

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1994-95/6
Attorney/Client Relationship, Independent Professional Judgment and Conflicts Avoidance:
Association Staff Attorney Providing Legal Counsel to Association Members
June 14, 1995

RULE REFERENCES:

- *Rule 1.2
- *Rule 1.6
- *Rule 1.7(b)
- *Rule 1.8(f)
- *Rule 1.13
- *Rule 1.13(d)
- *Rule 2.1
- *Rule 4.2
- *Rule 4.3
- *Rule 5.4(c)

SUBJECTS:

- *Adverse effect on professional judgment
- *Attorney-client relationship
- *Conflict of interest
- *Independent judgment
- *Pre-paid legal services

ANNOTATIONS:

Attorneys employed by an association to render advice on behalf of association members, like other attorneys, have a duty to render independent professional judgment under Rule 2.1 irrespective of any employment agreements; employment agreements should not conflict with Rule 2.1 and provisions of employment agreements recognizing the requirements of Rule 2.1 may aid an attorney in avoiding conflicts under Rule 1.7(b)

An attorney-client relationship is not created between an attorney retained by a pre-paid legal services plan and a member of that plan simply by virtue of plan membership; the attorney-client relationship does not arise in such situations until a member of the pre-paid legal services plan utilizes the services of the attorney.

While clients may limit the scope of representation under Rule 1.2, an attorney generally does not have a duty to advise clients of this right to tailor the scope of representation. A duty to explain or clarify the attorney's role does arise under Rule 1.13(d) in situations where the client is an organization and the attorney is dealing with a constituent of that organization who is uncertain as to the attorney's role.

In furtherance of public policy, a lawyer should be entitled to provide a second opinion to a client of another attorney without running afoul of Rule 4.2, at least where the second attorney does not utilize the occasion to attempt to undermine the relationship existing between the first attorney and the client.

FACTS:

The inquiring attorney is employed full-time by a non-profit voluntary association. This association provides various services to its members, including pooled liability and health insurance and legal counsel through the inquiring attorney and others. The inquiring attorney does not represent the association nor its

insurance divisions, but rather provides legal counsel to association members and serves as a lobbyist before the legislature on issues of concern to association members as determined by the association. The inquiring attorney is compensated through a salary paid by the association. Association members, in turn, receive the inquiring attorney's services and other services from the association in return for their dues payments to the association. Further facts appear in the opinion.

QUESTIONS:

Do the rules of professional conduct require that there be an affirmative agreement between the inquiring attorney and the association which recognizes the attorney's duty to exercise independent professional judgment on behalf of association members and/or which assures the attorney will not be influenced by the association or its governing body in the exercise of that judgment?

What does it take to create an attorney/client relationship between the inquiring attorney and an association member and what rights or responsibilities do the inquiring attorney or association members have relative to limiting the scope of this relationship?

What obligations does the inquiring attorney have to association members to advise members about the attorney's relationship or non-relationship with the insurance trusts of the association or otherwise to take affirmative steps to insure that members are not misled about the attorney's role with respect to insurance coverage issues and that the attorney's independent professional judgment is not compromised?

RESPONSE:

1. Exercise of Independent Professional Judgement

For purposes of responding to the inquiring attorney's first question, the Ethics Committee assumes, as the inquiring attorney did, that association members seeking counsel from the attorney, rather than the association itself, are the attorney's clients.

As the inquiring attorney clearly recognizes, a lawyer has an obligation to exercise independent professional judgment and render candid advice in representing a client pursuant to Rule 2.1. Where, as here, a lawyer is employed to render legal services for another, that lawyer may not permit the employer to direct or regulate the lawyer's professional judgment in rendering such legal services. Rule 5.4(c). Similarly, Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client consents after consultation, the lawyer's independent professional judgment is not compromised and client information is protected as required by Rule 1.6. The obligation to exercise independent professional judgment exists irrespective of any contractual arrangements between an attorney and the attorney's employer. While it is clear that an attorney should not enter into an agreement which by its terms compromises such independent judgment, these rules do not mandate that employment agreements with attorneys expressly confirm the duty of the attorney to render independent professional judgment.

