50 Shades of Gray: Identifying and Navigating Ethical Issues in Community Associations <ETHICS>

As community associations continue to grow and more people live in them, attorneys are finding themselves involved with more disputes. You need to understand the ethical issues and pitfalls involved in representing community associations and how each party may use ethical issues to their advantage.

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ISBN: 978-1-59618-093-2

2025 Community Association Law Seminar

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Printed in the United States of America

50 SHADES OF ETHICAL GRAY

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2025 COMMUNITY ASSOCIATION Law Seminar

community ASSOCIATIONS INSTITUTE

Introduction

The ethical gray areas that community association attorneys face are myriad. To name a few:

- Representing multiple parties;
- Navigating the relationship with the community manager; and
- Board requests for opinions supporting their position.

Scenario 1

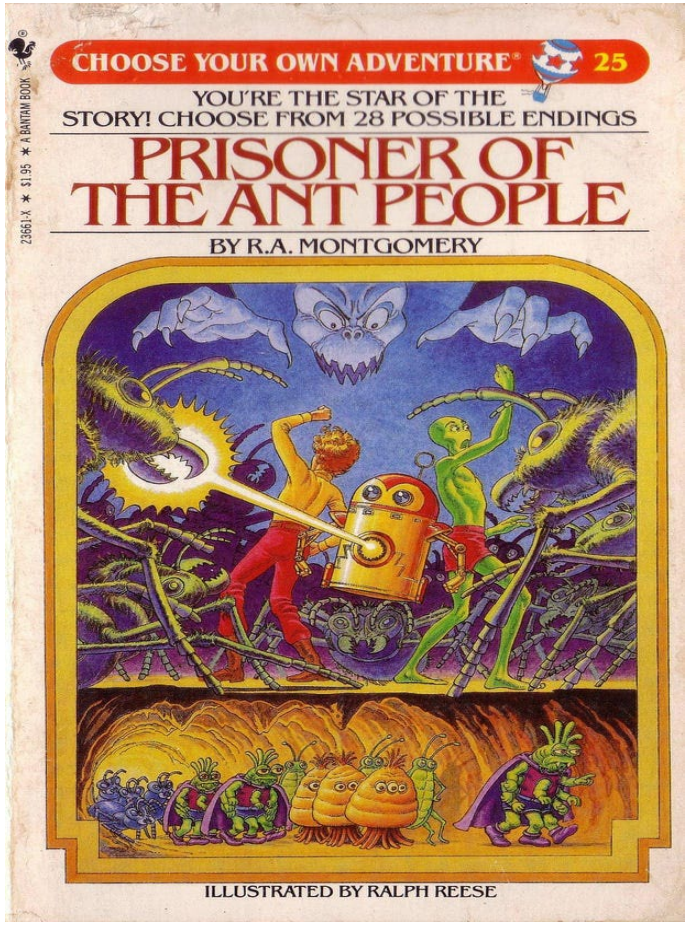
You represent a master association and a sub-association. The Board of the master association asks you to amend a reciprocal easement agreement between their association and the sub-association. Can the concurrent conflict of interest be waived?

Rule 1.7

Rule 1.7(a): “Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”

Rule 1.7(b): “(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 (4) each affected client gives informed consent, confirmed in writing.

Can the conflict of interest be waived?



Option 1

Yes, conflict of interest can be waived

- What makes this conflict waivable? (Rule 1.7(b))
- What is the nature of the conflict?
- How can the conflict be waived?

Scenario 2 Return

Option 2

No, conflict of interest cannot be waived

- Concurrent conflict of interest (Rule 1.7(a)(1) and (2))
- Pick one and refer the other client
- Refer them both out

