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# Legal Ethics

## Question of the Week—Representing a Group of Corporations\*

Assume that Congress recently enacted legislation that provides for a new investment tax credit for corporations that is intended to spur investment and thereby help the economy recover from the recent downturn. The Internal Revenue Service has issued proposed regulations concerning the new tax credit. Five of the major U.S. airlines retain the law firm of Pugliese & Songer to represent them in seeking to have the final regulations be as beneficial as possible to the corporations. The corporations generally have a similar interest on this matter. However, there are some aspects of the regulations that will have differing effects on the corporations, such as how they are worded concerning the specific types of property that will be eligible for the credit. Each of the airlines intends to be completely candid with the lawyers at Pugliese & Songer concerning this matter. However, none of them want certain information that they provide to the lawyers shared with the other airlines (e.g., the amount of the purchases they have made or are planning to make).

Will Pugliese & Songer be violating any of the Model Rules of Professional Conduct by representing the group of corporations in this matter?

### Answer

**Jonathan M. Gordon:**<sup>1</sup> There are two issues with the multiple client representation proposed here: (1) the potentially different and conflicting interests among the airline clients with respect to the particulars of the proposed IRS regulations; and (2) the attempt to prevent disclosure as between the various clients of certain confidential information that will be provided to counsel by each client.

The first problem has a potential solution, while the second appears to be more difficult.

<sup>1</sup> Mr. Gordon is a partner at Alston+Bird LLP. He practices in the IP & Technology Transactions group. He is the ethics/loss prevention partner for the firm's Los Angeles office.



**Jonathan M. Gordon**

Pugliese & Songer should look first to Rule 1.7, ABA Model Rules of Professional Conduct, and its Comment. Rule 1.7(a) prohibits an engagement where concurrent representation of one client will be “directly adverse” to another client or where the representation of one client will be “materially limited” by counsel’s responsibility to another client. However, Rule 1.7(b) allows for a client to give its informed written consent to the potential conflict if:

- the lawyer believes he or she can provide “competent and diligent” representation to each affected client;
- the representation isn’t prohibited by law; and
- the representation does not involve the assertion of a claim by one client against another client in the same proceeding before a court or tribunal.

Can counsel really give competent and diligent representation to each of the five clients, where the specific wording of the final IRS regulations may benefit one client and hurt another (e.g., the “specific types of property that will be eligible for the tax credit”)? What wording should counsel lobby for? Comment [8] to Rule 1.7 suggests that here, counsel may have to pull some punches so as not to suggest any wording on a

conflicted issue, thus foreclosing benefits that one client might otherwise get at the expense of another. If counsel concludes any client will miss a chance to argue for a material benefit, then even the willingness of the clients to sign a written waiver does not fix this. Only if counsel concludes there will be no impediment with respect to any of the clients will the consent and waiver work here. Presumably, the consent discussion would address why the group representation would not impede diligent representation of any individual client’s interests or would acknowledge that the client was free to “break off” from the group to pursue such interests.

The second issue really compounds the first one. If it is true that each client wants to be able to provide some information to counsel that is material to the representation, but which is to be withheld from the other clients, then the common representation is questionable. See Comments [30] and [31] to Rule 1.7. This situation only aggravates the potentially different interests of the clients with respect to specific language in the proposed IRS regulation. How can counsel sort out these confidences and remain an effective advocate for the common group? Or, if the confidences are not material, why do they need to be shared with counsel? There are some limited circumstances where keeping each client’s trade secrets from the other clients, for example, might not impede counsel’s work on behalf of the group. Comment [31]. But, the much more typical arrangement requires the sharing of all privileged communications within the client group. Comment [30].

*\* Editor’s Note: A legal ethics “Question of the Week” will be included in each issue of Corporate Counsel Weekly for the next several months. If you have a question that you would like to have addressed, please send it, in the form of a hypothetical, to [mbrady@bna.com](mailto:mbrady@bna.com).*