

OPINION 2014-2

SYNOPSIS:

A lawyer, who has represented a corporation and its sole shareholder, may subsequently represent the purchaser of the corporate shares and the corporation where the interests are materially adverse, provided that both the former shareholder and the new shareholder give informed consent to such representation, confirmed in writing. In addition, a lawyer may serve as an as escrow agent of the pledged stock held as security in the sale, provided that both parties give informed consent.

FACTS:

The requesting lawyer, a sole practitioner, for years represented a Vermont corporation with a single shareholder, and, prior to converting it to a close corporation, served on its Board. The sole shareholder (“Client A”) has effected a sale of all stock to a buyer who served as the accountant for the corporation for decades. The buyer was represented for the sale by another lawyer. As part of the sale, the requesting lawyer is acting as escrow agent for the stock which has been pledged as primary security for a material loan from Client A to the buyer, which loan should exist for at least three years. Client A is also a long-term friend of the requesting lawyer.

Immediately prior to the closing, the buyer (“Client B”) asked the requesting lawyer if the requesting lawyer would be willing to continue as lawyer for the company, and become Client B’s lawyer as to the business. While there is and would be full disclosure between Client A and Client B, the requesting lawyer is concerned that the requesting lawyer’s obligations as escrow agent of the pledged stock could be impacted by knowledge gained in capacity of counsel to the new organization.

QUESTION PRESENTED:

The requesting lawyer asks whether acting as the escrow agent as well as lawyer for the new owner/obligor, Client B, is prohibited by the Vermont Rules of Professional Conduct.

APPLICABLE RULES:

The relevant provisions of the Vermont Rules of Professional Conduct that are applicable to the question presented include Rule 1.6, Rule 1.7, Rule 1.9 and Rule 1.15.

Rule 1.6 pertains to confidentiality of information and provides as follows:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c).

V.R.P.C. 1.6.

Rule 1.7 addresses conflicts of interest and provides as follows:

(a) Except as provided in paragraph (b), 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; or
- (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.

(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.

V.R.P.C. 1.7.

Rule 1.9 speaks to the lawyer's duties to former clients as follows:

(a) 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.

V.R.P.C. 1.9.

“‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” V.R.P.C. 1.0(e); see also Cmt. 18 to Rule 1.7.

“‘Confirmed in writing’, when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.” V.R.P.C. 1.0(b).

Rule 1.15 pertains to safekeeping property and reads in part:

(a)(1) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property...

(2) For purposes of these rules, property held "in connection with a representation" means funds or property of a client or third party that is in the lawyer's possession as a result of a representation in a lawyer-client relationship or as a result of a fiduciary relationship that arises in the course of a lawyer-client relationship or as a result of a court appointment. "Fiduciary relationship" includes, but is not limited to, agent, attorney-in-fact, conservator, guardian, executor, administrator, personal representative, special administrator, or trustee.

V.R.P.C. 1.15.

DISCUSSION:

While a lawyer must protect confidential information, this proscription may be waived if the client gives informed consent as defined by the Rules. See Rule 1.6 and Rule 1.0(e); see also *Opinion No. 2011-2*.

Any conflict of interest between a client and a former client is not an impediment to a lawyer's representation provided that the lawyer satisfies the requirements of Rule 1.7(b). Rule 1.9 likewise governs potential conflicts between a lawyer and former clients. Rule 1.9(a) forbids a lawyer who has formerly represented a client in a matter from representing another person in the same or a substantially related matter in which the second person's interests are "materially adverse" to the interests of the former client unless the former client gives informed consent, confirmed in writing.

In the present circumstances, the requesting lawyer may represent Client B after the purchase provided that Client A gives informed consent to such representation, confirmed in writing.

Further, the requesting lawyer, as the escrow agent, has the responsibility to hold the pledged stock as security for the term of the loan from Client A to Client B. As such, the requesting lawyer is a fiduciary charged with the duty to disclose to a party to the escrow any information whose disclosure is necessary to prevent a loss to a party. See *Powell v. H.E.F. Partnership*, 793 F.Supp. 91, 93 (D.Vt. 1992); and 28 Am.Jur.2d, *Escrow* §27 at 26 (2000).

The requesting lawyer advises that there would be "full disclosure" between Client A and Client B with respect to the lawyer's obligations as escrow agent of the pledged stock. In these circumstances, the requesting lawyer must make reasonable efforts to ensure that the both Client A and Client B possess information reasonably adequate to make an informed decision. See Cmt. 6, Rule 1.0. This disclosure should include any explanation reasonably necessary to inform both Client A and Client B of the material advantages and disadvantages of the requesting lawyer's obligations as escrow agent of the pledged stock, and include the options and alternatives of Client A and Client B in the event that the requesting lawyer is required to disclose any information whose disclosure is necessary to prevent a loss to a party. *Id.* Further,

it is appropriate for the requesting lawyer to advise both Client A and Client B that circumstances may arise where they may need to seek the advice of other counsel with respect to the escrow agreement.

So long as each client gives “informed consent” (in accordance with Rule 1.0(e)) to the requesting lawyer in carrying out these obligations as the escrow agent, the requesting lawyer’s conduct is not prohibited under the Rules of Professional Conduct.

CONCLUSION:

In summary, a lawyer, who has represented a corporation and its sole shareholder, may subsequently represent the purchaser of the corporate shares and the corporation where the interests are materially adverse, provided that both the former shareholder and the new shareholder give informed consent to such representation, confirmed in writing. In addition, a lawyer may serve as an as escrow agent of the pledged stock held as security in the sale, provided that both parties give informed consent.