Scenario 2 Return

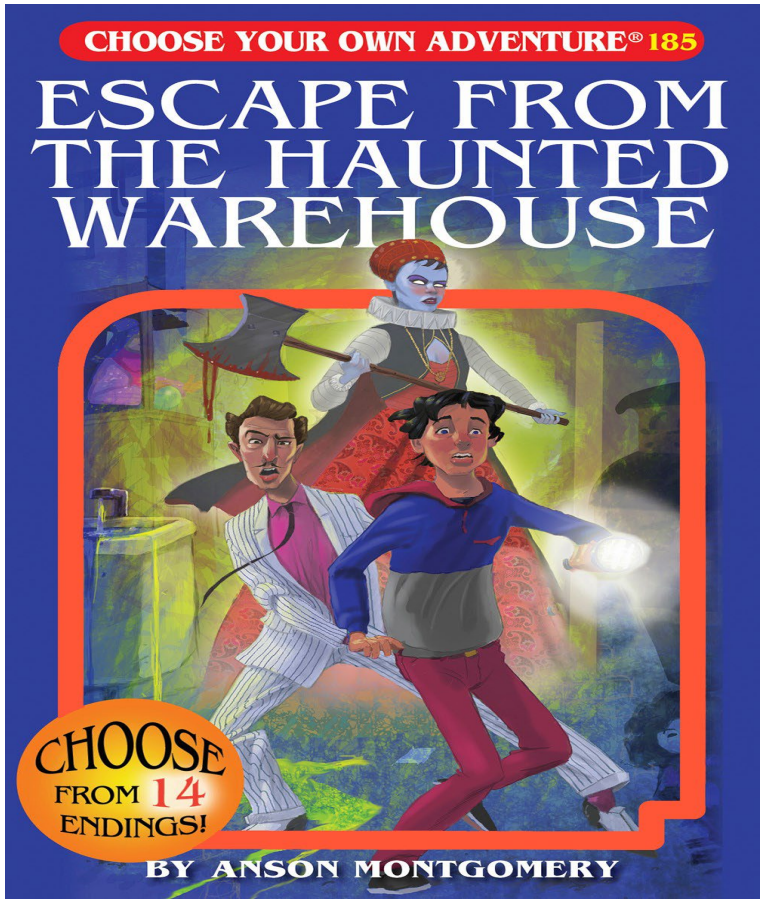
Scenario 2

You are retained to represent multiple Board members or multiple owners. All clients provided written informed consent. Later, one client revokes their consent. Can you continue to represent the other owners?

Rule 1.7

Rule 1.7, Comment [21]: Whether you can continue with representation "depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result."

Continue to represent the other owners?



Option 1

Yes, continue to represent other owners

- Revocation of consent not justified
- Would withdrawal result in a material detriment to your other represented clients?

Scenario 3 Return

Option 2

No, do not continue to represent other owners

- Revocation of consent was justified
- Would withdrawal result in a material detriment to your other represented clients?

Scenario 3 Return

Scenario 3

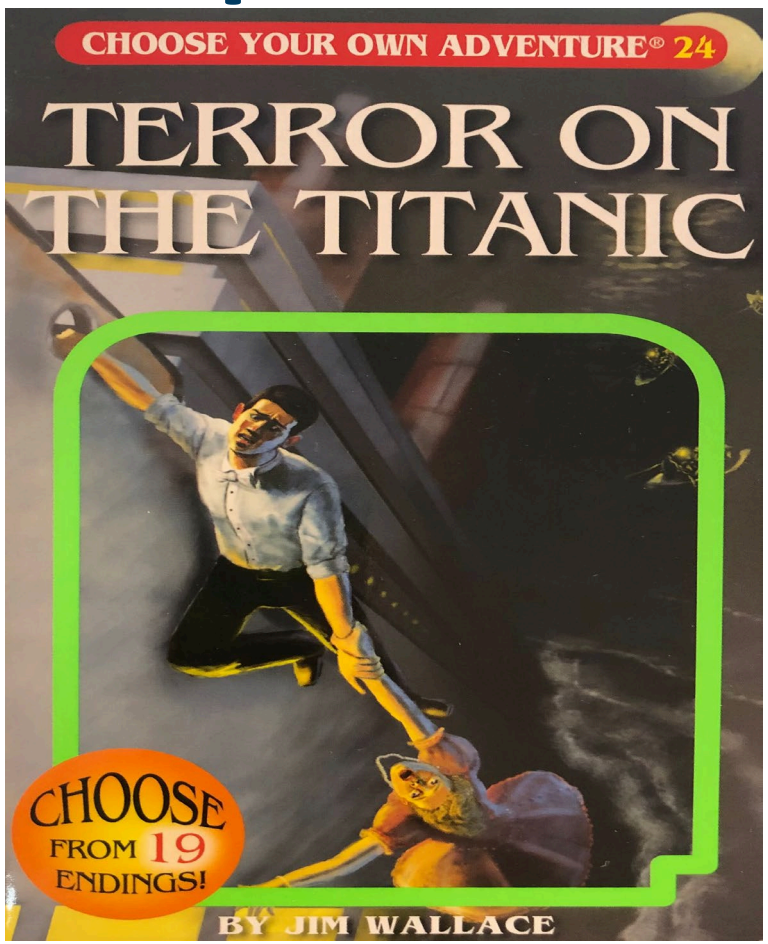
You are retained to represent multiple Board members or multiple owners. One client is paying all of the attorneys' fees. All clients provided written informed consent. Is this permissible?

