

MINUTES

COMMITTEE: Ethics Committee

DATE: December 11, 2008

3. CHAPTER 6: WHETHER LAWYER MAY ACT ON BOTH SIDES OF A TRANSACTION

A lawyer asked the Committee whether it is proper for him to act on both sides of a transaction in small to medium sized merger acquisition transactions involving both asset and share purchase agreements. It would be the lawyer's intention to act for both parties in the following circumstances described by the lawyer:

Both parties request the firm to prepare documentation to evidence an agreement negotiated by the parties (i.e., an offer to purchase agreement).

Both parties request the firm to prepare documentation having received the firm's recommendation that both parties obtain ILA. Both parties' independent counsel would then use the documentation prepared by the firm to conduct further negotiation, only if necessary to conclude an agreement.

The Committee noted that in July 2002 the Ethics Committee gave the following opinion with respect to the issue of lawyers acting for two parties to a transaction:

With respect to non-real property matters, it was the Committee's opinion that a lawyer can never act jointly for two parties to a transaction where the interests of the parties are actually adverse. However, it was conceivable to the Committee that, in limited circumstances, two opposite parties to a transaction could be described as not "adverse in interest" such that a lawyer could act for them jointly. Those circumstances might include the following:

- where all issues with respect to the transaction have been agreed upon by the parties and the lawyer is asked only to prepare standard form documents to give effect to the transaction.
- where both parties have requested that the lawyer prepare documentation to evidence an agreement negotiated by the parties, on the understanding that the parties' own separate lawyers will use that documentation to conduct further negotiations, if necessary, and conclude an agreement.
- where lawyers for both parties retain a single lawyer to prepare documentation to give effect to an agreement the separate lawyers for the parties have negotiated and are free to negotiate further if they choose.

It was the Committee's view that in most circumstances other than the above, the interests of the clients conflict and it would not be proper for a lawyer to act for them jointly. In particular, it was the Committee's view that the preparation of documents to give effect to an agreement already reached by the parties is not proper. The preparation of documents, other than standard form documents, will

require a lawyer to emphasize certain aspects of the bargain that favour one party at the expense of the other.

In the present circumstances, the lawyer proposes to act for both parties with only a recommendation that the parties seek and obtain independent legal advice. It was the Committee's view that this recommendation for independent legal advice is insufficient to permit the lawyer to act, since the lawyer would inevitably be faced with having to make drafting decisions which favour one party at the expense of the other. Only if the parties were both independently represented on all matters could the lawyer take joint instructions to draw the agreement.