Nonetheless, the Ethics Committee recommends that there be created between the *inquiring* attorney and the employing association an agreement recognizing the attorney's duty to exercise independent professional judgment on behalf of association members making inquiries. This recommendation flows principally from the mandates of Rule 1.7(b). This rule provides, in pertinent part, that a lawyer may not represent a client if the representation of that client may be materially limited by the lawyer's own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation and with knowledge of the consequences. Absent a clear agreement between the attorney and the employing association, uncertainties about the attorney's role potentially may lead to concerns about job security and impairment of the attorney's independence. While an agreement clarifying the duties of the attorney in this regard cannot provide complete protection, it should serve to minimize such risks. Whether or not an agreement exists recognizing the lawyer's duty to exercise independent judgment, attorneys employed to provide counsel to others than their employer should remain watchful for

situations where the lawyer's self interests may be -implicated and, correspondingly , the mandates of Rule 1.7(b) must be followed.

2. Creation and Scope of Attorney/Client Relationship

As previously noted, members of the association are entitled by virtue of payment of dues to the association to avail themselves of the inquiring attorney's legal advice. All of the association's members are organizations rather than individuals. Each of these organizations has a governing body and various officers, employees, boards and other constituents. The inquiring attorney has asked various questions regarding when the attorney/client relationship between the attorney and the association members is triggered and what the scope of this relationship is or may be agreed to be.

For example, the inquiring attorney wishes to know whether or not a telephone call from an officer or other constituent of the organization/association member is sufficient to create an attorney/client relationship between the attorney and the member. The rules of professional conduct do not define the attorney/client relationship nor offer any explicit guidance as to when such a relationship exists. In the preface to the rules entitled "Scope," reference is made to "Illegal rules external to these Rules" for purposes of determining whether a client/lawyer relationship exists.

Generally, the Ethics Committee regards its role as being limited to offering opinions about the meaning and application of the Rules of Professional Conduct. The Committee usually does not go beyond the limits of the Rules of Professional Conduct in offering its advice. To facilitate responding to the balance of the inquiring attorney's questions, though, the Committee is of the opinion that an attorney/client relationship does not arise simply because members of the association are informed in a membership pamphlet or otherwise of the right to access the legal services of the inquiring attorney. Until this right or privilege of membership is utilized, an attorney/client relationship is not established. In this regard, the situation is much like a pre-paid legal services plan. While subscribers to such a plan generally derive the right to access legal services upon payment of plan fees, the attorney/client relationship does not spring to life until those pre-paid services are utilized.

The Committee believes, though, that at least a limited attorney/client relationship is created when a telephone inquiry is made from a constituent of an association member to the inquiring attorney. Under such circumstances, the constituent is calling for the purpose of obtaining legal advice. The inquiring attorney, in return, routinely responds to such inquiries with a view towards providing legal counsel in accordance with his employment agreement with the association and the association's representations about membership benefits to its members. The reasonable expectations of the parties and common sense would dictate, then, that an attorney/client relationship is created when such a telephone call is made, even if such a relationship did not exist before.

The inquiring attorney next asks whether the attorney has a duty to inform the governing board of every association member that the member has the authority to limit the scope of the attorney/client relationship between it and the association attorneys. At present, the association provides a legal department users guide to its members. In this user's guide, the procedure for accessing the legal services of the association is described. So far as it is relevant to this inquiry, the pamphlet indicates that the legal department of the association will respond to inquiries from all officers or other constituents of a member organization, provided the call relates to issues within that constituents scope of responsibilities. The inquiring attorney is concerned that such open access by all levels of a member organization may lead to violations of Rule 4.2 or Rule 4.3. Further, such open access occasionally is problematic for the legal services section of the association in situations where the member organization is factionalized to some degree.

Clearly, both lawyers and clients have certain authority and responsibilities with respect to the objectives and means of representation and the scope of representation. Under Rule 1.2, a lawyer must abide by a clients decision concerning the objectives of representation, subject to certain limitations. Identifying who may establish such objectives and limitations can be complicated when the client is an organization.

Rule 1.13 governs organizations as clients. Under this rule, a lawyer employed or retained to represent an organization represents the organization, as distinct from its officers, employees or other constituents. Naturally, though, someone must speak for the organization. The organizations which are members of the association all have governing bodies charged generally with the administration of the organization's affairs. In the absence of some other decision unique to a particular member organization, these governing bodies should have the authority to define, in conjunction with the inquiring attorney, the scope of the attorney-client relationship between the inquiring attorney and the member organization.

