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Re: Request for Informal Opinion on City Bar Justice Center – Federal Reserve Bank of New York Pro Bono Project

Dear Alan:

This letter responds to your request, dated February 15, 2008, for an informal opinion from this Committee regarding ethical issues arising in connection with a program to be administered by the City Bar Justice Center and the Federal Reserve Bank of New York, under which lawyers from law firms representing financial institutions may provide pro bono representation to clients who took out subprime mortgages, with the pro bono representation limited to (1) counseling the pro bono client and negotiating with the relevant financial institution(s) regarding the client's mortgage, and (2) representing the pro bono client, when appropriate, in bankruptcy proceedings. Under the program, pro bono counsel will inform their clients before the representation begins that if litigation against the financial institution(s) becomes advisable, other counsel would bring that litigation.

As a threshold matter, the need for an ethical analysis largely disappears if the pro bono representations can be structured so that the law firm that represents the pro bono client also does not represent the relevant financial institution(s). We recognize that certain financial institutions are represented by myriad law firms, so that structuring the pro bono representations in this way may not always be feasible, but to the extent that it is, doing so should be considered.

We turn next to the circumstance when the law firm providing the pro bono lawyer also represents a financial institution that had a role in the mortgage taken out by the pro bono client. We understand that the Federal Reserve Bank has had discussions with several financial institutions and that they are willing to consent to have lawyers associated with law firms that represent those institutions also act adversely to those institutions, subject to the limitations set forth above and to the requirement that those lawyers will not personally represent the institutions during the pro bono representations.

As a general matter, for current clients of a law firm, as the financial institution and pro bono client would be here, to consent to a simultaneous representation, the consent must satisfy two tests under DR 5-105(C): (i) a disinterested lawyer must believe that the lawyer can competently represent the interests of each client, and (ii) each client must consent to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. Under the circumstances here, the validity of that consent is determined largely by whether the law firm's representation of the financial institution substantially relates to the mortgage taken out by the pro bono client.[1]

The easier circumstance is when the law firm's representation of the financial institution does not substantially relate to the mortgage taken out by the pro bono client. In this situation, the financial institution can readily consent to having lawyers at a law firm that represents the institution also negotiate adversely to the institution.[2] Indeed, it is commonplace for financial institutions to consent to having law firms that represent them also act adversely to those institutions, including suing them, regarding matters not substantially related to the scope of the representation. But we hasten to add that because the determination that two representations are not substantially related is at times highly nuanced and subject to fine judgments, in

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[1] Applying the substantial relationship test of DR 5-108 serves two salutary purposes: it helps ensure that (a) the financial institution's confidences and secrets are not used against the institution, and (b) as explained below, the law firm is not asked, on behalf of the pro bono client, to attack the work that the law firm performed for the financial institution.

[2] We assume that because the law firm's representation is not substantially related to the mortgage taken out by the pro bono client, the law firm would not be asked to represent the financial institution in negotiating with the pro bono client. But if the law firm was asked to simultaneously represent both the financial institution and the pro bono client, that would present a non-consentable conflict for the reasons discussed below.

close calls, the law firm should consider erecting an ethical screen between those lawyers at the firm who represent the financial institution and those who represent the pro bono client. Finally, in evaluating the consent, the financial institution should be advised by independent counsel and should not rely exclusively on the advice of the law firm that also represents the pro bono client. The financial institution's inside counsel should generally be able to fill this role.

Thus far, we have concluded that the financial institution may consent to have a law firm that represents it also negotiate adversely to it in a non-substantially-related matter. Of course, the law firm's representation of the financial institution might also substantially relate to the mortgage taken out by the firm's pro bono client. For the reasons discussed below, we conclude that these circumstances may well present a non-consentable conflict.

We consider first the possibility that (a) the law firm's representation of the financial institution substantially relates to the mortgage taken out by its pro bono client and (b) the law firm is asked to negotiate on behalf of both the financial institution and the pro bono client in the same matter.

As a starting point, clients cannot consent to a lawyer's representing both sides in a litigation.[3] Although there is more nuance and more flexibility in transactional matters, the degree of adversity here between the financial institution and the pro bono client would still be too great for the conflict to be consentable.[4]

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[3] *See* ABCNY 2001-2 ("In litigation, the answer is clear-cut. As Professor Simon states, 'Obviously, a lawyer cannot represent both sides in the same litigation. That is one of the few per se rules in the field of conflicts.' Simon's New York Code of Prof'l Resp. Ann., DR 5-105, at 337 (West 2000)"); ABA Model Rule 1.7(b)(3)(a lawyer may not represent multiple clients if the representation "involve[s] the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal").

