

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 47
Issued on October 27, 2011.

QUESTIONS PRESENTED

- (1) May a lawyer who sits on the board of directors of a company still render estate planning services to a client that is interested in identifying this same company as a beneficiary?
- (2) Must the lawyer disclose his relationship with the company to the estate planning client?

ANSWERS

- (1) No. The lawyer, as a member of the board of directors, holds a fiduciary relationship to the company and is under the duties of loyalty, confidentiality and impartiality. The lawyer's duties to the company would limit his or her ability to be a fair advisor for the estate planning client because of the inability to disclose information that could be pertinent to the client's decision. Further, the lawyer's knowledge of the company's financial situation and interest in advancing the economic goals of the company would create a conflict of interest.
- (2) Yes. The lawyer must disclose to the client that the lawyer is associated with the company and that there may be a conflict of interest.

AUTHORITIES

- a. Nevada Rules of Professional Conduct 1.7, 1.8, 2.1 (2010)
- b. ABA Model Rule of Professional Conduct 1.7
- c. *Duval Ranching Co. v. Glickman*, 930 F. Supp 469 (Nev. 1996)
- d. Maryland State Bar Ass'n, Inc., Comm. on Ethics, *Docket 2003-09* (2003)
- e. *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992)
- f. *Ricks v. Dabney (In re Jane Tiffany Living Trust 2001)*, 177 P.3d 1060 (Nev. 2008)

DISCUSSION

Nevada Rule of Professional Conduct ["NRPC"] 1.7(a) states that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists when: (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.¹

NRPC 1.7 is based upon American Bar Association ["ABA"] Model Rule 1.7. Although the comments to the ABA Model Rules are not adopted by Nevada, they may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct.²

Comment 8 to ABA Model Rule 1.7 discusses conflicts that arise in situations other than the typical directly adverse positions between two clients. "A conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibility or interests." Comment 9 to ABA Model Rule 1.7 provides even further guidance as "[i]n addition to conflicts with current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to...other persons, such as fiduciary duties arising from a lawyer's service as trustee, corporate executor or corporate director."

When a lawyer's responsibility to a third party may impair representation of a client, the lawyer must decline or withdraw from that representation.³ In *Duval Ranching Co. v. Glickman*, 930 F. Supp 469 (Nev. 1996), an Elko County district attorney appeared on behalf of private plaintiffs in a case involving the legality of federal regulation of local residents' public land rights.⁴ The U.S. District Court of Nevada found that the possibility that the district attorney's professional judgment could be influenced by the Elko County Commissioners created a potential conflict of interest in violation of the Nevada Supreme Court Rules. The court commented that the district attorney placed himself in a situation in which the "exercise of his professional judgment on behalf of his private clients could be affected by his public responsibility to the County."⁵ The court concluded that in order to continue representing the private clients, the district attorney would have to reasonably believe that this conflict would not be adverse to the representation of the private clients. Consent of the private clients was also needed.⁶

The Maryland Bar Association Committee on Ethics found that a lawyer's offer of pro bono estate planning services to church parishioners in exchange for bequests to the church violated the lawyer's ethical responsibilities as the lawyer was a member of

¹ See NRPC 1.7(a).

² See NRPC 1.0A.

³ See *Duval Ranching Co. v. Glickman*, 930 F. Supp 469, 472 (Nev. 1996).

⁴ *Id.*, at 470-471.

⁵ *Id.*, at 472.

⁶ *Id.*, at 473.

the church's legacy committee.⁷ The Maryland Committee on Ethics found that the lawyer's "role as a Legacy Committee Chair and/or [his] own interest in advancing the church's financial interests would be the sorts of responsibilities to a third person and/or personal interest that are governed by [ABA Model] Rule 1.7(b)."⁸

A lawyer is also required to exercise independent professional judgment and render candid advice during representation.⁹ In other words, the lawyer is obligated to ensure that the client has independent advice in the matter or is "given the same information as would have been given by a disinterested attorney."¹⁰

The main issue that must be addressed is whether the lawyer, who is a member of a company's board of directors, is faced with a conflict of interest when asked to prepare an estate plan in which that company is a beneficiary. Although the lawyer does not represent the company and therefore there is no attorney-client relationship, the lawyer does have a fiduciary duty to the company. Through the lawyer's work with the company's board of directors, the lawyer may obtain confidential information about the company's financial structure and may have an interest in advancing the economic goals of the company that could limit the lawyer's ability to remain independent and loyal toward the estate planning client.

The lawyer's position on the board of directors of a company may not appear directly adverse to the client. However, the lawyer's professional judgment could be affected by his or her knowledge and loyalty toward the company. Hypothetically, if the company is preparing to file bankruptcy or otherwise dissolve, and this information is still unknown to the public, the lawyer's inside knowledge could limit his or her ability to be an independent advocate for the client. By failing to disclose the imminent demise of the company to the estate planning client, the lawyer is preparing an estate plan that may fail due to the lack of an existing beneficiary. Further, the representation of the client could be compromised because of the lawyer's conflicting responsibility to secure the economic welfare of the company.

If the lawyer determines that a conflict exists, the lawyer may still seek to obtain the written consent of both parties to proceed with representation, but only if the lawyer reasonably believes that the representation will not be adversely affected.¹¹ The lawyer should provide the estate planning client with an explanation of the possible implications of the conflict, including advantages and disadvantages, before asking for the written

⁷ Maryland State Bar Ass'n, Inc., Comm. on Ethics, *Docket 2003-09* (2003).

⁸ *Id.*

⁹ See NRPC 2.1.

¹⁰ *Williams v. Waldman*, 108 Nev. 466, 472-473 (1992); see also *Ricks v. Dabney (In re Jane Tiffany Living Trust 2001)*, 177 P.3d 1060, 1062 (Nev. 2008) ("when an attorney deals with a client for the former's benefit, the attorney must demonstrate by a higher standard of clear and satisfactory evidence that the transaction was fundamentally fair and free of professional overreaching").

¹¹ See NRPC 1.8.

consent. Additionally, the lawyer must obtain the company's consent to disclose any information that could impact the estate planning client's decisions.

Regardless of whether an actual conflict exists or does not exist, the lawyer should reveal to the client any potential conflict arising from the lawyer's position on the board of directors. By doing this the lawyer is assisting the client to make an informed decision to either proceed using the lawyer or seek other counsel.

CONCLUSION

The lawyer should not represent an estate planning client where the lawyer is a member of the board of directors of a company that is to be a beneficiary of the estate planning. The lawyer's fiduciary relationship with the company can lead to a conflict of interest when the lawyer has obligations and responsibilities to the company that could ultimately cause the lawyer's independent judgment and loyalty to the estate planning client to be compromised.

The lawyer can seek written consent from both the estate planning client and the company so long as the lawyer has a reasonable belief the representation of the client will not be adversely affected. The lawyer should still inform the client of any possible conflicts of interest that could arise.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.