The inquiring attorney's question, though, is whether the attorney has an affirmative ethical duty to inform the governing body of the member organization that it has authority to so limit the relationship. As a general proposition, no such affirmative duty exists in Rule 1.2 or elsewhere within the rules of professional conduct. A duty to clarify the identity of the client certainly exists under Rule 1.13(d) when it is apparent that the organization's interests are adverse to those of the constituent with whom the lawyer is dealing. A similar obligation to attempt to clear up misunderstandings regarding the lawyer's role exists under Rule 4.3.

While no affirmative duty exists to draw to a member organizations attention its authority to limit the scope of the attorney/client relationship, at least in the absence of facts indicating confusion on the part of an inquirer as to the attorney's role, it is certainly permissible for the inquiring attorney to educate member organizations about their authority to shape the scope of representation. Since the user's guide brochure describing the legal services function of the association is not generally distributed through the ranks of each member organization and since there has been at least some history of difficulties due to factions within member organizations it may well serve the interests of both the inquiring attorney and the clients to formalize or define more clearly the relationship the inquiring attorney is to have with each member organization.

How this is to occur is best left to the inquiring attorney. One suggestion, though, would be for the inquiring attorney or the association to send out an authorization form requesting that each member organization identify the individuals with whom the inquiring attorney and other staff attorneys are authorized to speak. Such a form should be signed by a majority of the governing body of a member organization. It would probably be prudent to send such a form out at least once each year, as the membership of the governing body of the member organizations changes that frequently. The member organization's authority to limit the scope of representation may also be added to the association's legal department user's guide.

Although not specifically addressed by the inquiring attorney, there is one element of the association's user's guide which does require some clarification to bring it into line with the Rules of Professional Conduct. In the section dealing with confidentiality, the legal department represents that it will protect confidentiality of inquirers if asked to do so. It is not clear from this user's guide whether that protection is intended by the association to extend to the member organization or to the individual constituent of the organization making the inquiry. An individual might reasonably infer from this provision of the user's guide that information communicated to the inquiring attorney will be treated as confidential. This is not necessarily consistent with Rule 1.13, as the organization, rather than the officer or constituent of the organization, is the client and circumstances may dictate that others within the member organization be made aware of the information shared by the inquiring constituent of the organization. As suggested in the ABA Model Code comments to Rule 1.13, the lawyer under such circumstances should take reasonable care to prevent such misunderstandings and the resulting embarrassing or prejudicial consequences to the inquiring individual. In the present situation, such clarification should be made both in the user's guide and on an as-needed basis in fielding inquiries from Constituents of the member organizations.

A difficult question is presented as to possible violations of Rule 4.2 arising from the associations policy of open access to legal counsel. Nearly all of the association's member organizations employ regular legal counsel apart from the association's attorneys. The association recognizes this in their legal services user's guide. It is noted therein that the legal services of the association are not intended to be a substitute for the organizations' regular attorneys and that the associations attorney's main advice will be to follow the

advice of the organization's regular lawyer if the association's attorney knows that the regular lawyer is already involved in a matter. The question remains as to whether the inquiring attorney or others within the association's legal department may render advice to organizations at all under such circumstances, absent consent from the member's regular counsel.

Rule 4.2 proscribes communications by a lawyer representing a client about the subject of the representation with a party the lawyer knows to be represented by another attorney in that matters absent the other attorney's consent or authorization by law to do so. The purpose of Rule 4.2 is to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer-client relationship. ABA ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 424(2d ed. 1992). The rule has been interpreted as intended to prevent situations in which adverse counsel would take advantage of a represented party. Id.; citing Frey v. Department of Health and Human Services, 106 F.R.D. 32 (E.D.N.Y. 1985). The Ethics Committee is inclined to agree that the rule should not be interpreted as preventing a represented party from seeking advice about a matter from another attorney. Public policy should favor the freedom of clients to seek second opinions in legal matters. Naturally, though, attorneys from whom such second opinions are sought should not attempt to use the occasion to undermine the previously-existing attorney/client relationship. There would appear to be little danger of that in the present instance given the inquiring attorney's employment relationship with the association and not with its members. In the Ethics Committee's view, then, the inquiring attorney may respond to inquiries from members known or believed to be represented by counsel in a particular matter so long as the purpose in doing so is to respond to a request for a further or second opinion and not to interfere with regular counsel's relationship with the member.

