

Committee Opinion
March 13, 1992

LEGAL ETHICS OPINION 1454

CONFLICT OF INTEREST - MULTIPLE
REPRESENTATIONS.

You have indicated that a financial institution was put into receivership by federal agency A which is represented generally with respect to this matter by law firm B. With respect to one loan in the financial institution's portfolio, law firm C was asked by A to render an opinion as to whether A may foreclose under a deed of trust and pursue guarantors when the sole act of default was the non-payment of interest by borrowers. The facts you provide indicate that the non-payment in question was occasioned by agency A's repudiation of the financial institution's obligation to lend the interest amount to borrowers. You indicate that law firm C completed its work on the opinion and rendered it to agency A in draft form without signature, as requested by agency A. Furthermore, you advise that law firm C has heard nothing further from agency A as to the opinion and is unsure if anything further will be heard from the agency on that matter, but is also presently advising the same agency on a matter unrelated to the financial institution in question.

Finally, you indicate that, subsequent to rendering the opinion, law firm C is proffered representation of an officer/director/shareholder (hereinafter "Executive") of the financial institution in question pertaining to a subpoena duces tecum issued to the Executive from a federal grand jury which seeks certain documents under his control, some of which may relate to either the financial institution or to the Executive. Executive has not been identified as a target by any federal agency, but he seeks law firm C's representation of the matter to conclusion.

You have asked the Committee to opine whether, under the facts of the inquiry, it is proper for law firm C to undertake representation of Executive and, if so, whether C is required to obtain a waiver from either A or Executive, or both.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:5-105(A) which requires a lawyer to 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; DR:5-105(C) which permits the lawyer to cure the conflict identified in DR:5-105(A) if it is obvious that he can adequately represent the interest of each [client] and if each consents to the representation after full disclosure; DR:5-105(D) which precludes a lawyer who has represented a client in a matter from thereafter representing another person in the same or substantially related matter if the interest of that person is adverse in any material respect unless the former client consents after disclosure; DR:5-105(E) which provides that no partner or associate of a lawyer who has been disqualified because of a multiple-client conflict may accept or continue such employment; and DR:4-101(B) which prohibits a lawyer from knowingly revealing a confidence or secret of his client and from using that information to the disadvantage of the client or to the advantage of himself or a third person.

Further guidance is available through EC:5-14 which cautions that problems regarding a lawyer's independent professional judgment may arise when the lawyer is asked to

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represent two or more clients who may have conflicting, inconsistent, diverse, or otherwise discordant interests; and EC:5-15 which exhorts the lawyer facing the possibility of impaired independent judgment or divided loyalty to resolve all doubts against the propriety of the [multiple] representation. A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially ... there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation ... if [those] interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients. (Emphasis added)

The Committee has previously opined that even with the multiple clients' consent, it would be improper for a lawyer to continue simultaneous multiple representation as it "would not be possible for an attorney to adequately represent the interest of a client when the attorney is defending a client in an action one day and suing the same client the next day in a separate action brought by an unrelated party." See LE Op. 1150; see also LE Op. 706 (indicating that, notwithstanding dissimilarity of the subject matter, simultaneous representation of adverse clients creates a presumption of adverse effect on the attorney's absolute duty of loyalty; same opinion permits multiple representation with all clients' consent, apparently rebutting the presumption) and LE Op. 1408 (simultaneous representation of a bank's borrower and of the commercial finance division of that same bank, in unrelated litigation, would be improper).

In the facts you present, the Committee understands that, although the representation as to the opinion rendered to agency A may be concluded, law firm C continues to represent agency A in a matter unrelated to the financial institution in question. Under those circumstances, the Committee is of the opinion that, there is no per se conflict prohibiting law firm C from undertaking the representation of Executive. Such representation would be improper, however, if firm C had obtained secrets or confidences from agency A during the rendering of the opinion or during the present representation which is unrelated to the opinion. Furthermore, the representation also would be potentially improper if it developed that the documents sought under the federal grand jury subpoena duces tecum actually related to either the opinion or the other matter on which law firm C represents agency A.

The Committee is of the opinion that, even if no confidences or secrets had been obtained, thus limiting any conflict to that of a potential nature, the consent (waiver of conflict) of both agency A and Executive is required and would provide a cure, permitting the present simultaneous representation. However, the Committee cautions that any actual adversity maturing during the course of the representation would necessitate law firm C's withdrawal from representation of both Executive, in the grand jury matter, and agency A, in the matter unrelated to the financial institution in question, thus not permitting law firm C to represent Executive to the conclusion of the matter

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before the grand jury as he desires and in derogation of the exhortations of EC:5-15. Under the mandates of DR:5-105(E), any such withdrawal would render representation of either or both parties by any of the lawyers in law firm C to be improper.