

ETHICS OPINION

RO-90-06

QUESTION:

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"In brief, I am a director, an officer, and a shareholder (approximately 12%) in a corporation based here in H [REDACTED], which is proposed to be acquired by a larger corporation based principally in C [REDACTED].

I have been requested by my company to represent the interests of the company and its shareholders in this acquisition. I intend to have the documentation (primarily to be prepared by the acquiring company's counsel) to be reviewed by a W [REDACTED]-based law firm, as well as by me, since the acquisition involves points of securities law and regulations with which I am not intimately familiar.

I intend to represent all interests involved on our side of the transaction as equitably as possible. It is possible, however, that some of the very small shareholders may not be able to raise funds to exercise stock options which they hold in our company in order to obtain exchange of shares in the acquiring company.

Every effort will be made to obtain financing from the acquiring company to assist these shareholders in exercising their options. However, this may not be possible in the overall context of this acquisition as now envisioned. I would add that no contractual obligation has been entered into to provide the small shareholders with financing in order to allow them to obtain shares in our company through their options and then trade their shares for shares of the acquiring company.

One of my principal concerns is the possibility that one or more of the small shareholders might make a claim that my negotiations and representation were tailored to suit the interests of the directors and major shareholders."

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ANSWER:

Ethical Consideration 5-18 states as follows:

"A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case the lawyer may service the individual only if the lawyer

is convinced that differing interests are not present."

Disciplinary Rule 5-101(A) provides as follows:

"DR 5-101 * * *

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

It is our opinion that you may represent the corporation, and its Board of Directors, in the matter referred to in your request provided that you make full disclosure of your personal interests to the Board of Directors and that, based upon that full disclosure, the Board of Directors consents to your continued representation. The Board of Directors serve, by election, as representatives of the stockholders and so long as the Board of Directors is acting within its scope and authority in retaining counsel, then you may proceed to represent the corporation and its interests as defined by the Board of Directors, notwithstanding the fact that some individual stockholders may disagree with or be imperiled by that representation.

Another obvious point is that, should your personal interests, as they now exist or as they may exist in the future, be such as to preclude your full and vigorous representation of the corporation, or should your personal interests act to dilute in any way your loyalty to the client, then you should either decline representation or withdraw from representation if you have already commenced the same.

We would commend to you and recommend retention of outside counsel to review the documentation to be used in the transaction. We would further caution you that, should your personal involvement in this matter become a focal point of the negotiations and detract from the interests of the corporation, the Board of Directors, and the stockholders, then we believe that you should strongly consider the propriety of your continued participation in this matter.

AWJ/vf

1/18/90