

**ETHICAL CONSIDERATIONS FOR THE HOMEOWNERS ASSOCIATION AND
CONDO ASSOCIATION ATTORNEY**

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Advising Homeowners and Condominium Associations
Washington State Bar Association

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ADVISING CONDOMINIUM AND HOMEOWNER ASSOCIATIONS

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I. INTRODUCTION

The attorney advising or representing a homeowners association, condominium association or cooperative works with a unique type of client. The client is a corporation with the responsibility to operate a business that can be large and valuable, but that frequently has minimal assets since the property is owned by its members (co-ops excepted). The association can run a large and complicated real estate business, but the issues most important to it can be personal issues relating to the homes and lives of its members. The combination of individual ownership and collective control can vitalize the community, but can be a source of tension and conflict.

The association attorney has roles and responsibilities similar to the general counsel of a large corporation. An association is a corporation that operates a business for the benefit of its shareholders. The attorney advises the governing board and officers on external matters such as contract issues, internal matters such as employment or corporate issues, and governance issues such as voting issues. The association's attorney must work in a broad spectrum of business and legal issues. Unlike general counsel for a large corporation, however, the association attorney rarely has the ability to hire outside counsel to handle specific issues. Moreover, the association counsel also faces the very likely prospect of advising the association on matters that pit the collective interest of the shareholders against the individual interests of the members.

This chapter will focus on ethical issues that -- due to the unique nature of associations -- the association attorney is likely to confront. Luckily for the association attorney, the Washington State Bar Association does not receive a high number of complaints involving association attorneys. Conversation with Barrie Althoff, May 5, 2005. Nevertheless, association practice presents a number of potential pitfalls for the association attorney, primarily as a result of the attorney's role as advisor to an entity that can be at odds with its own members.

II. PROPOSED AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

Attorneys practicing in the State of Washington are bound by Washington's Rules of Professional Conduct ("RPC"). The RPCs establish the minimum ethical standards required of attorneys. They establish the minimum level of conduct below which a lawyer will be subject to disciplinary action.

Our current RPCs were adopted in 1985. They are based on the ABA Model Rules of Professional Conduct. The amendments were developed by a WSBA committee (the "Ethics 2003" committee), [which delivered them to the WSBA Board of Governors in March of 2004. The Board of Governors delivered them to the Supreme Court in July of 2004. In December of 2004, our Supreme Court published for comment a comprehensive set of amendments to the RPCs.] The public comment period expired on April 29, 2005. The Supreme Court is expected to adopt the revisions in the near future. Citations to the RPCs in this paper refer to the proposed amendments to the RPCs.

III. CONFIDENTIALITY (RULE 1.6)

Rule 1.6 has been revised in two important ways. First, the basic rule that prohibits an attorney from revealing “confidences or secrets” has been changed to prohibit revealing “information.” The confidentiality rule is broader in scope than the attorney-client privilege. The attorney-client privilege applies in judicial and other proceedings. It only protects statements made by or to the client. The confidentiality rule applies in all contexts and prohibits disclosure of any information regarding the representation, whether the information is a client confidence or not.

The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

RPC 1.6, Comment 3 (emphasis added). See also, Comment 19. Attorneys should bear in mind that the duty of confidentiality continues after the attorney-client relationship has terminated. RPC 1.6, Comment 18. Also, the duty of confidentiality prohibits disclosure of any information that could reasonably lead to the discovery of protected (i.e. confidential) information. RPC 1.6, Comment 4.

Second, an attorney’s ability to disclose information relating to the representation has been expanded, in large part due to the Enron scandal. The current rule 1.6 allows disclosure when it is impliedly authorized and (i) to prevent the client from committing a crime, (ii) to respond to legal and criminal claims against the lawyer, (iii) pursuant to a court order, and (iv) to inform a tribunal when the client breaches a fiduciary duty as a court-appointed fiduciary. The new rule also allows disclosure (v) to secure legal advice about complying with the RPCs, (vi) to prevent reasonably certain death or substantial bodily harm, and (vii) to prevent the client from committing a fraud that is reasonably certain to cause substantial injury to the financial or property interests of another and in which the client has used the lawyer’s services.

Washington’s authorization to disclose a crime is significantly broader than the ABA Model Rule. The model rules allow disclosure to prevent a crime that is reasonably certain to result in substantial injury to financial or property interests. Our rule covers any crime.

