ADVISORY ETHICS OPINION 82-02

SYNOPSIS:

When a lawyer merges with another law firm, the resulting new firm may not continue to represent clients with differing interests who were formerly represented by the old firm and the individual lawyer.

OPINION:

A law firm, X firm, and an individual lawyer, Y, represent respectively a corporation and the majority stockholder in a suit brought by minority stockholders. When the suit arose, X firm referred the majority stockholder to Y, apparently feeling the firm could not represent both the corporation and the majority stockholder. During the course of the litigation, the minority stockholders dismissed the suit as to the corporation leaving only the majority stockholder as the defendant. X firm continues to be counsel for the corporation in all its dealings.

X firm and lawyer Y have now merged and ask whether the new firm can continue to represent the majority stockholder in the litigation. We assume from the inquiry that the new firm will represent the corporation.

The question presented to the committee is whether lawyer Y can continue to represent the majority stockholder in the litigation. The answer to this question is "no."

We must take it as a given that the majority stockholder and the corporation have differing interests since X firm referred out the majority stockholder in the first instance. Thus X firm could not have represented both interests.[1] DR 5-105(D) provides that where a lawyer must decline employment or withdraw, no partner or associate may accept or continue the employment. Thus Y, as an associate of X firm and part of the new firm, cannot represent these differing interests.

Only two facts could change this conclusion: the corporation has been let out of the litigation; and the firm is newly formed after the start of the representation. The dismissal of the corporation does nothing to change the nature of the interests of the corporation and the stockholder, and, thus, does not change the ethical result. The fact the conflict is caused by the formation of the new firm would also seem to be irrelevant. The rule protects the client against misuse of confidential information and divided loyalty. There is a risk of both in the new firm arrangement.

Because similar situations may arise in the future, the committee has looked at the question of whether a lawyer may represent both a corporation and the individual defendants in defending a stockholder's derivative action. The precedents are divided on the question.[2] As a result, the committee does not want to give an opinion on the question where it is not directly raised by the inquiry. The firm may, however, want to look at the precedents before referring out an officer, director of stockholder of the corporation in the future.

[1] See DR 5-105(A).
[2] See Note, Developments in the Law – Conflicts of Interests in the Legal Profession, 94 Harv. L. Rev. 1244, 1339 (1981).