

City Bar Issues Opinion On "Thrust Upon" Conflicts

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Most conflicts of interest can be resolved or avoided by a lawyer before problems occur if the lawyer recognizes and analyzes a potential conflict between a prospective client and a current client, or between two current clients, or between a former client and either a new client or a current client (DR 5-105; DR 5-108), and the lawyer either obtains client consent after full disclosure or declines the conflicting representation. But what if a conflict of interest is unexpectedly "thrust upon" the lawyer by circumstances beyond his own control?

That question was the subject of Opinion 2005-5 of the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (ABCNY). The Committee defined a "thrust-upon" conflict as a conflict between two concurrent clients that:

- (1) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where
- (2) the conflict was not reasonably foreseeable at the outset of the representation,
- (3) the conflict arose through no fault of the lawyer or law firm involved, and
- (4) the conflict is waivable under DR 5-105(C), but one of the two clients will not consent to the dual representation.

With most conflicts, the Committee recognized, DR 5-105(C) requires that two conditions be satisfied before a lawyer may continue to represent two concurrent clients if, during the representation, the clients develop differing interests or if the lawyer's exercise of independent judgment on behalf of either client will be adversely affected by representing the other client (DR 5-105(B)). Those conditions are: 1) a disinterested lawyer must believe that the lawyer can competently represent the interest of each client; and 2) each client must consent to the representation after full disclosure. But the rules for "thrust upon" conflicts, the Committee said, are different.

Changes in Corporate Ownership

"Thrust upon" conflicts often occur as a result of changes in corporate ownership (though they may occur in other circumstances as well). To illustrate how a conflict may arise in the case of corporate changes, the Committee offered the following scenario:

A law firm represents Client A in a breach of contract suit against Company B. During the pendency of that suit, Client C, a longtime ongoing client of the law firm, acquires Company B in a stock sale, and Company B becomes a wholly owned subsidiary of Client C. The law firm (which does not represent Client C in the acquisition of B) informs Clients A and C that it wishes to continue to represent each of them in their respective matters. Client A consents to a conflict of interest waiver, but Client C does not...

(The Committee also offered a non-litigation scenario, but the conflict analysis is the same.) Confronted by this apparent conflict, the law firm must first decide whether there is really a conflict at all. Under New York case law, that will depend on several factors, including the closeness and interdependence of Company C and Company B; the relationship between the work the law firm has done for Company C and the issues involved in the litigation the law firm is conducting against Company B; whether either company reasonably believes that an attorney-client relationship with the law firm exists; and whether Company C's interests would be materially adversely affected by the law firm's action against Company B.

After examining these factors, the law firm may reasonably "conclude that it does not have an attorney-client relationship with Company B," especially if: 1) it had no pre-existing relationship with Company B, 2) it was not involved in the transaction in which Company B became a subsidiary of Company C, and 3) it has not acquired any confidences of Company B relevant to the litigation.

When Conflict Does Exist

Assuming, however, that the firm concludes that a conflict does exist, it may not ordinarily continue the litigation against Company B unless Company C consents. "It is well settled that...a lawyer may not oppose a current client in any matter, even if the matter is totally unrelated to the firm's representation of the client, without consent from both clients." (citing *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir 1976); *IBM v. Levin*, 579 F.2d 271 (3rd Cir. 1978); and N.Y. City Eth. Op 2003-03.) That raised a new question: When a conflict is "thrust upon" upon a law firm, must the firm withdraw from both representations, or may it continue representing one of the conflicting clients - and if so, which one?

DR 2-110(B)(2) requires withdrawal when the lawyer "knows or it is obvious that continued employment will result in violation of a Disciplinary Rule," but that rule "sheds no light on situations where the withdrawal...involves more than one client."

Some New York ethics opinions have required withdrawal from both clients, but these are distinguishable. They generally involve clients with divergent interests on the same side of a matter, or situations in which a lawyer's knowledge of a client's confidences affects his ability to represent both clients. In cases of "thrust upon" conflicts, these factors probably do not apply.