[4] *See* ABCNY 2006-1 ("[I]n a transactional setting in which the parties' interests are inherently antagonistic, such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited"); ABCNY 2001-2 ("Situations in which a lawyer or members of a single law firm would be required to negotiate directly with herself or each other on behalf of multiple clients in a transaction also will rarely be consentable"); Roy Simon, *Simon's New York Code of Professional Responsibility Annotated* (2007) at 859 ("Moreover, only rarely may a lawyer ethically represent both

Similarly, we conclude that a non-consentable conflict may exist even when the law firm, which is providing the pro bono counsel, is not asked to negotiate against the pro bono client, if the law firm's representation of the financial institution substantially relates to the mortgage taken out by the pro bono client, so that the financial institution's confidences and secrets could be turned against it, or pro bono counsel could be called upon, in vigorously representing the pro bono client in negotiations, to attack the validity of the firm's work on behalf of the financial institution.[5]

Turning to the perspective of the pro bono client, that client is being asked to agree to a representation (a) that is limited, and (b) in which the law firm offering the pro bono representation may have the adverse party, and other similarly situated financial institutions, as significant clients.

It is well established that a client can consent to a limited representation.[6] Indeed, it is commonplace for pro bono clients to agree with counsel to limited

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sides of the same transaction .... In many situations these two-sided conflicts are non-consentable because a disinterested lawyer would not believe a lawyer could competently represent both sides of the same transaction. Even in the rare case where a lawyer may, in theory, ethically represent both sides in the same transaction, I would advise against it").

[5] This latter aspect of the substantial relationship test has been recognized in caselaw, in the Restatement, and in the Model Rules. *See Price v. Price*, 289 A.D.2d 11 (1st Dep't 2001) (attorney could not be called upon to attack prenuptial agreement that his firm had drafted); Restatement of Law Governing Lawyers § 132, Comment d(ii) ("[A] lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client. Similarly, a lawyer may not represent a debtor in bankruptcy in seeking to set aside a security interest of a creditor that is embodied in a document that the lawyer previously drafted for the creditor."); Model Rules of Professional Conduct, Rule 1.9, Comment 1 ("Under this Rule. . .a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.").

[6] *See* ABCNY 2001-3 ("We conclude that a representation may be limited to eliminate adversity and avoid a conflict of interest, as long as the lawyer's continuing representation of the client is not so restricted that it renders her counsel inadequate and the client for whom the lawyer will provide the limited representation consents to the limitation"); N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. No. 604 (1989) (attorney may ethically limit scope of representation in certain circumstances); Model Rule 1.2(c) ("A lawyer may limit the scope of the representation").

representations.[7]

Whether the pro bono client should consent to a representation by a law firm that has the adverse party, or a similarly situated institution, as its client cannot be answered except by analyzing individual circumstances. It is here that a disinterested lawyer plays a pivotal role. The disinterested lawyer "is an independent lawyer who has no personal or financial interest in continuing the representation of the client — a lawyer whose only aim is to give the client the best advice possible about whether the client should or should not consent to a conflict." Roy Simon, *supra*, at 857. We do not believe that the pro bono client can decide whether to consent without the benefit of advice from a disinterested lawyer — who cannot be the pro bono counsel supplied by the law firm representing the financial institution, or a similarly situated institution. On the other hand, based on your description, it appears that the director hired to run the program might be able to undertake that limited representation. The director, who is a lawyer committed to representing pro bono clients, should not be under pressure to recommend a law firm having an affected financial institution as a client because we understand that, as part of the program, there will be a second group of law firms that do not have financial institutions as clients.

Finally, as you and I have also discussed, we are prepared to review the representation letters that you sent us after they have been revised to conform to this opinion.

In providing these views, the Committee is opining only on matters of ethics. Questions of law are outside the Committee's jurisdiction. In addition, we offer no guidance regarding the rules of any jurisdiction other than New York. The foregoing is a letter response, not a formal opinion, and is based solely on the information submitted,

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[7] *See, e.g.,* N.Y. St. Bar Assoc. Comm. on Prof'l Ethics, Op. No. 613 (1990) (A lawyer may ethically agree, without entering an appearance as attorney of record, to advise a pro se litigant to the extent of preparing pleadings for the litigant to sign and file with the court pro se); ABCNY 2005-1 (A lawyer may ethically agree with the client at the outset of the representation to provide advice and drafting assistance up to a Chapter 7 filing, when the representation will end); Del. St. Bar Assoc. Comm. on Prof'l Ethics, Op. 1994-2 (May 6, 1994) ("[ethics] opinions generally agree that it is permissible for an attorney to limit his or her representation of a litigant to advice and the preparation of documents") (collecting ethics opinions); *see generally* ABA Section of Litigation, Report of the Modest Means Task Force, Handbook on Limited Scope Legal Assistance (2003) (discussing the trend toward "limited scope legal assistance" and the synonymous "unbundled legal services").

the representations you have made to us, and the assumptions set forth in this letter. This letter shall have no effect as precedent in any other factual situation.

Very truly yours,

Paul Dutka
Chair