

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1989-90/1  
Attorney's Representation of Community Land Trusts  
June 21, 1990

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RULE REFERENCES:

- \*Rule 1.7
- \*Rule 1.7(b)

SUBJECTS:

- \*Adverse Effect on Professional Judgment
- \*Conflict of Interest
- \*Consent
- \*Consultation
- \*Harsh Reality Test
- \*Multiple Representation
- \*Real Estate/Realtors

ANNOTATIONS:

In a setting involving a community land trust and a tenant cooperative, an attorney cannot undertake representation of one which could be materially limited by the lawyer's responsibilities to another or to a third person unless the lawyer reasonably believes the representation will not be adversely affected and both the land trust and the cooperative consent after consultation and with knowledge of the consequences. (Rule 1.7)

In matters involving multiple representation, an attorney should apply "the harsh reality test" in making the threshold determination as to whether to proceed with representation. (Rule 1.7)

If the attorney decides that it is possible to proceed, the attorney must provide full and adequate disclosure of the potential circumstances and obtain the client's or clients' consent to proceed. (Rule 1.7)

Material limitations may arise not only from an attorney's responsibilities to clients, but also from an attorney's own interests. (Rule 1.7(b))

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FACTS:

As described by the inquiring attorney, Community Land Trusts ("CLT") are a relatively new mechanism to provide affordable housing. A non-profit CLT buys or

builds housing, helps tenants form a cooperative and then leases the building(s) to the cooperative under a long-term lease, typically 60 years or more. The CLT continues to own the fee interest and in the lease establishes a formula limiting the equity of the cooperative units to ensure long-term affordability for present and future occupants. All cooperative members must pay a nominal fee to be members of the CLT.

QUESTIONS:

Due to changed circumstances since the inquiry was originally made to the Ethics Committee, the inquiring attorney now has limited the inquiry to the following areas:

1. Can a lawyer represent a cooperative and
  - A. Represent the CLT on tasks not associated with that cooperative (e.g., acquiring new buildings) or
  - B. Assist without representing the CLT on tasks not associated with that cooperative (e.g., a manual for future cooperatives)?
2. Can a lawyer be a member of a CLT and represent a cooperative negotiating with that CLT?

BRIEF RESPONSE:

As to Inquiry 1(A), the attorney's activities must be guided by Rule 1.7(b) so that the attorney does not undertake representation which could be materially limited by the lawyer's responsibilities to the cooperative unless the attorney reasonably believes that representation will not be adversely affected and the client consents after consultation and with knowledge of the consequences.

As to Inquiry 1(B), the Rules of Professional Conduct may not apply if the tasks which the inquiring attorney takes on are not such as to create an attorney-client relationship with the CLT. However, the inquiring attorney must analyze the proposed task carefully to determine if the CLT would reasonably consider the attorney to be acting as its attorney, whether compensated or not.

Finally, as to Inquiry 2, mere membership in a CLT, as dictated by cooperative rules, would not appear to preclude the lawyer from representing a cooperative in negotiations with a CLT. Again, the attorney must be guided by Rule 1.7(b) if the attorney concludes that representation of the cooperative could be materially limited by the attorney's responsibility to the CLT or by the lawyer's own interests as a cooperative member.

RESPONSE:

Since Rule 1.7(b) governs much of the analysis herein, its full text is set forth:

### Rule 1.7. Conflict of Interest: General Rule

(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 or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation and with knowledge of the consequences. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As to Inquiry I(A), the Committee believes that the attorney must consider whether the particular task for which the attorney's services are being retained would trigger the provisions of Rule 1.7. Many assignments, such as researching the title to a proposed acquisition, analyzing the building code requirements of a community other than the one in which the existing cooperative client is located, or reviewing loan documents for the CLT to obtain needed financing to acquire a new building, would not seem to give rise to any issue pertinent to Rule 1.7(b) because no aspect of the assignment would be materially limited by the attorney's responsibilities to the existing cooperative.

However, certain assignments could trigger the provisions of Rule 1.7(b). For example, if the attorney is asked by the CLT to negotiate a lease with a new cooperative embodying different terms, such as more stringent equity levels than were agreed to by the CLT and the attorney's existing cooperative client, the attorney must consider whether there is any way in which the attorney's work for the CLT could be adversely affected by representation of the cooperative. If so, the provisions of Rule 1.7(b) apply. Similarly, if the attorney's work for the CLT could adversely affect the interests of the attorney's existing cooperative client, the provisions of Rule 1.7(b) also apply. Those provisions require that before the attorney undertakes representation for the CLT, the attorney must have a reasonable belief that such representation would be appropriate and obtain the cooperative's and the CLT's consent to such representation. The Committee believes that in making the threshold determination as to whether to proceed with representation of the CLT, the attorney must analyze the nature of the proposed representation carefully before proceeding to seek the client's consent. Under "the harsh reality test" articulated by this Committee, the attorney:

should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent ... If this "harsh reality test" may not be readily satisfied by the

inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation [of the second client].

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If, utilizing these standards, the attorney decides that it is possible to proceed, the attorney must provide full and adequate disclosure of the potential consequences and obtain the client's or clients' consent to proceed. Disclosure must be appropriate, in light of the level of the client's legal sophistication and experience. While not required by the Rule, it would be preferable to obtain the client's or clients' consent in writing.

As to Inquiry 1(b), if the attorney is being asked to perform tasks which do not create an attorney/client relationship, the Rules of Professional Conduct would not appear to apply. Reference would have to be made to New Hampshire common law defining an attorney/client relationship. The attorney must take care to determine whether the CLT would consider the attorney to be acting as its attorney in performing these particular tasks. If so, the provisions of Rule 1.7(b) may apply (see discussion, supra).

Finally, as to Inquiry 2, the Committee does not believe that an attorney is necessarily disqualified from representing a cooperative in negotiations with a CLT in which the attorney is a member by virtue of the attorney's status as a member of the cooperative. We assume, for the purposes of this inquiry, that no attorney/client relationship exists between the attorney and the CLT. Therefore, the provisions of Rule 1.7(a) dealing with direct adversity between clients do not apply. However, Rule 1.7(b) may be applicable. In this regard, the attorney must consider whether there are any material limitations arising not only from the attorney's responsibilities to the CLT but also from the attorney's own interests as a member of the cooperative. If so, the analysis set forth with respect to Inquiry 1(A) is pertinent.

#### CONCLUSION:

The inquiry highlights the unusual evolving relationship between CLTs and cooperatives. This form of ownership and occupancy seems intended to avoid the adversarial tension inherent in the conventional landlord/tenant relationship. The Committee assumes that in many instances, the interests of the CLT and cooperative will be similar, if not identical. However, the Committee believes a careful analysis of each proposed assignment is necessary to determine if the attorney can carry out that assignment in a manner consistent with the Rules of Professional Conduct.