ETHICAL ISSUES IN M&A TRANSACTIONS

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Business lawyers generally do not pay a lot of attention to the ethical rules that impact a merger and acquisition ("***M&A***") transaction. Other than the widely accepted principle that an attorney shouldn't contact the principal of the other side if he or she knows them to be represented by counsel, M&A lawyers may not pay attention to the other rules that might be applicable in a given situation. This paper analyzes three of the more common areas where an attorney may face ethical issues in an M&A transaction: (i) determining when conflicts of interest exist among clients and potential clients; (ii) preserving the attorney-client privilege during and after the transaction; and (iii) balancing the need to be an advocate for the client versus obligations of candor to opposing counsel.

I. WHO IS MY CLIENT? – CONFLICTS OF INTEREST IN M&A TRANSACTIONS

Introduction. Resolving conflicts of interest among parties in an M&A transaction is a very easy process, provided that your client is an entity with one owner who is also the sole employee of the business. Anything beyond that fact pattern is complicated and requires you to determine the identity of your client. Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct (the "***Texas Rules***") tells the M&A practitioner right up front that not much help will be forthcoming:

> **RULE 1.06 Conflict of Interest: General Rule**
>
> (a) A lawyer shall not represent opposing parties to the same litigation.

The Texas Rules were obviously written by litigators for litigators. The rest of Texas Rule 1.06 provides marginally more help.

> (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

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> (1) Involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
>
> (2) Reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyers' or law firm's own interests.
>
> (c) A lawyer may represent a client in the circumstances described in (b) if:
>
> (1) The lawyer reasonably believes the representation of each client will not be materially affected; and
>
> (2) Each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible advance consequences of the common representation and the advantages involved, if any.

The commentary to Texas Rule 1.06 at least mentions the problems caused by the standards set in 1.06(b) and (c) in a non-litigation context.

> **Non-litigation Conflict Situations**
> 13. Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include 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 actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.
>
> 14. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation may be permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

After working through those rules and commentary, the only definitive take-away is that a practitioner cannot represent the buyer and the seller in the same M&A transaction. This applies to lawyers within the same firm—so one partner cannot represent the seller and another partner, even if from another office, cannot represent the buyer.[1]

[1] *See* Texas Rule 1.06(f).

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