

UT Institute Ethics Program

ETHICAL ISSUES IN
AUCTION SALES

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The University of Texas Mergers and Acquisitions Institute

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LARGE PUBLIC COMPANY IS SELLING A DIVISION ("TARGET"). IT HAS HIRED A NATIONALLY KNOWN INVESTMENT BANKING FIRM TO CONDUCT AN AUCTION.

LAW FIRM REPRESENTS PUBLIC COMPANY IN ITS M&A ACTIVITIES AND ALSO HAS REPRESENTED THE TARGET FROM TIME TO TIME. BYRON IS THE LEAD PARTNER ON THE ACCOUNT. SCOTT IS BYRON'S PARTNER.

SCOTT GETS A CALL FROM PRIVATE EQUITY FUND SAYING IT JUST "WON" AN AUCTION AND WANTS SCOTT AND HIS LAW FIRM TO REPRESENT IT IN ITS ACQUISITION OF TARGET. SCOTT RUNS A CONFLICTS CHECK AND FINDS OUT HIS FIRM, THROUGH BYRON, IS REPRESENTING THE PUBLIC COMPANY SELLER.

RULE 1.7(a)

“... A LAWYER SHALL NOT REPRESENT A CLIENT IF THE REPRESENTATION INVOLVES A CONCURRENT CONFLICT OF INTEREST. A CONCURRENT CONFLICT OF INTEREST EXISTS IF:

- (1) THE REPRESENTATION OF ONE CLIENT WILL BE DIRECTLY ADVERSE TO ANOTHER CLIENT . . .
- (2) THERE IS A SIGNIFICANT RISK THAT THE REPRESENTATION OF ONE OR MORE CLIENTS WILL BE MATERIALLY LIMITED BY THE LAWYER'S RESPONSIBILITIES TO ANOTHER CLIENT, A FORMER CLIENT OR A THIRD PERSON OR BY A PERSONAL INTEREST OF THE LAWYER.”

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RULE 1.7(b)

(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.

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COMMENT 28

Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant facts, the clients may prefer that the lawyer act for all of them.

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LANGUAGE FOR NDA

The Company has engaged XXX LLP ("Law Firm") as its legal counsel in connection with the Transaction, and you are hereby (i) consent to the continued representation of the Company by Law Firm in relation to the Transaction notwithstanding the fact that Law Firm may have represented, and may currently or in the future represent, you or any of your affiliates with respect to unrelated matters and (ii) waive any actual or alleged conflict that may arise from its representation of the Company in connection with the Transaction, including but not limited to representing the Company against you or any of your affiliates in litigation, arbitration or mediation in connection therewith. In addition, you hereby acknowledge that your consent and waiver under this paragraph are voluntary and informed.

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