Committee Opinion
May 2, 1988

LEGAL ETHICS OPINION 1082

CONFLICT OF INTEREST – MERGER OF LAW FIRMS WHICH ARE OPPOSING COUNSEL ON RELATED MATTERS.

You advise that Firm "A" and Firm "B" were discussing merger of the two firms when Firm "A" learned that a partner of Firm "B" ("Attorney B") had filed a Chapter 13 bankruptcy petition on behalf of an individual debtor ("debtor") who has listed one of Firm "A's" major clients ("client"), a financial institution, as a scheduled creditor. Firm "A" has been actively representing the client in all pending matters involving collections from the debtor and his related businesses and will continue that representation in the future. Such representation by Firm "A" has been hostile and adversarial and could potentially last for years. At the same time Firm "A" learned of Attorney "B's" representation of the debtor, Firm "B" also became aware that another attorney within Firm "B" had a pending action against one of the debtor companies which may pose a conflict with Firm "B". Immediately upon learning of Attorney "B's" representation of the debtor, the firm ceased further discussions concerning a merger. At no time during the merger discussions were any of the facts or substance of any pending cases within Firm "A" or Firm "B" ever discussed.

Attorney "B" is physically located in a satellite office about seven miles from the remainder of the attorneys in Firm "B" and has never been an active participant in the merger discussions. Other attorneys within Firm "B" use the satellite office when they happen to be in that community, but they have their principal offices at other locations. At no time has any other attorney within Firm "B", other than Attorney "B", had any contact with the debtor, handled any matter on behalf of the debtor, or otherwise had any involvement with the affairs of the debtor. Attorney "B's" only representation of the debtor involved a preparation and filing of the Chapter 13 petition after conferring with the debtor. (Debtor is represented by a number of firms and five are listed as creditors in his bankruptcy petition.)

Attorney "B" and the other Firm "B" attorneys made an independent judgment within a week following the initial filing of the Chapter 13 petition, based upon the internal conflict within Firm "B", to withdraw as counsel for the debtor in the Chapter 13 proceeding as well as counsel in the action against debtor's related business. At the same time, Attorney "B" informed the firm that because of his field of practice and the potential for future conflicts, he did not desire to participate in the merger with Firm "A". He does not object, however, to merger discussions resuming between Firm "A" and the remaining attorneys of Firm "B".

Firm "A" and Firm "B", excluding Attorney "B" and certain other attorneys in Firm "B", wish to renew the merger discussions once Attorney "B" has withdrawn as counsel in the bankruptcy proceeding. You state that the Committee may assume that following full disclosure, Firm "A's" client will consent to Firm "A's" continued representation in pursuit of the debtor by the successor firm as a result of the merger. You further state

that the Committee may assume that the debtor would never consent, nor allow his new counsel to consent, to Firm "A's" or the successor's firm continued representation of the client in matters involving him or his related business.

You pose three questions relative to the above. The first is whether Firm "A" and Firm "B" may resume discussions with regard to a merger, excluding Attorney "B," without the consent of the debtor. Your second question is whether one or more of the partners or associate attorneys in Firm "B (excluding Attorney "B") may withdraw from Firm "B" and independently negotiate an association with Firm "A" without the consent of the debtor. Your last question is if Firm "B" (excluding Attorney "B") or any of Firm "B's" individual attorneys are ethically precluded from resuming discussions with Firm "A" without the debtor's consent, is there any appropriate time period after which Attorney "B" has withdrawn from Firm "B" when discussions concerning merger could resume.

The Committee will address your questions in the order presented.

Your first question is governed by Canons 4 and 9 of the Code. Basically, the controlling question is whether or not the other attorneys in Firm "B" gained confidential information regarding the debtor which would be carried to merged Firm "AB." Generally, lawyers associated in a firm with a lawyer who directly represents a client are presumed to have access to confidential information about that client. Westinghouse Electric Corp. v. Kerr McGee Corp., 580 F.2d 1311 (CA7), cert. denied, 439 U.S. 955 (1978). This presumption, however, is rebuttable. Silver Chrysler Plymouth Inc. v. Chrysler Motors Corporation, 518 F.2d 751 (1975).

In your situation, the Committee believes the presumption that the attorneys in Firm "B" (excluding Attorney "B") gained confidential information regarding the debtor which may be carried to the merged firm is rebutted for the following reasons:

1. Attorney "B" was located in a satellite office;

2. You assure the Committee that at no time has any other attorney within Firm "B" other than Attorney "B" had any contact with the debtor or otherwise had any involvement with the affairs of the debtor;

3. Attorney "B" and the other Firm "B" attorneys have withdrawn as counsel for the debtor;

4. Attorney "B" has not and will not participate in the merger with Firm "A"; and

5. You assure the Committee that at no time during the merger discussions were any of the facts or substance of any pending cases within Firm “A” or “B” ever discussed.

Based upon the Committee’s belief that no confidences and secrets were learned about the debtor by the other attorneys in Firm “B”, the Committee opines that it would not be

improper for Firm “A” and Firm “B” to resume merger discussions without the debtor’s consent.

Canons 4 and 9 also control your second question. For the reasons stated above, the Committee does not believe that the partners or associate attorneys in Firm “B” (excluding Attorney “B”) learned any confidential information regarding the debtor. Therefore, it would not be improper for one or more of the partners or associate attorneys in Firm “B” (excluding Attorney “B”) to withdraw from Firm “B” and independently negotiate association with Firm “A” without the debtor’s consent.

The Committee believes its response to questions one and two renders question three moot.

The Committee wishes to advise you that its opinion is based upon your assurance that no confidences and secrets were passed on to the other members of Firm “B” (excluding Attorney “B”).

Committee Opinion
May 2, 1988