Instead, the Committee said, "Since the ethics rules do not instruct lawyers to determine from which client to withdraw...lawyers confronting this situation must be guided by the duties of confidentiality and loyalty to the client." If the conflict between the clients arises because the lawyer has confidential information, or if there is a substantial relationship between the two matters in which the concurrent clients are involved, the lawyer probably cannot solve the conflict by dropping one client and continuing to represent the other. (This is because the discarded client would become a former client and would be protected by DR 5-108's requirement that it give its consent to any adverse representation in a substantially related matter.)

The duty of loyalty is also central to the rules prohibiting lawyers from representing multiple clients with differing interests. The Committee quoted EC 5-1 in full:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising interests and loyalties. Neither the lawyer's

personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.

The "Hot Potato" Rule

In deciding which one of two clients to discard, the lawyer must usually consider the so-called "hot potato" rule, which instructs a lawyer facing a conflict between two clients not to prefer the more lucrative client. The rule has been cited in several cases involving attorney disqualification motions. See, e.g., *Hartford Accident and Indemnity Co. v. RJR Nabisco, Inc.*, 721 F. Supp. 534 (S.D.N.Y. 1989).

But, the Committee said, "the 'hot potato' rule ... is not commanded by the text of the Code or the ABA Model Rules and should not apply to situations where its underlying rationale would not be served." The rule was intended to cover affirmative, opportunistic, self-interested acts of disloyalty to an existing client. When a conflict is "thrust upon" a lawyer, "concerns about opportunistic attorney activity are less evident."

In the current business climate, corporate mergers and acquisitions are so common that conflicts between clients often arise unexpectedly and without any fault by the lawyer. Conflicts created in this way should not be governed by the "hot potato" rule. Instead, the courts have applied a more flexible approach in "thrust upon" cases that calls for "balancing the interests of all affected parties rather than mechanically applying the 'hot potato' rule."

Faced with a "thrust upon" conflict, therefore, a lawyer should also balance the interests of the two conflicting clients. First, the lawyer should avoid picking one client over another if the confidences and secrets of the discarded client would be compromised. Where confidences are not at risk, however, "the overriding factor should be the prejudice the withdrawal or continued representation will cause the parties, including whether representation of one client over the other would give an unfair advantage to a client."

The lawyer should also consider the following additional factors:

- (1) the origin of the conflict, i.e., which client's action caused the conflict to arise;
- (2) whether one client has manipulated the conflict to try to force a lawyer off the matter and is using the conflict as leverage;
- (3) the costs and inconvenience to the party that is forced to get new counsel, including the complexity of the representation;
- (4) whether the choice would diminish the lawyer's vigor of representation toward the remaining client; and
- (5) the lawyer's overall relationship to each client.

The Committee's approach to "thrust upon" conflicts is similar to the approach of ABA Model Rule 1.7, Comment [5] and of *Restatement (Third) of the Law Governing Lawyers*, § 132, Comment j. It is also consistent with a number of decisions by the courts.

Finally, the Committee recommended a number of "prophylactic measures" that lawyers can take to anticipate and avoid unexpected concurrent client conflicts:

[S]ome conflicts may be avoided by obtaining advance consents from clients to waive conflicts that may come up in the future. Of course, the fact that "thrust upon" conflicts by definition are not reasonably foreseeable may make it particularly difficult in some cases to obtain enforceable advance waivers. Nonetheless, in appropriate instances clients can give informed and therefore effective waivers in advance to a sufficiently described set of circumstances without necessarily knowing all details or the identity of the other client. [Citations omitted.]

In addition, attorneys may be able to draft the letter of engagement to avoid uncertainty as to whether the representation is ongoing or not, and who is the client. For example, the lawyer could clarify that he or she only represents the client in a particular area or for a particular matter, and representation in any other matter would necessitate a separate agreement. Similarly, the lawyer could clarify that he or she represents only specified entities within the corporate family, and not current or future affiliates.

On the whole, Opinion 2005-5 provides significant new guidance to lawyers about how to deal with "thrust-upon" conflicts when they arise, and offers useful thoughts on how to prevent them before they occur.