Washington’s authorization to disclose fraud is identical to the ABA Model Rule 1.6(b)(2). This rule is intertwined with RPC 1.2(d), which prohibits a lawyer from counseling a client to commit a fraud, and RPC 1.16, requiring an attorney to withdraw in some circumstances, and RPC 1.13(c) which permits disclosure of information relating to the representation of an organization. See Section VI, below.

If a member of an association discloses to the association attorney an intent to commit a crime, may the attorney disclose the information? Does it matter if the member is also a member of the board of directors? Does it matter whether the crime relates to the business of the association?

IV. CONFLICTS: CURRENT CLIENTS (RULE 1.7)

The current rule 1.7 prohibits an attorney from representing a client “if the representation of that client” (a) would be “directly adverse to another client” or if (b) it might be “materially limited by the lawyer’s responsibilities” to another client, a third person or the lawyers own interests. Sub-paragraph (a) of the current rule invites a lawyer to look only at how the interests of the “new” client would be affected. By using the word “may” sub-paragraph (b) also seems to allow a lawyer to represent a client if the lawyer could envision a scenario in which a direct conflict would not come to pass.

The new rule 1.7 makes it clear that the lawyer must consider the interests of both clients. It states:

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.

A concurrent conflict exists if the representation will be adverse to another client. Note that the rule does not state “adverse to the representation of another client”. It states “adverse to another client”. The inquiry for adversity extends beyond the scope of work undertaken by the lawyer. The comments to new rule 1.7 enforce this point by stating that simultaneous representation in unrelated matters of clients whose interests are only economically adverse (such as competitors) does not ordinarily constitute a conflict and may not require consent.

Like the current rule, the new rule allows an attorney to represent a client despite a concurrent conflict. The new rule provides some helpful guidance to the lawyer. It states that the lawyer must reasonably believe that he or she will be able to provide competent and diligent representation to both clients. The former rule directed the lawyer to ask whether the representation of the new client would be adversely affected.

The comments to the new rule include helpful guidance regarding obtaining “informed consent” to a conflict. Comment 18 points out that each affected client must be made aware of the relevant circumstances and the material and reasonably foreseeable ways that the conflict could have adverse effects on the client’s interest. Comment 39 also makes it clear that a lawyer must obtain the authorization of a client before any disclosure of information about that client can be made to the other client. Thus, lawyers must get informed consent to the making of disclosures necessary to obtain a waiver of a conflict.

Does a lawyer who represents an HOA have a concurrent conflict when the lawyer is a director of the HOA? Comment 35 to the new rule 1.7 suggests that there could be a conflict and

provides some guidance to the lawyer considering whether a conflict exists and how to provide disclosure to the HOA. It states:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

May a lawyer who represents an HOA also represent its directors, officers, employees or members? The answer lies in Rule 1.7, as does the requirement to get informed consent from the organization and the other party. See RPC 1.13(g), discussed below.

V. DUTIES TO FORMER CLIENTS (RULE 1.9)

The current rule 1.9 is captioned "Conflict of Interest; Former Clients". The new rule is captioned "Duties To Former Clients". This change in title shows the focus of changes to Rule 1.9. This rule does not deal with "conflicts of interest" between clients as does Rule 1.7. This rule states the duties that a lawyer continues to owe to former clients, even after representation is over. Those duties can loosely be described as duties of confidentiality and loyalty.

A lawyer who formerly represented a client in a matter may not (a) represent another person in the same or a substantially related matter in which the person's interests are materially adverse to the former client (unless the former client gives informed consent); (b) later use information relating to the representation to the disadvantage of the former client, except as permitted or required by the rules, or if the information has become generally known; and (c) reveal information relating to the representation except as permitted or required by the RPCs. The first two of these strictures were contained in the former rule. The third is new.

May a lawyer who represented the declarant in the formation of a condominium thereafter represent the HOA during or after the period of declarant control? It is difficult to imagine a situation in which at least some of the interests of the declarant would not be adverse to the owners. Representing the HOA during the period of declarant control would seem to fall under rule 1.7, rather than rule 1.9, since the concurrent interests of the declarant as owner of units, seller of units and (wearing the hat of HOA director during declarant control) fiduciary to the

association are likely conflict with the interests of the association as representative of the buyers of the units.

VI. ORGANIZATION AS A CLIENT (RULE 1.13)

Rule 1.13 is completely new. The RPCs formerly had no counterpart to this rule. Rule 1.13(a) makes it clear that the lawyer for an organization represents the organization, not the members, shareholders, officers or directors of the organization. It states:

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

The organization is a legal entity but it can only act through its directors, officers, employees, shareholders and shareholders. Thus, when one of those constituents communicates with the organization's lawyer in that person's organizational capacity, the confidentiality obligations of RPC 1.6 apply. But since those constituents are not the client, the lawyer may not disclose information relating to the representation to those constituents, except where impliedly or expressly authorized by the client or as authorized by rule 1.6. See, rule 1.13, comments 1 and 2.

