ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I represent Client Alpha and Client Beta in unrelated matters. Client Beta is a federal agency. Client Alpha's matter requires me to seek discovery from a third party, which is bankrupt and in receivership with Client Beta. Does this discovery request put me in conflict with Client Beta? If so, is this a waivable conflict? Can I avoid the conflict by having another firm seek the discovery on my firm's behalf?

Sincerely,

A.M. I. Conflicted

Dear A.M. I. Conflicted:

Your question poses the problem of the "thrust-upon" conflict, in which an attorney did not deliberately attempt to represent two opposing parties, but because of circumstances outside the attorney's control, the attorney finds him- or herself in that unenviable position. Thrust-upon conflicts often arise due to changes in corporate ownership; the classic example is the law firm who represents Corporation A in a suit against Corporation B, and, while the suit is ongoing, another of the firm's clients, Corporation C, acquires Corporation B, thrusting upon the firm the conflict presented by representing both the plaintiff and the defendant.

In the classic example, the law firm cannot waive the conflict. Pursuant to Rule 1.7(a)(1) of the New York Rules of Professional Responsibility (the Rules), a lawyer cannot represent a client if the representation involves representing differing interests unless the lawyer satisfies the Rule 1.7(b) exceptions: the lawyer reasonably believes he or she can provide competent and diligent representation to each affected client, the representation is not legally prohibited, the clients are not opposing each other in the same litigation, and the affected clients give their informed written consent to the representation. The classic thrust-upon conflict does not meet the Rule 1.7(b) exception and thus is not a waivable conflict.

Your situation differs, however, because you are not directly opposing an existing client. Instead, you represent a client who needs discovery from a third party who is in receivership with an existing client. We must determine, first, if you are adverse or otherwise in conflict with your client, and then, if a conflict does exist, determine whether the conflict is waivable pursuant to Rule 1.7(b).

Underlying the conflicts rules are the primary duties lawyers owe their clients: the duty of loyalty and the duty of confidentiality. If lawyers were permitted to represent a client in one action and be adverse to the client in another action, we could not be true to these duties, because the very secrets learned from the client in the first action could be valuable ammunition against the client in the second. A surface-level analysis of your situation suggests that your duties to Client Beta would not be violated if you represent Client Alpha in its quest for third-party discovery from the bankrupt entity, because the records you seek are not Beta's and you are not seeking to exploit Beta's confidences, given to you under the veil of attorney-client privilege, for the benefit of Alpha. Adhering to the strict letter of your duties, one might conclude that there is no conflict.

A surface-level analysis, however, is not enough. Client Beta, as receiver, has stepped into the shoes of the bankrupt entity with the purpose of preserving the bankruptcy estate. It is Beta who will be maintaining and managing the records of the bankrupt entity, and it is Beta which must respond to any discovery request served on the entity. If any records of the receivership period are sought, the records to be produced are Beta's as well as the bankrupt entity's. For all these reasons, while the third-party discovery Client Alpha needs is ostensibly sought from the bankrupt entity, in actuality the disclosures will come from Beta. If Beta finds it advisable to oppose the discovery demand, you would find yourself in an adversarial position with your client, a crystalline example of the representation of differing interests description of conflicts prohibited by Rule 1.7(a)(1). With a conflict present, you cannot represent Alpha in seeking the third-party discovery from the bankrupt entity in receivership unless the conflict is waivable and you are able to obtain the necessary waivers.

Furthermore, even if this conflict was not readily apparent, as lawyers we have a duty to the perception or appearance of conflicts as well as actual conflicts. Courts have disqualified attorneys on the basis of perception alone, even when no evidence of an actual conflict existed. In *Bank of Tokyo Trust Co. v. Urban Food Malls*, 229 A.D.2d 14, 22 (1st Dep't 1996), for example, the court disqualified a law firm from acting as counsel to a receiver "because of the spectre of a possible conflict" present because an associate at the firm, who was not involved in the current dispute, had worked on matters for the owners of the properties in receivership when he worked at another law firm some 10 years prior. While the third-party discovery you seek may not intrude into the period in which Client Beta began acting as receiver, and Beta may

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not oppose the discovery request, the risk of an appearance of a conflict here is simply too high.

The next question is, Is your conflict waivable? If your situation fits within the exceptions described in Rule 1.7(b), the conflict is waivable. However, you may want to consider an alternative to waivers: conflict counsel.

