

Utah Ethics Opinion

2009.

09-02.

UTAH STATE BAR ETHICS ADVISORY OPINION
COMMITTEE: OPINION NO. 09-02

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MAIN OPINION:

Issued August 11, 2009

The five issues addressed in this Opinion are based upon the following general scenario:

A lawyer represents many homeowner's associations (both condominium and PUD) in various matters, at various times. Many of these associations are nonprofit corporations and others are common law associations. They are all operated through elected volunteer owner representatives who are organized into boards of directors (although they sometimes use different names for the representatives such as the management committee or board of trustees). Many of these boards hire professional managers, as they lack the experience, skills, and time to properly manage the associations. Some associations that the lawyer represents were referred through managers of the associations. Some of these managers work for management companies that manage many associations, thus providing an incentive for the lawyer to develop a good relationship with the manager to hopefully facilitate future referrals of other associations that the manager manages. It is also important for the lawyer to maintain a reasonably good relationship with the manager related to the lawyer's clients managed by that manager, because it is common in the industry for the manager to act as the point of contact with the attorney on legal matters involving an association. The lawyer does not represent or work directly for the manager or management companies.

1. **Issue 1:** Given the general circumstances described above, can the lawyer ethically represent associations in matters that do not include adversarial situations with the manager, and is any disclosure required?

Opinion: The lawyer may represent the associations, and no disclosure is required.

Analysis: Under the circumstances summarized in the Introduction, there does not appear to be a conflict of interest in the scenario described in Issue 1. Assuming compliance with the Rules of Professional Conduct

generally, the representation does not appear to implicate Rule 1.7(fn1), and it does not appear that disclosure would be required.

2. **Issue 2:** Given the general circumstances described above, can the lawyer represent the association in a lawsuit against the manager, and is any disclosure required?

Opinion: conflict of interest exists under this scenario. Whether the clients may consent to the representation will depend upon the circumstances of the representation.

Analysis: This scenario clearly creates a conflict under Rule 1.7(a), as "there is a significant risk that the representation of (the homeowner's association ('HOA')) will be materially limited by. . . a personal interest of the lawyer." Lawyer has a personal and financial interest in preserving a friendly relationship with Manager, both to enhance the likelihood of future business referrals, and to preserve existing business relationships with other HOAs with which the manager is affiliated.(fn2)

"Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in [Rule 1.7] paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent."(fn3) A conflict of interest is consentable if each of the four provisions of Rule 1.7(b) is satisfied:

(b)(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(b)(2) the representation is not prohibited by law;

(b)(3) the representation does not involve 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; and

(b)(4) each affected client gives informed consent, confirmed in writing. In this case, the scenario described does not involve the representation of adverse "clients" "in the same litigation or other proceeding before a tribunal." Unless Manager has some other basis for reasonably believing that an attorney-client relationship exists between Manager and Lawyer, Manager is not a client.(fn4) Additionally, the Issue assumes the absence of pending litigation or similar proceeding, and the representation of Manager by Lawyer also does not appear to be otherwise prohibited by law.

Although the inquiry "(a)ssume(s) for each question that

the attorney believes that he or she will be able to provide competent and diligent representation to the association," such belief must be reasonable in order for a conflict to be waivable. In this case, the Committee lacks sufficient facts to make a determination as to whether such belief would be reasonable. Although Lawyer may not technically owe duties to Manager, Manager's apparent ability to direct present and future business on its face appears to pose a significant threat to Lawyer's ability to provide unfettered loyalty and independent judgment to HOA. (fn5) Other factors would include the nature of the lawsuit (e.g., a claim that is essentially uncontested, such as for indemnification, versus a claim of fraud).

However, it is possible that Lawyer might reasonably believe that his or her representation of HOA would be unimpaired by assuming an adversarial relationship with Manager. For example, Lawyer might learn that Manager has no actual ability to affect an association's choice of counsel, or the HOA line of business might reflect a relatively minor portion of Lawyer's practice. Lawyer has an obligation to determine whether Rule 1.7(b)(1) is satisfied, based upon the facts actually and constructively known to Lawyer.

