Committee Opinion
May 11, 1993

LEGAL ETHICS OPINION 1526

CONFLICT OF INTEREST: REPRESENTING BENEFICIARIES OF A FUND AND REPRESENTING CORPORATE CONTRIBUTORS TO FUND.

You have presented a hypothetical situation in which a law firm brought a class action suit on behalf of the beneficiaries of an employee benefit plan to enforce the guarantee of benefits contained in a collective bargaining agreement ("Agreement"). The Agreement had been negotiated between a union and a multi-employer group (" Association"). Under the Agreement, the Association was responsible for determining the rate of contributions by the employers who were signatory to the Agreement.

Under the facts you present, the class action suit resulted in the issuance of injunctions requiring the trustees of the fund to continue payment of benefits under the Agreement and directing the Association to raise the contribution rate for the remaining term of the Agreement. The agreement covered a period of five years and has now expired.

You indicate that the beneficiaries have obtained payment for all but their claims of the final months of the term of the Agreement. Claims for these final months have not yet been processed. You state that during the pendency of the class action suit, a new federal statute was enacted which creates new funds and plans for future benefits and provides expressly for the payment of any deficit in the fund resulting from claims for the benefits guaranteed under the Agreement.

Further, you state that the federal statute requires certain employers ("Agreement Operators") to make contributions to pay off any deficit in the benefit fund following the expiration of the Agreement. The Agreement Operators include the members of the Association, the largest employers in the industry. You indicate that members of the Association and other Agreement Operators are obligated under the federal statute to pay whatever remains to be paid in order to fund the remaining cost of the benefits guaranteed under the Agreement.

You indicate that the trustees have brought suit against a group of employers who either were not signatory to the Agreement or signed an altered version of the Agreement that modified or limited their obligations to contribute to the fund (" Companies"). The trustees allege that these Companies are contractually liable for contributions to the fund because each, at one time, signed a predecessor to the Agreement which contained a successorship clause. One or more of the Companies has asked the law firm to represent them in their defense against the contractual claim based on the successorship clause. Furthermore, you indicate that the potential liability of these companies is a relatively insignificant fraction of the vast sums the trustees have received and spent in connection with health benefits during the term of the Agreement.

You state that the successorship clause provided that, with respect to contributions to the fund, the employer would be bound by the provisions of each successor agreement.

Thus, the trustees assert that the Companies were contractually bound to make contributions in accordance with the terms of the Agreement. Some of the Companies may also be Agreement Operators as defined by statute. The alleged contractual liability of the Companies is for contributions to the fund during the term of the Agreement. The statutory liability of the Agreement Operators is to pay any deficit that remains in the fund at the end of the Agreement.

You indicate that the federal statute guarantees the funding of benefits for the beneficiaries and it also removes any uncertainty as to who must pay for the remaining debts of the fund. Finally, you also indicate that under the federal statute, the obligation of the Agreement Operators to pay any deficit in the fund is not contingent on the trustees' inability to enforce the successorship clause against the Companies. If the trustees' contractual claims against the Companies results in additional contributions to the fund, creating a surplus, the Agreement Operators will receive credit for any overpayments by way of reductions of their obligations to pay into the new funds.

You have asked the committee to opine whether, under the facts of the inquiry, the law firm may represent both the class of beneficiaries of a benefit fund in a suit to continue payment of benefits and one or more of the Companies, i.e. employers, who have been sued for breach of alleged contractual obligations to contribute to the fund, when a new statute guarantees payment of the benefits by requiring the Agreement Operators to pay any deficit in the fund.

The appropriate and controlling Disciplinary Rule related to your inquiry is DR:5-105(A) which states that a lawyer shall decline proffered employment if the exercise of his independent professional judgment will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR:5-105(C). Disciplinary Rule 5-105(C) provides that 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. The committee also directs your attention to DR:5-107(A) which requires that a lawyer who represents two or more clients shall not make an aggregate settlement of the claims of or against his clients unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

The committee believes that the fact situation presented here is analogous to that of an attorney representing several creditors against a single debtor. The committee has previously opined that it is not improper for an attorney to represent separate creditors against a single debtor, if, after full disclosure to each creditor, all creditors consent to the multiple representation and concur as to the distribution of any funds collected should the amount be inadequate to pay fully each creditor's claim. See LE Op. 478.

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Under the facts you have posed, the committee is of the opinion that the law firm's representation of both the beneficiaries and one or more of the Companies would not be per se violative of DR:5-105(A) or (C). You state that, because the success of the trustees' contractual claim will have no effect on the beneficiaries, the interests of the two clients are not presently in conflict. However, because the interests of the two clients are potentially differing, the requirements of full disclosure and consent to the representation by all clients, as articulated in DR:5-105(C), must be met. Furthermore, should the potential differing interests mature into actual adverse interests, it may then become necessary for the law firm to withdraw from representing both the beneficiaries and the Companies or to obtain separate counsel for the issues giving rise to a conflict. See LE Op. 1410, LE Op. 1454.