3. Relationship to Insurance Pools

The final questions of the inquiring attorney relate to other services offered by the associations namely liability insurance available to members through a trust established under the auspices of the association. The attorney does not work directly for or with the insurance divisions of the association. Nonetheless the inquiring attorney wishes to know whether or not the attorney has any affirmative duty to explain to members that the attorney is not providing advice on behalf of the insurance trust nor making any representations regarding coverage. Assuming such a duty, the inquiring attorney wishes to know the parameters of the duty and how such a duty might be discharged. Lastly, the inquiring attorney wishes to know whether the attorney should take any affirmative steps to insure that the attorney's exercise of independent professional judgment is not compromised by the existence of the insurance trusts.

The attorney should take reasonable steps to insure that the attorney's role is understood by association members. Underlying Rules 1.2, 1.13(d), 4.3 and other rules is a policy of candor and disclosure towards the end of insuring that clients understand what a lawyer is or is not doing or able to do for the client. The parameters of an attorney's corresponding duties are not clearly defined and must be tailored to the factual situation. Since the association already publishes a legal services user's guide, it would be reasonable for that guide to include some discussion about the attorney's role vis a vis the client and the insurance trusts. Disclosure in this user's guide likely would be insufficient in some cases, though, given the uncertainties as to the distribution of the user's guide within a particular organization and a constituent's apprehension of the meaning of all provisions of the user's guide. It would behoove the inquiring attorney and others within the association's legal department to explain their roles anew to association members inquiring about issues overlapping with the function of the insurance trusts.

With respect to the steps necessary to insure that the inquiring attorney's independent professional judgment is not compromised by the existence of the trust, it appears from the facts presented that there is no communication about specific insurance issues between the insurance trusts and the legal services division of the association. The insurance trusts are represented by separate legal counsel. Assuming that such division exists and is maintained, the Committee has no further recommendations as to affirmative steps which the inquiring attorney should take. Consistent with what has been stated above, the duty to exercise independent professional judgment exists more on an internal level and independent of any contractual provisions or other devices attorneys and clients may employ. The inquiring attorney clearly is

mindful of these obligations and such vigilance is the most effective step one may take to avoid violations of Rule 2.1.

4. Relationship to Employer

In addition to the questions posed by the inquiring attorney, the Ethics Committee identified a further area of concern warranting discussion in this opinion. This area of concern relates to the relationship between the inquiring attorney and the attorneys, employer, the association. To the extent the association, as distinguished from its constituent members and from its insurance trusts, is a client of the inquiring attorney, the Ethics Committee is concerned that the potential for conflict of interest situations to arise exists.

The inquiring attorney has advised that the attorney generally does not provide legal counsel to the association itself. Nonetheless, there is included among the attorney's duties in the attorney's job description a reference to providing legal advice and services to the association in the conduct of its activities as an institution.

Under Rule 1.7(b), 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, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation and with knowledge of the consequences. Although apparently not consistent with the practice that has developed between the association and the inquiring attorney, the inquiring attorney's job description presupposes an attorney-client relationship between the association and the inquiring attorney. In representing the constituents of the association, the attorney may well acquire information potentially harmful to the interests of the association or its insurance trusts. For example, the inquiring attorney may learn from a constituent of the association that the constituent is engaging in certain practices that expose the insurance trust to an increased risk of loss. If the association is also a client of the inquiring attorney, a duty to disclose such information to the association may exist but that duty would be in conflict with the attorney's obligation to the constituent of the association to treat that information as confidential.

To mitigate the potential for conflicts, the Committee suggests that the inquiring attorney and the association explore one of two avenues. First, the association and the inquiring attorney may agree that the association will not be a client of the inquiring attorney. If this avenue is chosen, the inquiring attorney's job description should be amended to delete any reference to providing legal counsel to the association. Further, the inquiring attorney and the association should take care to insure that the inquiring attorney is not asked to render and does not render legal counsel to the association.

A second option would be for the inquiring attorney and the association to agree to limit the scope of representation of the association pursuant to Rule 1.2. The association and the inquiring attorney may expressly agree, for example, that notwithstanding any other obligations to the association the inquiring attorney may have, the inquiring attorney will have no duty to disclose information adverse to the interests of the association acquired through the attorney's representation of constituent members of the association.

While both options are available to the inquiring attorney and the association, the first option clearly is preferable and would appear to be consistent with the practice that has developed between the inquiring attorney and the association.