

## 9.7 ETHICAL CONSIDERATIONS IN PROVIDING LEGAL ASSISTANCE TO TENANT ORGANIZATIONS

The following discussion provides general guidelines for problems that may arise when an attorney represents a tenant organization or the Resident Advisory Board.<sup>2</sup> While, in many instances, the interests of a resident organization and individual tenants will be parallel, differing interests can arise. For example, unique problems can occur if an attorney, who represents the resident group, agrees to represent tenants or clients referred by, or who are members of, the tenant organization. Given the complexity of this area of law, attorneys should review more comprehensive materials to resolve and avoid ethical problems.<sup>3</sup>

In addition, advocates should know that they can provide assistance to tenant organizations without representation. For example, an attorney can report on laws and policies to resident groups so long as the attorney makes clear that they are only providing information or guidance on a limited basis and will not be representing them.

### 9.7.1 Model Rules of Professional Conduct

The American Bar Association (ABA) adopted Model Rules of Professional Conduct (Model Rules), which provide general guidelines and examples that may be helpful in answering ethical questions. Approximately 40 states have adopted these rules in whole, in part or with modifications. Practitioners should check their state rules.

The only Model Rule that deals exclusively with organizational representation is Rule 1.13. In general, Rule 1.13 addresses issues related to the duty that the attorney owes to the organization that she is representing. It discusses the obligation of the attorney when it is apparent that an individual associated with the organization is acting in a manner adverse to the interest of the organization. Furthermore, although Rule 1.13 does not directly address this matter, advocates should be mindful that when an organizational plaintiff becomes a client, the retainer agreement must clearly indicate the scope of representation and who has authority to speak for the organizational client. The retainer also should include a dispute resolution mechanism to be used if there are disputes between the organization and a third party regarding who has the authority to speak for the client.

Model Rule 1.7 governs conflicts of interest. This rule does not contain a clear definition of the conduct that is permitted or proscribed, but gives a two-part test to determine whether there is a conflict:

1. will the attorney's representation be directly adverse to another client or
2. is the attorney's representation materially limited by responsibilities to another client, third person or the lawyer's own interests?<sup>4</sup>

Even if there is a conflict of interest, there may still be an exception allowing representation if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation is not prohibited by law;
3. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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<sup>1</sup> Note this excerpt from the last edition of NHLP's "green book" has not been updated since the 2012 edition.

<sup>2</sup>Subject to the provisions of the LSC regulations on group eligibility, LSC funds may be used for group representation, and non-LSC funds can be used to represent any group, nonprofit corporation or community development entity that does not fit within the LSC eligibility standards. Alan W. Houseman and Linda E. Perle, *What Can and Cannot be Done: Representation of Clients by LSC-Funded Programs* (Jan. 22, 2009) (Companion Website). See also 42 U.S.C.A. § 2996f (West 2012).

<sup>3</sup>See, e.g., Geoffrey C. Hazard, Susan P. Koniak and Roger C. Cramton, THE LAW OF ETHICS AND LAWYERING (5th ed. 2010). See also list of materials available from the American Bar Association at <http://www.americanbar.org>.

<sup>4</sup>See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 (Westlaw 2012).

4. each affected client gives informed consent, confirmed in writing.<sup>5</sup>

The comments to the Rules advise that in the case of representing multiple clients in a single matter, the informed consent must include an explanation of the ramifications, including the benefits and risks involved. In addition to the considerations raised by Rule 1.7, the sections of the Model Rules prohibiting disclosure of a client's confidences must be taken into account.<sup>6</sup> An attorney who represents differing or potentially differing interests may be jeopardizing his or her ability to preserve such confidences, since the information obtained from one client may be detrimental to the cause of another client.

### 9.7.2 Issues Arising in Conflicts

**Duty to the Client.** Most of the reported cases raising conflict-of-interest issues involve dual representation of two present clients or former and present clients having adverse interests in litigation, and arise in the context of a motion for disqualification.<sup>7</sup> Therefore, an attorney representing a tenant organization should be aware of potential conflicts that can arise when contemplating whether to provide legal assistance to an individual tenant. The attorney should always remember that her duty is to the client – the tenant organization. For example, if an individual tenant seeks representation on a problem that raises issues of conflict with the organization, then the attorney must not represent the tenant. Similarly, if there is a dispute between the tenant organization and an officer or member of the organization, then the attorney representing the organization owes allegiance to the tenant organization as an “entity” and not to the officer or other person connected with it.<sup>8</sup>

**Written Policy.** The attorney representing the tenant organization should have a written policy with the entity regarding any representation of individual tenants and other resident groups, if applicable. Such a policy could be contained in a letter of understanding regarding the general parameters of the attorney's responsibilities in representing the organization. The policy should describe how and if the attorney may represent individual residents or other resident groups. For example, the attorney and organization can agree that representation of tenants will be decided on a case-by-case basis by the organization. If the tenant organization has an effective grievance procedure, some individual cases could first be referred to the tenant organization for resolution. In any case, before agreeing on a procedure for consent, it is important that there be a discussion of tough questions raised by hypothetical conflict situations.

**Informing Tenants of the Written Policy.** When individual tenants seek assistance from Legal Services representing a tenant organization, it should be office policy to inform them fully of the office's relationship with the tenant organization, and to outline any agreement it may have with the tenant organization. Where insoluble conflicts exist, the attorney could refer the tenant to another Legal Services office or program, if confidentiality can be preserved. Where there is no possibility of a conflict, informed consent must be obtained from the tenant and the organization. However, be aware of the problem that a tenant may be forced to consent because not doing so would effectively deny that person access to any legal assistance. Furthermore, disclosure and consent by both clients may not be sufficient where the likelihood of prejudice to one party is particularly great or where the conflict of interest is so patent that a direct clash emerges.<sup>9</sup> In such situations, despite disclosure and consent, dual representation may place the attorney in an impossible situation with respect to preserving client confidence.

**Ethical screens.** Model Rule 1.10 states the general rule that an attorney's disqualification due to conflict of interest is imputed to the entire firm. However, some jurisdictions permit the use of ethical screens within a law office that enable concurrent representation of clients whose interests are adverse. For instance, with lots of foresight and planning, a legal services organization representing a tenant

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<sup>5</sup>See *id.*, Rules 1.7(b), 1.13(e), and 1.9(a).

<sup>6</sup>See, e.g., *id.*, Rules 1.8(b) and 1.9(b).

<sup>7</sup>E.g., *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976).

<sup>8</sup>See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.13 (Westlaw 2012).

<sup>9</sup>See, e.g., *Chateau De Ville Prod., Inc. v. Tams-Witmark Music Library, Inc.*, 474 F. Supp. 223 (S.D.N.Y. 1979); *Kelly v. Greason*, 244 N.E.2d 456 (N.Y. 1968). See also *Westinghouse Elec. Corp.*, 588 F.2d at 228-29.

organization could screen off designated advocates within an office so as to represent a tenant. These attorneys must not have physical or electronic access to the files of the organizational client. They must further be excluded from any cases involving the organizational clients. With strictly enforced policies in place, these designated attorneys could provide representation to the “conflicted” clients. Naturally, attorneys should disclose the screening both to the organizational client and to the “conflicted” clients, so that all clients are aware of and agree to the arrangement before agreeing to the representation.<sup>10</sup>

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<sup>10</sup>See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS §§ 123 and 124.