Rule 1.7 and Rule 5.4

Rule 1.7, Comment [13]: Permissible if client is informed of that fact, they consent, and **the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client.**

RPC 5.4(c): "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Is this permissible?



Option 1

Yes, this is permissible

- Will it compromise your duty of loyalty or independent judgment?
- Can you be impartial?
- Can you meet your ethical obligations to each client?

Scenario 4 Return

Option 2

No, this is not permissible

- Will it compromise your duty of loyalty or independent judgment?
- Does the paying client insist on directing you?
- Are you concerned about getting paid?
- To whom are you loyal?

Scenario 4 Return

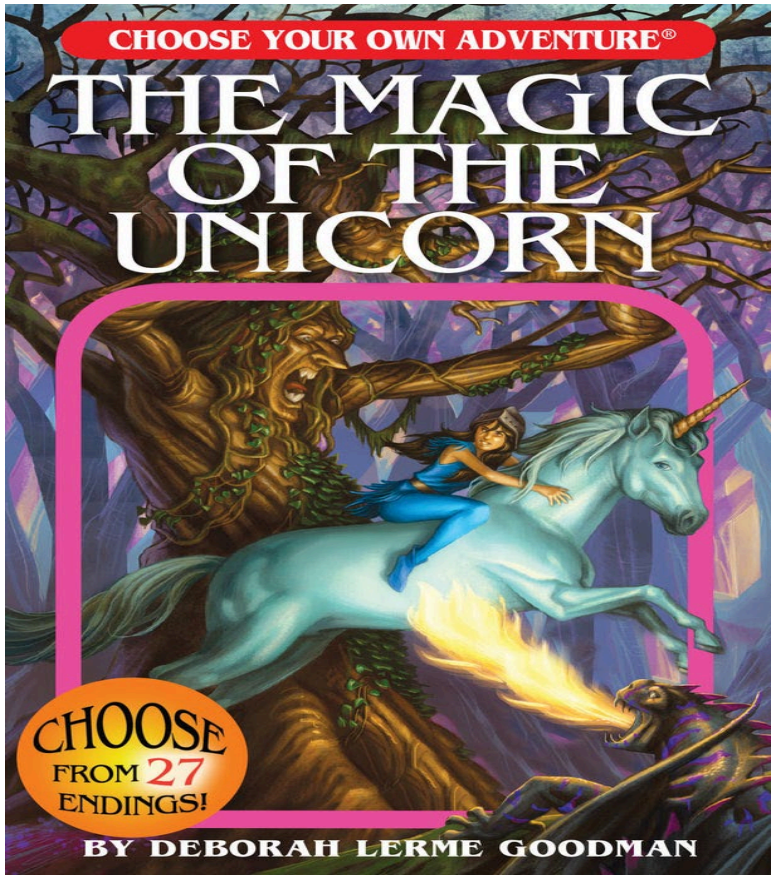
Scenario 4

A dispute arises between the Board and community manager and the Board wants you, the association's attorney, to threaten and later file suit against the community manager and the management company. What do you do?

Rule 1.13

Rule 1.13(a): A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

What do you do?



