

Ethics Corner: The Ethics Rules Do not Prevent a Lawyer from Representing both Sides of a Transaction, But

From the Committee on Professional Responsibility, William Freivogel, Chair

A wants to sell his business to B. A and B happen to have the same lawyer (“Lawyer”). They ask Lawyer to handle both sides of the sale because they trust Lawyer and they want to save legal fees. May Lawyer proceed?

The Rules. ABA Model Rule 1.7, the principal conflict of interest rule, does not address this in specific terms but suggests that if Lawyer believes she can do a good job for both parties and gets a waiver from both parties, Lawyer can proceed. Comments 26-33 to Rule 1.7 attempt to be more specific about multiple representations, but do not help much. The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York, in its Opinion 2001-2 (April 2001), discusses the issue in considerably more detail, but it concludes that whether the lawyer can proceed depends on the circumstances.

Waivers. Some transaction conflicts simply cannot be waived. The average good business lawyer will have a pretty good nose for transactions that are simply too difficult for joint representation. There may be too many contentious issues to be negotiated, which the parties cannot resolve without their own lawyers. In a few states, rules have evolved regarding certain types of transactions. For example, in New Jersey, the same lawyer cannot be on both sides of a commercial real estate sale, even with waivers, if the transaction is “complex,” *Baldassarre v. Butler*, 625 A.2d 458, 467 (N.J. 1993). Few states have decisions or rules that specific, but lawyers wishing to represent both sides of a transaction had better know what is expected in relevant jurisdictions.

Client Confidences. A lawyer representing more than one client in a transaction should obtain a written understanding up front, typically in the waiver document, as to the lawyer’s rights and obligations regarding client confidences. On the one hand, the lawyer must protect each client’s confidences (Model Rule 1.6). On the other hand, the lawyer must keep each client informed about what the client needs to know to make decisions regarding the transaction (Model Rule 1.4). Thus, the conflict waiver might contain language similar to the following:

I have explained to you that I must be forthcoming to each of you about what I know about, or learn from, the other, to enable each of you to make informed judgments about the transaction. There cannot be any secrets among us relating to this transaction. Therefore, you agree that if I learn something from one of you that I think the other needs to know, I will tell the other.
