

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 38
February 1, 2007

QUESTIONS:

May a lawyer who sits on the board of directors of a company render estate planning services to a client who is interested in identifying this same company as a beneficiary?

Must the lawyer disclose his relationship with the company to the estate planning client?

ANSWERS:

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 ability to be a fair advisor to 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.

Yes. The lawyer must disclose to the client that is associated with the company and that there may be a conflict of interest.

AUTHORITIES RELIED UPON

Nevada Supreme Court Rules 157, 167

American Bar Association Model Rules of Professional Conduct 1.7, Comments 8, 9

Duval Ranching Company v. Glickman, 930 F.Supp. 469 (Nev. 1996).

Maryland State Bar Association, Inc., Committee on Ethics, Docket 2003-09 (2003).

Williams v. Waldman, 108 Nev. 466, 836 P.2d 614 (1992).

DISCUSSION

This opinion discusses the ethical issues raised when a lawyer, who is a member of a company's board of directors, renders estate planning services to a client who is interested in identifying this same company as a beneficiary.

Nevada Supreme Court Rule 157 states that a “lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests. . .”

SCR 157 is based on 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. *See* SCR 150(2).

ABA Model Rule 1.7, Comment 8 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.” ABA Model Rule 1.7, Comment 9 provides even further guidance: “[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 a 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. Duval Ranching Company v. Glickman, 930 F.Supp. 469, 472 (Nev. 1996). In Duval Ranching, 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. *Id.* at 470-471. 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.” *Id.* at 472. 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 plaintiffs and must obtain their consent. *Id.* at 473.

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 the church’s legacy committee. Maryland State Bar Association, Inc., Committee on Ethics, Docket 2003-09 (2003). 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 Rule 1.7(b)”. *Id.* Maryland’s Rule 1.7 on conflicts of interest is nearly identical to SCR 157.

A lawyer is also required to exercise independent professional judgment and render candid advice during representation. *See* SCR 167. 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.” Williams v. Waldman, 108 Nev. 466, 472-73, 836 P.2d 614 (1992).

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 hold a fiduciary relationship to the company. The fiduciary relationship is created because the lawyer is an elected or appointed member of the company’s board of directors with the responsibility of overseeing and managing the welfare of the company. Through this oversight of the company, the lawyer as a director may obtain confidential insight into 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 towards the client.

The lawyer’s position on the board of directors of a company may not appear to be directly adverse to the client. However, the lawyer’s professional judgment could be effected by his knowledge and loyalty towards 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 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. *See* SCR 157. 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 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 allowing the client to make an informed and independent decision to either proceed using the lawyer or seek other counsel. The lawyer is also protecting his or her interests by eliminating the possibility of future disciplinary action for failing to inform the client of the potential conflict.

CONCLUSION

A lawyer should not represent an estate planning client where the lawyer is a director of a company that is to be a beneficiary of the estate planning. The lawyer's fiduciary relationship to 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 as to undertake the representation of the client as long as the lawyer has a reasonable belief the representation of the client will not be adversely effected. However, regardless of the conflict, the lawyer should 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 SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any persons or tribunals charged with regulatory responsibilities, or any member of the State Bar.