out of any future representations of the Bank adverse to the Supplier, the extent of the representation of the Supplier may be material to any consent.

CONCLUSION

15. A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in the financing program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

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