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**E-89-10      Conflicts: Representing majority and minority investors in new business formation**

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**Questions**

Under what circumstances may a lawyer represent both majority and minority investors in the formation of a business partnership or corporation? And, may a lawyer continue representing only one or some of the common clients if the common representation must be terminated?

**Opinion**

Generally a lawyer may represent both majority and minority investors in the formation of a business partnership or corporation if the lawyer's conduct comports with SCR 20:1.7 and SCR 20:2.2.

SCR 20:2.2, "Intermediary," sets forth the primary guidelines for acceptance, delivery and termination of common representation of this kind:

- a) A lawyer may act as intermediary between clients if:
  - 1) the lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
  - 2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
  - 3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.
- b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

The Comment to SCR 20:2.2 acknowledges the propriety of this kind of representation under appropriate circumstances (i.e., “. . . 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. . . .”) SCR 20:2.2, Comment.

Whether the common representation may be accepted and successfully provided depends upon strict compliance with SCR 20:2.2 and SCR 20:1.7(b). The Comment to SCR 20:2.2 describes various factors to consider in deciding upon the appropriateness of such representation (e.g., compatibility of client interests, prior or contemplated future representation of only one of the clients, presence of an antagonistic relationship among the clients and, generally, whether the lawyer can provide *all* common clients the “loyal and diligent representation” to which each is entitled.) SCR 20:2.2, Comment, “Withdrawal.”

Acceptance of this kind of common representation may proceed only upon the informed consent of the clients. SCR 20:2.2(a)(1). Although SCR 20:2.2 does not require written client consent, this committee believes that written consent would nevertheless be required by SCR 1.7(b), which also governs acceptance of common representation. Before explaining the risks, advantages and implications of common representation to the prospective clients, the lawyer should caution them that his explanation may include matters that, if he were representing only one of them, the lawyer probably would not state to the others. The lawyer would further explain that that would be necessary to ensure that the prospective clients had an adequate basis upon which to decide whether the common representation would be appropriate.

Finally if withdrawal from this kind of common representation is required, “the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.” SCR 20:2.2(c). “(C)ases of failed intermediation are so likely to engender further conflicts—and perhaps worse ones—that withdrawal from the entire matter has been made mandatory, as a precaution.” Hazard and Hodes, *The Law of Lawyering* 316 (1985, 1988 Supp.). SCR 20:2.2(c) is, therefore, an exception to SCR 20:1.9’s general rule that

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representation adverse to a former client in the same or a substantially related matter may be accepted if “the former client consents after consultation.” SCR 20:1.9(a).