

To the Forum:

I specialize in commodities and securities regulation, as well as the tax consequences of transactions in securities and commodities. Almost 10 years ago, a client of mine in the financial services industry had devised a new transaction that he asked me to implement. The transaction implicated numerous novel questions in commodities and securities regulation, and I was concerned about solicitation were I to represent both my client as the originator and the investors to whom the idea was to be pitched. *See Forum* (Mar./Apr. 2007) N.Y. St. B.J., p. 52.

As it turned out, for reasons related entirely to market conditions, that transaction did not go forward. In the interim I have stayed close with this client, and now he has come to me with a similar concept. The client would like me to represent only him in his individual capacity and the vehicle as issuer's counsel. He would also like me to connect him with some investors whom I know and whom I have represented on unrelated matters, but not to hold myself out as representing any of these investors. My role will be to structure the transaction and to provide an opinion stating that the transaction is legal and outlining the specific consequences (as well as any risks). My opinion will be included in the marketing materials, and it is expected that I will make myself available to speak with investors and their advisors. The investors will all be sophisticated persons. However, we will not be able to control whether or not they will each have their own counsel.

What advice do you have for me?
Sincerely,
U.N. Certain

Dear U.N. Certain:

Your question to the Forum raises three main issues:

1. Is there a conflict of interest or other professional issue from the standpoint of your position as

an attorney and counselor in this situation?

2. What specific rules apply to tax practice and how are opinions supposed to be written?
3. What can you do without violating the securities laws?

The interests of your individual client as the person who is putting together this transaction and those of the issuing vehicle (which we can refer to as "the issuer") are aligned in this situation, so there should not be any problem in representing both – the issuer and your individual client as its management – as an initial matter through the closing. That may change at some point in the future as events unfold, but that is not the subject of this discussion.

As we see it, as long as you are clearly identified in the marketing materials as representing the issuer, and take steps to identify yourself this way in any discussions that you may have with investors and their counsel, you should be able to steer clear of client conflicts.

Consider first investors with whom you have no other professional relationship; they are merely people whom you know and can introduce to the issuer or people who have been introduced by others to whom you may be speaking on behalf of the issuer.

To the extent that you are not involved in bringing this investment to the attention of a particular investor and do not engage in any discussions with him or with his counsel, there is not much more that you need to do. Should any investors or their advisors broach this subject with you, you should immediately inform them that you are representing "the other side" and cannot advise them as their attorney.

You can follow essentially the same approach with people whom you introduce. You also should make clear that you are not advising any such investor in any other capacity with respect to this investment – such

as financially or from an accounting perspective – even if you are skilled in such areas, lest that role derogate from your duty of loyalty to the issuer client or create an impression in the investor's mind that you are in any way representing his or her interests.

Next consider what you need to do if you become involved to any degree in the investment process with respect to investors whom you have represented in the past, or continue to represent – for example, explaining the investment to them or to their other advisors in your capacity representing the issuer. In a case like this, you will need to take extra precautions in order to avoid misunderstandings. Although some might say this is overly cautious, there are those who would suggest that you should require any such investor to acknowledge in writing that in so doing you are representing the issuer, and not the investor, and to waive any conflict. It would also be a good idea to have your client, on behalf of himself

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and the issuer, acknowledge this state of affairs and agree that in having you represent them they are aware that you have represented investors on other matters and that those investors have waived conflicts. We are aware, for example, of situations where a small group of clients in a specialized industry have found themselves repeatedly doing business with each other under circumstances where an even smaller group of lawyers – almost a club – are now on one side of a deal and now on another side of another deal for the same or different client. We are uncertain whether they always get conflicts waivers from all the clients past and present, although we know that this is on people's minds. Many deals have generally worked out and have run their course without incident, and yet there was always potential for a disaster lurking in the background.

Turning to the tax issue, we should all remember that the most important advice is that you have to know what you do not know.

The standards for giving tax advice are governed by the much criticized and much revised "Circular 230." This is too small a space to expound on all of the particulars, but suffice it to say that

1. you need to have a full understanding of the transaction;
2. in rendering your advice you must take into consideration all facts that you know or reasonably should know,
3. you must make reasonable efforts to ascertain the facts;
4. your opinion must be based on the known facts and reasonable assumptions;
5. you must relate applicable law and authorities to the facts; and
6. you cannot rely on representations from others that you know or should know are incorrect or incomplete.

Most important, you cannot base a positive evaluation on a low likelihood of an audit or of the possible discovery of an issue in an audit.

Different persons' required levels of comfort also vary in principle and as applied to particular situations, so you need to address this aspect with your client, as it affects not only how the transaction will perform in the real world but also whether it can be sold successfully to investors. As a planning matter, most practitioners we know are not comfortable advising any client to go forward with a transaction where it is not at least "more likely than not" that the transaction will achieve the intended outcome, assuming all the facts are on the table and fairly evaluated, and some clients, depending on their sophistication and preferences, need higher levels of comfort – popularly expressed as "should" or even "will" opinions, the latter becoming ever more scarce. That is not to say that *any* level of opinion precludes a challenge by the Internal Revenue Service that may or may not have any merit in the eyes of a court, and an analysis of the extent to which penalties may turn on the strength of an opinion and whether it was reasonable to rely on it is also beyond the scope of this discussion. You will reach your conclusions and discuss them with your client, and you and he may have to modify the business structure to reach the level of comfort that will be acceptable to the client and likely to the investors. Ultimately, you will likely go on the record as to what your conclusions are. You will have your view, and investors' counsel may or may not agree.