When dealing with the constituents of the organization, the organization's lawyer must anticipate potential conflicts of interest between the organization and the constituent. Rule 1.13 (f) states:

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

This does not mean that a lawyer is prohibited from representing an organization and a constituent. If the lawyer complies with Rule 1.7 regarding concurrent conflicts of interest, dual representation is allowed. Rule 1.13(g) states:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13 also contains "reporting up" and "reporting out" rules. Prior to 2000, the ABA Model Rule 1.13 contained a reporting up rule but not a reporting out rule. With the recent revelations of financial fraud in corporations such as WorldCom, Enron and others the model rule was amended to strengthen the reporting up requirement and to add the reporting out rule.

The "reporting up" requirement is found in rule 1.13(b), which requires the organization's attorney to act to protect the interests of the organization if the lawyer knows that a constituent's violation of a legal obligation of the organization is likely to harm the organization.

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

This rule requires the lawyer to act in the best interest of the organization and requires the lawyer to report the matter up the chain of authority.

If the highest authority of the organization fails or refuses to act in a clear case, the lawyer is permitted to “report out”, even if otherwise prohibited by rule 1.6. Rule 1.13(c) states:

(c) Except as provided in paragraph (d), if

(1) despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Unlike “reporting up”, which is presumptively required, reporting out is permitted but not required.

In the context of representing owners’ associations, members will move on and off the board over time and even dissident members may move on to the board. What duties affect the association attorney who communicates with a dissident board member?

VII. DUTIES TO PROSPECTIVE CLIENT (RULE 1.18)

Rule 1.18 is also new. This rule serves as a counterpart to rule 1.9, which deals with the lawyer’s duties to a former client. Rule 1.18 defines a prospective client as a person who discusses with a lawyer the possibility of forming a lawyer-client relationship. Rule 1.18(b) states that, even if no client-lawyer relationship results, the lawyer may not use or reveal information learned in the consultation. This rule is analogous to the provisions of rule 1.7 and 1.9 prohibiting disclosure or use of information learned from current or past clients. In order for rule 1.18 to apply, there must

be a discussion between the parties. Unilateral communications from a person do not constitute a discussion unless the lawyer invited the unilateral communication. See rule 1.18, Comment 10.

Rule 1.18(c) prohibits a lawyer from representing a client with interests adverse to a potential client. The rule states:

A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

This rule protects the reliance interests of the client who divulged information to the lawyer in anticipation of seeking legal advice. There are, however, important qualifications to this rule.

Under Rule 1.18(d), a lawyer may proceed under the foregoing circumstances if there is informed consent by both parties or if the lawyer who received the information reasonably tried to limit the information received, the firm builds a “Chinese wall” around that lawyer and notifies the prospective client.

Rule 1.18(e) states that a lawyer may also condition a conversation with a prospective client on informed consent that no information disclosed will prohibit the lawyer from representing other clients in the matter. Note, however, that the lawyer must obtain “informed consent”. A lawyer may not avoid Rule 1.18 by a simple oral warning.

VIII. COMMUNICATION WITH REPRESENTED PERSON (RULE 4.2)

Rule 4.2 prohibits a lawyer from communicating about the subject of the representation with a person whom the lawyer knows to be represented by another lawyer, unless the other lawyer has consented.

If an employee of a declarant attends an HOA meeting to discuss building defect issues and approaches the association’s lawyer after the meeting to discuss the matter, may the association’s lawyer speak to the person? The prohibition in rule 4.2 applies even though the represented person initiates the conversation. See RPC 4.2, Comment 3. “A pure heart and empty mind” does not relieve a lawyer from compliance with this rule because knowledge of a person’s representation can be inferred from circumstances. See RPC 4.2, Comment 8. Thus, a lawyer may have a duty to confirm the person’s status before proceeding.

As noted above, an organization can only act through its constituents. Thus, in the case where the “person” is an organization, this rule prohibits communication with the constituents of an organization who supervise, direct or regularly consult with the organization’s lawyer. See Rule

4.2, Comment 7. See also, Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984).

IX. DEALING WITH UNREPRESENTED PERSON (RULE 4.3)

Rule 4.3 states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

The last sentence of the rule is new. It establishes a bright line that a lawyer may not cross and makes it clear that a lawyer must resist the temptation to help an unrepresented person with "neutral" statements about the law. A lawyer must prevent an unrepresented person from mistakenly believing the lawyer is a disinterested authority on the law.

