# A Lawyer's Conflicts of Interest in Mergers and Acquisitions

*by Gianfranco A. Pietrafesa*

A lawyer must be aware of possible conflicts of interest when representing clients in a merger and acquisition transaction. The consequences of failing to properly deal with a conflict of interest may include the loss of one or more clients, an ethics grievance, and a malpractice action. As a result, a lawyer must be able to identify conflicts, address them with clients, and document them in writing. This article examines some common conflicts of interest in mergers and acquisitions involving private companies.

## IDENTIFYING THE CLIENT AND THE CONFLICT

Most conflicts of interest arise when a lawyer represents the seller of a business. For example, in a stock sale the lawyer represents the selling shareholders, each of whom may have different (*i.e.*, conflicting) interests in the transaction. Therefore, the question is whether the lawyer may represent all of the shareholders in light of their different interests.

This is a real, not a theoretical, conflict of interest. For example, consider the common scenario where the majority shareholders of the selling corporation manage the day-to-day affairs of the business and the minority shareholders are inactive. In addition to the price per share being paid to all shareholders, the majority shareholders will also be receiving consulting or employment agreements from the buyer. In effect, the majority shareholders will be receiving more consideration than the minority shareholders. May one lawyer represent both majority and minority shareholders?

A lawyer representing shareholders with different interests will have a concurrent conflict of interest if there is a significant risk that his or her representation of one or more shareholders will be materially limited by his or her responsibilities to other shareholders.[1] A lawyer may have a conflict of interest if his or her "ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."[2] Whether there is a significant risk of such a material limitation will depend on such factors as "the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict."[3]

Another common scenario is where a lawyer has been representing a corporation as its general counsel for a number of years. Its shareholders now seek to sell the company and the sale is structured as a stock sale. The buyer requires, as a condition of closing, the target corporation (owned by the selling shareholders) to enter into employment agreements with the target corporation's senior management, some of whom are also selling shareholders.

The lawyer is placed in the odd situation (*i.e.*, a conflict) of negotiating and preparing such agreements between several clients—the target corporation and the selling shareholders (and senior managers). Or is the lawyer really representing the buyer (especially where the terms of the employment agreement are largely dictated by the buyer) and the selling shareholders/managers? In either event, may the lawyer negotiate and prepare the agreements? In essence, the lawyer is representing both sides of the employment agreements—the target corporation (or the buyer) and the managers. Thus, the lawyer's representation of one client is directly adverse to another client.[4] Again, may he or she do so?

Although not quite as common, a conflict of interest may also arise when a lawyer represents a buyer. Take the situation, for example, of a management buyout. The lawyer represents the corporation. The corporation's managers, who are also shareholders, seek to buy the shares of the other shareholders. May the lawyer represent one group of shareholders—the buyers—in such a transaction but not the other shareholders of the corporate client that he or she has represented for several years?

The foregoing are only a few examples of the numerous conflicts of interest a lawyer may encounter in a merger and acquisition transaction. There may also be conflicts with other clients or former clients. For example, a lawyer may regularly represent a lender with its loan transactions and the buyer as its general counsel (no conflict). Now,

however, the lawyer is representing the buyer in an acquisition, and the buyer, to finance its acquisition, happens to be borrowing from the very lender represented by the lawyer (a conflict).

**ADDRESSING AND DOCUMENTING THE CONFLICT**

In general, as long as the representation is not prohibited by law, a lawyer may represent two or more clients in the same transaction when there is a concurrent conflict of interest if:

1. each client gives his or her informed consent, which is confirmed in writing, after full disclosure and consultation;
2. the lawyer's consultation with the clients includes an explanation of the common representation and the advantages and risks involved; and
3. the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each client.[5]

Informed consent means that each client is made

> aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client....When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on [a lawyer's duty of] loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved....[6]

Accordingly, in order for a lawyer to represent two or more clients in a merger and acquisition transaction, he or she must first "reasonably believe" that he or she will be able to provide "competent and diligent representation" to each client.[7] If so, he or she must fully disclose the conflict of interest to each client with an explanation of "the common representation and the advantages and risks involved" in one lawyer representing multiple clients in the same transaction.[8] Among other things, the lawyer should advise the clients about the material and reasonably foreseeable ways the conflict could adversely affect the clients' interests, including the effect on confidentiality and the attorney-client privilege. Finally, the lawyer must confirm the "informed consent" from each client in writing.[9]

A lawyer also may want to give serious thought to not representing any of the clients in the merger and acquisition transaction. The concerns include the loss of a client, an ethics grievance or a malpractice action due to the conflict, notwithstanding the informed consent of the clients. In other words, sometimes the risk to the lawyer does not justify the reward of a fee.

If the lawyer decides to represent the clients, then a letter must be sent to the clients to advise them of the conflicts of interest and to obtain their informed consent to the representation, thus satisfying the requirements of RPC 1.7. ■

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**ENDNOTES**

1. *See* RPC 1.7(a)(2).
2. ABA Comment 8 to Model Rule 1.7.
3. ABA Comment 26 to Model Rule 1.7.
4. *See* RPC 1.7(a)(1).
5. RPC 1.7(b)(1)-(3).
6. ABA Comment 18 to Model Rule 1.7.
7. RPC 1.7(b)(2).
8. RPC 1.7(b)(1).
9. RPC 1.7(b)(1).

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