



**New York State Bar Association
Committee on Professional Ethics**

Opinion 901 (12/28/11)

Topic: Simultaneous representation of corporation and individual director, officer, or shareholder

Digest: Simultaneously representing both a corporation and a director, officer or shareholder of that corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed consent from each affected client, confirmed in writing.

Rules: 1.0(f) & (j), 1.7(a) & (b), 1.9(a) & (c), 1.13(a), (d) & (e)

QUESTIONS

1. *Question A.* May an attorney who has in the past provided personal legal services to an individual officer, director, or shareholder of a closely-held corporation in matters relating to the corporation thereafter undertake to represent the corporation?
2. *Question B.* May an attorney who currently represents a corporation also represent an officer, director, or shareholder of the corporation in matters unrelated to the corporation?

BACKGROUND

3. The inquiring attorney (“Attorney”) has represented a client (“Officer”) over the course of a few years in various legal matters involving transactions. One representation related to Officer’s interest as a minority shareholder and officer of a private, closely-held corporation, X Corp. Attorney’s representation of Officer’s interests in X Corp included negotiations concerning Officer’s employment relation with and part ownership of X Corp. Those negotiations involved both the CEO of X Corp and the attorneys retained by the CEO to represent X Corp.

4. After the negotiations involving Officer and X Corp ended, Officer informed Attorney that Officer had been discussing with X Corp’s CEO the possibility of X Corp using Attorney as its attorney on future matters, in place of X Corp’s previous counsel. The CEO followed up with a direct contact to Attorney to request that he represent X Corp. Officer advised Attorney of Officer’s understanding that A would not be able to continue representing Officer in any future matters related to Officer’s interest in X Corp if X Corp became one of A’s clients. However, Officer informed Attorney that Officer would like to continue using Attorney’s legal services in the future for matters unrelated to the affairs of X Corp, such as the purchase of a summer home.

OPINION

QUESTION A: IF OFFICER IS ATTORNEY'S FORMER CLIENT, MAY ATTORNEY BEGIN REPRESENTING X CORP?

5. The facts that have been presented to us describe the past and contemplated representations of Officer and X Corp in general terms, so we cannot apply the applicable New York Rules of Professional Conduct (the "Rules") with precision. Rather, our opinion sets out general principles that Attorney should consider in evaluating whether conflicts of interest exist and whether and how any such conflicts can be cured.

6. We begin by discussing conflicts with former clients. We assume that Attorney has completed all of his legal work for Officer and that Officer is only a former client of Attorney, not a current client, at the time X Corp asks Attorney to begin representing X Corp. The rule governing conflicts of interest with former clients is Rule 1.9(a), which provides as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

7. Since Attorney formerly represented Officer in negotiations with X Corp, Attorney could not represent X Corp in the same or a "substantially related" matter, without informed consent from Officer, confirmed in writing. The key term is "substantially related." When are two matters substantially related? Comment [3] to Rule 1.9 explains the concept as follows:

[3] Matters are "substantially related" ... if they involve the same transaction or legal dispute or *if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.* For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations [Emphasis added.]

8. Attorney should test each proposed engagement for X Corp against the principles in Comment [3]. If X Corp asks Attorney to represent it in a matter that is not substantially related to Attorney's prior legal work for Officer, Attorney may ethically undertake the new matter even if X Corp's interests are "materially adverse" to Officer's interests. But if X Corp asks Attorney to represent it in a matter that is substantially related to Attorney's prior legal work for Officer and materially adverse to Officer's

interests, then Attorney may not ethically undertake the new matter on behalf of X Corp without obtaining informed consent, confirmed in writing, from Officer. According to Rule 1.0(j), the term “informed consent” requires, among other things, that the lawyer adequately explain to each person “the material risks of the proposed course of conduct and reasonably available alternatives.” The requirements for confirming informed consent in writing are set forth in Rule 1.0(e).