X. RESOURCES

The November, 2000 report of the American Bar Association's Commission on Evaluation of the Model Rules of Professional Conduct (the "Ethics 2000 Commission") is available at http://www.abanet.org/cpr/e2k-whole_report_home.html. The Ethics 2003 report, the Board of Governor's Report and other materials regarding the 2005 amendments are available at http://www.wsha.org/lawyers/groups/ethics_2003/default1.htm. The proposed amendments to the RPCs are available at http://www.courts.wa.gov/court-rules/?fa=court_rules.rules_display&folder-id=2004dec&fileid=RPC.

There are several secondary sources useful in understanding the RPCs. They include:

- *Annotated Model Rules of Professional Conduct* (4th Edition, 1999), published by the American Bar Association Center for Professional Responsibility. This reprints the Model RPCs, the official comments thereon (none of which will be adopted by the Washington Supreme Court), and provides further editorial commentary and useful citations.
- *Legal Ethics – The Lawyer's Deskbook on Professional Responsibility* (2000), published by the American Bar Association Center for Professional Responsibility and West Publishing Company. This is practically oriented, rather than a research tool.
- Charles Wolfram, *Modern Legal Ethics* (West, 1986), a classic hornbook which, though aging, is still very useful.

- American Law Institute, *Restatement of the Law Third – Restatement of the Law – The Law Governing Lawyers* (2000). This two-volume work is at present the most comprehensive analysis of laws governing lawyers' conduct and is likely to be widely quoted in the years ahead. Lawyers should beware, however, that while the work aims to be a "restatement" of the law as it actually exists, it has been criticized for at times stating as the "black-letter" law a minority position without indicating that it is not the majority opinion. Although expensive, there is much useful and very thoughtful information about the laws governing the legal profession.

There are two research treatises which, because of costs, are unlikely to be in most law offices, but which should be consulted for guidance:

- Hazard & Hodes, *The Law of Lawyering – A Handbook on the Model Rules of Professional Conduct* (Aspen Publishers).
- American Bar Association/Bureau of National Affairs, *Lawyers' Manual on Professional Conduct*. This is a principal multi-volume research treatise which is an excellent place to start in-depth research.

There is no comprehensive treatise on Washington legal ethics. Over 40 ethics articles by the Barrie Althoff which were previously published in the *Washington State Bar News* are available at the web site of the Washington State Bar Association at <http://www.wsba.org/barnews/ethics.html>. Readers may find it useful to consult them since they usually apply specifically Washington law to the RPCs and ethical issues.

In understanding their ethical duties, Washington's lawyers should also look to published court opinions about Washington's RPCs. In recent years, the Washington Supreme Court has averaged about three written opinions each year interpreting the RPCs in the context of lawyer discipline cases. In addition, descriptions of final actions of the Washington State Bar Association Disciplinary Board, which acts as an appellate court in lawyer discipline matters, are provided throughout the year in the form of public notices which summarize all disciplinary sanctions in the lawyer discipline system. The public notices are published monthly in the *Washington State Bar News* and are also available, from about late 1997 forward, on the Washington State Bar Association's Internet site.

Lawyers may seek informal telephone ethics advice from the Association's Professional Responsibility Counsel, by calling the Ethics Line at 206-727-8284. That counsel is part of the Association's Lawyer Services Department and is not part of the Association's Office of Disciplinary Counsel which investigates and prosecutes alleged ethical misconduct by Washington lawyers.

If lawyers want informal written ethical advice on their own proposed action, they may request an informal opinion of the Washington State Bar Association Committee on the Rules of Professional Conduct Committee. Requests may be sent to the WSBA Professional Responsibility Counsel at the Association's offices. Although the informal opinions are not binding on the Association's Office of Disciplinary Counsel, if the lawyer complies with the

informal opinion and the facts are consistent with the opinion, the informal opinion serves as evidence of good faith on the part of the lawyer and may mitigate, or even negate, any discipline for the conduct in question. Certain informal opinions which are likely to be widespread application and concern to Washington lawyers are submitted to the Association's Board of Governors for consideration as formal opinions. Most published opinions are available on the Association's Internet site and in the Association's publication, *Resources*.

This Chapter X was reprinted (with some modification and with Mr. Althoff's permission) from "Ethical Issues in Condominiums, Covenanted Communities and Commercial Developments", authored by Barrie Althoff for the WSBA Seminar, Drafting Real Estate Documents That Work, January 2001.