Because only a small and discrete portion of your representation of Client Alpha puts you in a conflict with Client Beta, you may negotiate a revision to your engagement letter to Alpha in order to exclude this particular third-party discovery from your representation. Alpha can engage another lawyer – the conflict counsel – for the limited purpose of seeking and obtaining the necessary third-party discovery from the bankrupt entity. This preserves your duties of confidentiality and loyalty to Alpha and Beta but allows Alpha to seek the discovery it needs while avoiding the potentially high costs of obtaining new counsel Alpha would incur if, due to the conflict with Beta, you were disqualified and forced to discontinue your representation of Alpha mid-stream.

Limiting the scope of your representation of Client Alpha is permitted under Rule 1.2(c), provided the limitation is reasonable, Alpha gives its informed consent and, if necessary, notice is provided to the tribunal and opposing counsel. Here, the limitation is reasonable, because you are only excluding from the representation the limited issue of the third-party discovery sought from the bankrupt entity. Assuming Alpha agrees to the limitation, you may limit your representation to exclude seeking the third-party discovery.

While conflict counsel do not appear to be in widespread use in New York, there is no indication that New York state courts disfavor their use, and courts in other jurisdictions have suggested or encouraged their use. *See, e.g.*, *United States v. Jeffers*, 520 F.2d 1256, 1266 (7th Cir. 1975) (Stevens, J.) (acknowledging that ethical considerations limited a lawyer's ability to thoroughly cross-examine a witness where the witness was a former client and suggesting that the lawyer should have had "some other lawyer retained for this limited purpose"); *Sumitomo Corp. v. J.P. Morgan & Co.*, No. 99 Civ. 8780(JSM), No. 99 Civ. 4004 (JSM), 2000 WL 145747, at *2–5 (S.D.N.Y. Feb. 8, 2000) (defendant Chase's motion to disqualify law firm Paul, Weiss from representing plaintiff Sumitomo in consolidated action, on the grounds that Paul, Weiss represented Chase in other matters, denied because Paul, Weiss had declined to represent Sumitomo in action against Chase and Sumitomo had engaged separate counsel for that action).

Conclusion

Seeking discovery from Client Beta on behalf of Client Alpha, even where Beta is merely acting as a receiver for the party from whom the discovery is actually needed, creates a conflict, but the conflict is waivable if your situation meets the requirements of Rule 1.7(b), i.e., you reasonably believe you can provide competent and diligent representation to Alpha and Beta, the representation is not legally prohibited, the clients are not opposing each other in the same litigation, and Alpha and Beta give their informed written consent to the representation. Additionally, you have the option of obtaining consent from Alpha to exclude from your representation seeking discovery from Beta and advising Alpha to seek conflict counsel for the limited purpose of seeking the necessary discovery.

The Forum, by
Vincent J. Syracuse, Esq. and
Amy S. Beard, Esq.
Tannenbaum Helpern Syracuse & Hirschtritt LLP
New York, New York

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

To the Forum:

I am an attorney at a law firm with a large litigation practice. Obviously, this entails the exchange of numerous discovery demands between parties, including demands for a bill of particulars or interrogatories, and demands for discovery and inspection. In addition, my cases involve the scheduling of numerous depositions.

Because of the demands of a busy practice, opposing attorneys do not always respond timely to discovery requests issued by my firm. In addition, disputes arise between parties regarding what is discoverable and whether certain documents have to be produced. Parties also struggle with scheduling depositions when written discovery requests have not been honored. I have sometimes encountered attorneys who refuse to respond to requests for their client's availability for deposition.

It is my understanding that attorneys are required to engage in good faith efforts prior to filing motions to compel discovery responses. However, I have received motions to compel from adversaries who have made little to no effort to confer with my office prior to filing their discovery motions. I have even received motions which include the obligatory affidavit of good faith efforts when no effort has been made by that party to speak with me about the allegedly outstanding discovery. In addition, I have often been in the position of making several attempts to contact opposing counsel with respect to outstanding discovery demands or a refusal to cooperate in deposition scheduling, without receiving any response. Phone calls and letters have gone unanswered.

Can the Forum please shed some light on what is required in order to fulfill the good faith efforts requirement prior to filing a discovery motion, including a motion to compel? What efforts are required prior to filing the motion by the party demanding compliance? How long must I wait before filing a motion to compel where opposing counsel is non-responsive to my efforts to communicate on this issue? Do lawyers have an ethical obligation to cooperate with each other during discovery?

Sincerely,
Undiscovered