9. If Officer gives informed consent (confirmed in writing) for Attorney to represent X Corp against him in a substantially related matter, that consent does not automatically allow him to use Officer’s confidential against Officer.¹ Absent Officer’s consent to use Officer’s confidential information to Officer’s disadvantage, Attorney must still take one more step – Attorney must determine whether he has a conflict of interest under Rule 1.7(a), either because he cannot avoid using Officer’s confidential information while representing X Corp or because Attorney’s possession of Officer’s confidential information would adversely affect Attorney’s independent professional judgment in representing X Corp. See N.Y. City 2005-2 (addressing conflicts arising solely from possession of confidential information of another client). If Attorney has no such confidential information, then there is no conflict under Rule 1.7(a).² If Attorney does have such confidential information, then Attorney must determine whether he nevertheless “reasonably believes” that he can “provide competent and diligent representation” to X Corp within the meaning of Rule 1.7(b)(1) despite his continuing duty of confidentiality to Officer under Rule 1.9(c).

10. If Attorney does reasonably believe that he can provide competent and diligent representation to X Corp despite his continuing duty of confidentiality to Officer, then Attorney must obtain X Corp’s informed consent, confirmed in writing. In obtaining X Corp’s informed consent, however, Attorney must not disclose Officer’s confidential information that is at the root of the conflict. If Attorney cannot disclose sufficient information to obtain X Corp’s informed consent, or if Attorney believes that his continuing duty of confidentiality to Officer will prevent him from providing competent and diligent representation to X Corp, then the conflict is non-consentable.

QUESTION B: IF OFFICER IS OR BECOMES ATTORNEY’S CURRENT CLIENT, MAY ATTORNEY CONCURRENTLY REPRESENT BOTH OFFICER AND X CORP?

11. The second question is whether Attorney may concurrently represent both Officer and X Corp. The first sentence of Rule 1.13(d) –which had no equivalent in our former

¹ Consent to oppose the former client in a substantially related matter would be sought under Rule 1.9(a), but consent to use the former client’s confidential information to the former client’s disadvantage would be sought under Rule 1.6(a), which is incorporated by reference into Rule 1.9(c). Consent under Rule 1.9(a) does not imply consent under Rule 1.9(c), and vice versa. A lawyer who desires both to oppose a former client in a substantially related matter and to use the former client’s confidential information to the former client’s disadvantage must obtain consent under both provisions.

² The “substantially related” test assumes that Attorney acquired confidential information from the former client, see Rule 1.9, cmt. [3], but that assumption should not carry over to Rule 1.7(a). If Attorney did not in fact acquire any confidential information that he needs to use on X Corp’s behalf against Officer, then no conflict arises under Rule 1.7(a) because Attorney’s representation of X Corp against Officer will not be impaired in any way.

Code of Professional Responsibility -- specifically addresses this situation, stating: "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Therefore, Rule 1.13(d) directs us to analyze the second question under Rule 1.7, which provides as follows:

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

11. The term "differing interests" in Rule 1.7(a)(1) is broadly defined in Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

12. To apply Rule 1.7, we need to evaluate whether Attorney's representation of X Corp would conflict with Attorney's continuing or renewed representation of Officer by creating "differing interests" under Rule 1.7(a)(1).³ To make that evaluation, we need to know what legal work Attorney will be doing for Officer and what legal work Attorney will be doing for X Corp. The inquiry stated that Officer understands that Attorney cannot represent Officer in any future matters related to Officer's interest in X Corp, so we will assume that Attorney will not do so.

³ Attorney's representation of X Corp could also, in theory, create conflicts under Rule 1.7(a)(2), which prohibits a representation when a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." However, nothing in the facts suggests that such personal interest conflicts are more likely here than in any other context, so we will not address Rule 1.7(a)(2).

13. As Attorney's inquiry also gave the purchase of a summer home as an example of the kinds of legal work Officer might want Attorney to perform in the future, so we will assume that Attorney is engaged in representing Officer in buying a summer home at the time X Corp asks Attorney to take on a new matter for X Corp. We will further assume that X Corp has no interest of any kind in Officer's purchase of a summer home, and that Officer's purchase of a summer home therefore does not involve the Attorney in representing "differing interests" under Rule 1.7(a)(1). With all of those assumptions in place, we will analyze several hypothetical examples to illustrate different types of matters that Attorney might be asked to undertake for the X Corp.