The fourth requirement of Rule 1.7(b) is informed consent. Rule 1.0(e) of the Utah Rules of Professional Conduct provides:

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct,

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance. "Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client."(fn6) Merely advising HOA that Manager manages other HOA clients of Lawyer's would not be sufficient to meet this requirement. Rather, Lawyer must disclose not only his or her relationship with Manager, but explain the

implications of that relationship, including Lawyer's financial interest in maintaining a good business relationship with Manager in order to keep existing business and/or obtain future referrals.

3. **Issue 3:** Given the general circumstances described above, can the lawyer represent the association in contract negotiations with manager, and is any disclosure required?

Opinion: The lawyer may represent the association, but disclosure is required.

Analysis: As stated earlier, "there is a significant risk that the representation of (HOA) will be materially limited by . . . a personal interest of the lawyer," because lawyer has a financial interest in preserving a friendly relationship with Manager. The conflict of interest appears to be consentable, assuming that the four requirements of Rule 1.7(b) are met. See also Rule 1.7, cmt. 28,29, and 32 (addressing nonlitigation conflicts between clients). The lawyer's duty of confidentiality remains in effect. See Rule 1.6.

4. **Issue 4:** Given the general circumstances described above, can the lawyer represent associations in matters that are not adversarial to the manager, and simply refuse when the association asks the attorney to represent the association in a matter that is adversarial to the manager?

Opinion: Yes.

Analysis: A conflict arises only when Lawyer represents HOA in matters in which Lawyer's personal interest (keeping Manager amenable to continued and future business) might negatively impact Lawyer's representation of HOA. There would appear to be no such impact when HOA's and Manager's interests are non-adversarial.

In general, a lawyer may refuse to represent a client (and a client may refuse to retain a lawyer) on any given matter. That principle would appear to apply to matters in which HOA and Manager are adversarial. This answer assumes compliance with Rule 1.2(c) (Scope of Representation).

5. **Issue 5:** Given the general circumstances described above, can the lawyer represent associations in matters that are adverse to the manager, but limit that representation by refusing to engage in an actual lawsuit, and, is any disclosure required?

Opinion: The lawyer can represent associations in such matters only if the

Analysis: As indicated in response to Issue 2, a clear conflict of interest exists in representing HOA in matters adverse to Manager. Accordingly, representation would be permitted only if all four of the elements of Rule 1.7(b) are present. Those requirements include Informed Consent,

which requires complete disclosure of pertinent facts, including the nature of Lawyer's personal interest and its specific implications. This answer assumes compliance with Rule 1.2(c) (Scope of Representation). requirements of Rule 1.7(b) are satisfied.

Note: In the scenarios presented in the letter of inquiry, Lawyer would have to consider the impact of his or her representation on other existing clients. For example, if Lawyer is representing HOA1 in a dispute against Manager, such representation could impact other HOA clients that employ the same Manager. In the event of a conflict, the same principles set forth above would apply to these other clients.

Footnotes:

1. Rule 1.7 of the Utah Rules of Professional Conduct provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

2. See, e.g., Formal Advisory Opinion 05-11,284 Ga. 283 (Ga. 2008) ("the attorney might have a conflict with the attorney's own interests under Rule 1.7(a), since the attorney would have a financial interest in maintaining a good business relationship with the non-client insurance company"); *In re Mid-America Living Trust Assoc., Inc.*, 927 S.W.2d 855, 862 (Mo. 1996, En Banc) ("attorneys who regularly receive referrals from trust marketing companies, without being directly employed by them, also have been found to suffer from a conflict of interest. An attorney's advice may be tainted by his desire to continue receiving referrals."), and cases cited.

3. Rule 1.7, cmt. 14.

4. See, e.g., D.R.Prof.Conduct 1.13 (Organization as a Client). The letter of inquiry assumes that Manager is not a client. These opinions further assume that Manager has not sought Lawyer's advice on matters adverse to the HOA in such a manner as to become a "prospective client," to whom Lawyer would owe duties under Utah Rule of Professional Conduct 1.18 (Duties to Prospective Client).

5. See, e.g., UT Eth. Op. 06-03 (where lawyer proposed to operate entity that would lend litigation expenses to lawyer's client, "Lawyer's dual loyalties make it difficult, if not impossible, for Lawyer to provide objective, unbiased advice and representation to the client where, by doing so, the interests of Affiliated Lending might be impaired, or the personal interests of Lawyer in Affiliated Lending might be adversely affected.")

6. Rule 1.7, cmt. 19.