If you have any questions about all this, you should seek further guidance from a person experienced in transactional structuring and experienced in evaluating and writing tax opinions.

There are also numerous reporting and recordkeeping requirements concerning transactions that have other than very standard and uncontroversial tax consequences ("listed transactions," "reportable transactions," "uncertain tax positions," etc.). That

set of issues is also beyond the scope of this discussion.

Your final question raises an issue that is often misunderstood. We assume that you are not licensed and employed as a broker, which raises an issue as to whether you would be deemed to be acting as a broker under the Securities Exchange Act of 1934, as amended (Exchange Act), which would require you to be registered under that Act or associated with a broker-dealer that is so registered. A broker is defined in § 3(a)(4)(A) of the Exchange Act as "any person engaged in the business of effecting transactions in securities for the account of others." It is possible for you to avoid being deemed a broker if you act solely as a finder and limit your activities to introducing prospective investors to the issuer. However, the line between a finder and broker is often unclear and the term finder has not been defined by the Securities and Exchange Commission (SEC) or the Financial Industry Regulatory Authority (FINRA). If you participate in the negotiation of financial terms or try to convince any investor to buy the securities, you may end up on the wrong side of the line.

Another factor relevant to the issue of whether you will be deemed a "broker" is if you are compensated for introducing investors to the issuer. Moreover, if you do receive a fee for such activity and it is contingent on the investor making an investment, you will most likely be deemed (at least by the SEC) to be a broker, rather than a finder. The SEC has been very aggressive in recent years in prosecuting cases involving activities of persons acting as unregistered broker-dealers and, by receiving a fee, even for making the introduction, you are running the risk of regulatory scrutiny. The SEC and its staff have issued guidance on this issue. See "Guide to Broker-Dealer Registration," issued in April of 2008 by the SEC's Division of Trading and Markets (www.sec.gov/divisions/marketreg/bdguide.htm); "A Few

Observations in the Private Fund Space,” a speech by the then-Chief Counsel of the Division of Trading and Markets, April 5, 2013 (www.sec.gov/News/Speech/Detail/Speech/1365171515178). While the SEC’s position with respect to a finder may not be correct or consistent with current case law, acting as a finder creates a risk of investigation and an enforcement action. There is also a risk of an investor claim for rescission of the transaction if a court determines that the sale was made in violation of the Exchange Act. In all events, any fees paid for your services in introducing investors would need to be disclosed to the prospective investor.

We do not rule out the possibility of your receiving some compensation as a finder, as long as it is calculated based on an hourly rate or a flat fee regardless of whether anyone actually makes an investment. This works as long as you do nothing beyond the introduction (i.e., do not try to convince the person to invest or negotiate financial terms), as long as such activity is subsidiary to what you are doing in connection with this engagement as a whole, and as long as it is properly disclosed and your client understands the issues. As noted above, though, considerable care is required (especially if you will be negotiating documentation points) in order not to find yourself and your client on the wrong side of the line. Accordingly, the more straightforward and safer course is to keep your fees strictly related to your legal work.

Sincerely,
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

A little over a week ago, my client and I met with opposing counsel, whom I will call Lawyer X, and his client to attempt to negotiate a settlement concerning a potential contractual dispute. To my shock and surprise, when my client would not concede to certain provisions demanded by Lawyer X’s client, Lawyer X started screaming at me and my client, making numerous derogatory comments. Among other things, he stated that my client “had no ba**s,” and was a thief. Finally, he said we were nothing more than “money-grabbing lowlifes,” peppering his comments with several pejoratives about our ethnic origins and religions.

Needless to say, I was deeply offended by his comments and conduct. As a result, I got up and told my client that we were leaving, which only provoked Lawyer X even more. He began screaming profanities at us, which I will not repeat, as we walked out the door.

I later spoke with some other attorneys who have dealt with this lawyer in the past, and they indicated that Lawyer X had comported himself in a similar fashion with them. He called one lawyer “physically and mentally unkempt” in a public courtroom, and called another a “liar” and “disgrace to the legal profession” in front of other attorneys.

Two days after my incident with Lawyer X, he called to apologize, citing family troubles and the stress of the job as excuses for his inappropriate behavior.

Do I have an obligation to report this type of behavior to the Disciplinary Committee? What consequences could Lawyer X face? On the one hand, I really don’t want to see another lawyer out of a paycheck. However, on the other hand, I don’t think it’s appropriate for a member of the bar to address others and to act the way Lawyer X has been acting.

Sincerely,
I.M. Outraged

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