14. *Hypothetical # 1.* As a first hypothetical, suppose X Corp asks Attorney to represent it in the defense of a personal injury claim in which Officer is not involved and has no interests, differing or otherwise. Because there are no "differing interests" between X Corp and Officer regarding the personal injury claim, a reasonable attorney could conclude that no conflict exists. If no conflict exists, then informed consent pursuant to Rule 1.7(b)(4) is not necessary.

15. *Hypothetical # 2.* As a second hypothetical -- at the opposite extreme -- suppose X Corp asks Attorney to represent X Corp in a dispute directly adverse to Officer (*e.g.*, asserting a claim against Officer for usurping a corporate opportunity, or defending X Corp against a breach of contract action brought by Officer).⁴ Representing X Corp in a suit by or against Officer obviously will "involve the lawyer in representing differing interests," so Rule 1.7(a)(1) prohibits Attorney from representing X Corp against Officer unless Attorney "reasonably believes" he can "provide competent and diligent representation" per Rule 1.7(b)(1) to "each affected client" (X Corp and Officer). The aim of Rule 1.7(b)(1) is to ensure that Attorney's loyalty to Officer does not impair his competence and diligence on behalf of X Corp, and that Attorney's loyalty to X Corp does not impair his competence and diligence on behalf of Officer. The "reasonably believes" test in Rule 1.7(b)(4) depends on all of the circumstances. For example, it might be easier to meet in a minor breach of contract suit than in a fraud suit. If Attorney satisfies the "reasonably believes" test, then he must obtain informed consent, confirmed in writing, from both Officer and X Corp, per to Rule 1.7(b)(4), before undertaking the representation of X Corp.⁵

⁴ We assume that Attorney is not representing Officer against X Corp. Nor could Attorney represent Officer and X Corp against each other in the same litigation matter even if both X Corp and client Officer gave their informed consent, because such a conflict would be non-consentable. Under Rule 1.7(b)(3), a lawyer may never handle both sides of the same litigation before a tribunal. That is a *per se* conflict and cannot be cured by consent.

⁵ In the facts here, Officer was the one who first suggested that X Corp retain Attorney as its counsel, which implies that Officer has already give his consent (express or implied) for Attorney to represent X Corp. However, Officer's consent was not necessarily *informed* consent. Each time Attorney A considers taking on a new matter for X Corp, he needs to make sure, per Rule 1.0(j), that Officer understands the material risks, advantages, and alternatives, and give Officer the opportunity to withhold consent in light of that explanation. Alternatively, Attorney may seek an advance waiver from Officer (and from X Corp) waiving conflicts before they arise, obviating the need to obtain a waiver for each new matter – see Rule 1.7, cmts. [22] and [22A] (headed "Consent to Future Conflict").

16. *Hypothetical # 3.* As a third hypothetical, suppose X Corp were to ask Attorney to advise the corporation concerning its by-laws, corporate compliance manual, compensation system, management structure, or the like. Those matters would potentially affect the rights and obligations of Officer, who is a shareholder and officer of X Corp. In some situations, a reasonable lawyer could conclude that Attorney's simultaneous representation of Officer and X Corp "will involve the lawyer in representing differing interests," which would create a conflict under Rule 1.7(a)(1). For example, Attorney might be reluctant to give advice to X Corp that, if followed, could adversely affect Officer's compensation or power at X Corp. Accordingly, Attorney could not undertake such a representation without obtaining informed consent, confirmed in writing, from both Officer individually and X Corp as an entity.⁶

17. Finally, whether Officer is a current client or a former client, he continues to be an officer and shareholder of X Corp. Consequently, when Attorney is acting on behalf of X Corp, Attorney should take steps to avoid any misunderstanding by Officer (or other X Corp personnel) about Attorney's role. As stated by Rule 1.13(a), when the organization's interests "may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."

CONCLUSION

19. Simultaneously representing both a corporation and a director, officer or shareholder of that same corporation can create conflicts, but if the conflicts are consentable, then the conflicts can be cured by obtaining informed consent from each affected client, confirmed in writing.

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⁶ Whenever Rule 1.7 requires X Corp's consent to a conflict between X Corp and Officer, Rule 1.13(d) demands that "the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders." Thus, someone other than Officer will have to consent on behalf of X Corp, because Officer may consent to the conflict on his own behalf but not on behalf of the corporation.