



MEMORANDUM

TO: REF Attorneys & Legal Assistants

DATE: 5/27/93

FROM: Gary R. Connor *mc*

RE: Counsel Who Are Indicted or Sued By The Department of Law

Several of you have asked for a clarification of how the Bureau handles a situation in which an attorney who appears before us is either indicted or sued civilly by the Bureau. I am writing this memo in order to set out our practice, while recognizing that each set of facts is somewhat different.

There are two separate issues to consider: the disclosure required by the Martin Act and the potential conflict of interest created if the attorney continues to represent a client before this Bureau.

1. Disclosure is the simpler issue. An attorney representing a sponsor in connection with an offering plan who has been sued by this Bureau or is the subject of an indictment filed by the Bureau should disclose this fact in an amendment to the offering plan, as it is a material fact. (In addition, any sponsor's attorney who is the subject of a lawsuit brought or indictment filed by someone else, the outcome of which could affect the attorney's ability to practice law, should disclose that fact in an amendment.) If the attorney is also the escrow agent for the sponsor, that fact should be incorporated into the disclosure. In making the disclosure the attorney may choose to add an explanation or narrative, in addition to the usual denials and disclaimers.

An attorney who represents an apartment corporation, condominium association or homeowner's association, etc., before this Bureau, should also disclose the indictment or litigation to his/her client, preferably in writing. It is our responsibility to point out the attorney's obligation to do so, which suggestion should also be in written form.

2. Conflict of interest is a more complicated issue. It would seem to be a conflict of interest for an attorney who has been indicted or sued by the Attorney General for actions involving real estate securities to represent a client before this Bureau. A person who is potentially involved in negotiating sanctions against him/herself may not be able to separate such

interests from the interests of the client. At a minimum, it would not be possible for the client to be certain that there was no conflict.

This conclusion is based on my reading of the Code of Professional Responsibility, which can be found in an Appendix to the Judiciary Law (McKinney's Volume 29). Canon 5 provides: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client." Ethical Consideration 5-1 states:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Finally, Disciplinary Rule 5-101 provides:

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

We do not have the authority to rule on conflicts of interest or to prohibit an attorney from representing a client before this Bureau solely because a conflict of interest exists. See, e.g., Matter of Heinz and Co. v. Lefkowitz, 22 A.D. 2d 475 (1st Dep't 1965), aff'd 16 N.Y. 2d 544 (1965). We can, however, point out the problem to the attorney. If an appropriate situation arises we can seek an opinion from the Grievance Committee, as well.

Obviously, decisions may depend upon particular facts as well as the timing of events. If you have questions about situations involving attorneys who are defendants, please discuss them with Nancy Kramer, Mary Sabatini DiStephan or me.

GRC:ac