Option 1

Implement all the Board's directives

- You take direction from the Board
- You are not concerned about professional/political repercussions

Scenario 5 Return

Option 2

Implement some of the Board's directives

- You do not have to do everything the Board requests
- Refer some portion of the work to a different attorney

Scenario 5 Return

Option 3

Do not agree to implement any of the Board's directives

- You do not have to do everything the Board requests
- Refer the work to a different attorney

Scenario 5 Return

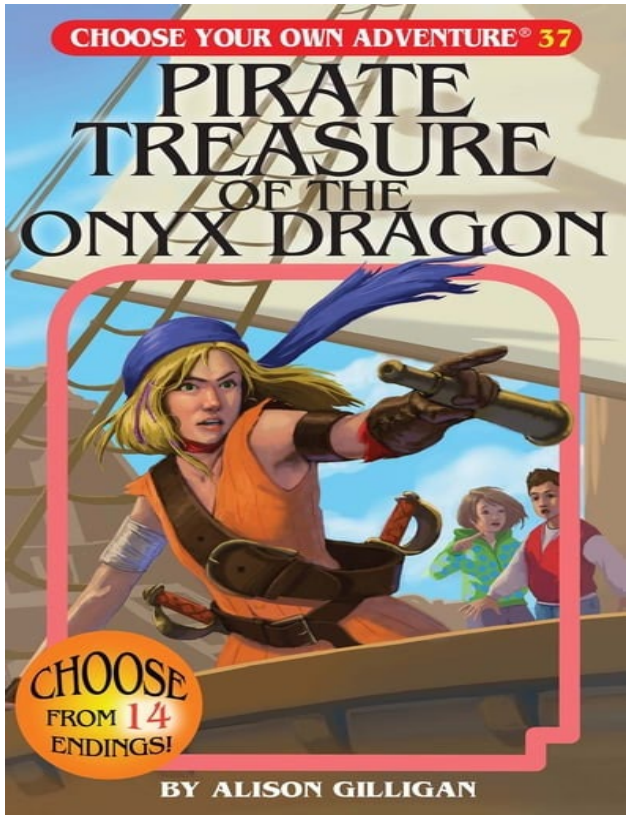
Scenario 5

The Board asks you for an opinion supporting their position that short-term rentals are allowed. The association's governing documents prohibit short-term rentals. What do you do?

Rule 2.1

Rule 2.1: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”

What do you do?



Option 1

Provide them with the opinion they requested

- Rule 2.1, Comment [2]: "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied."
- Provide them with options and risks for each option

Return

Option 2

Provide them with an opinion justified by the governing documents

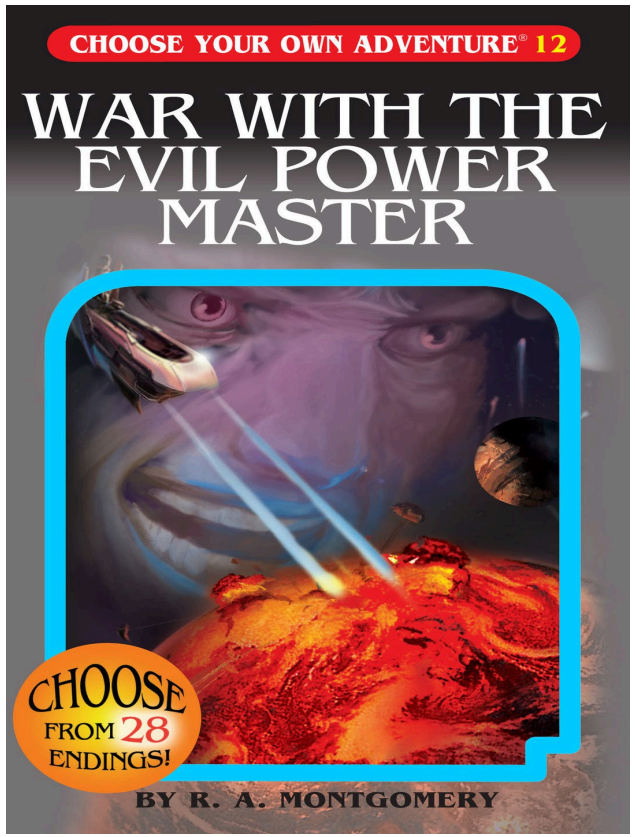
- Rule 2.1, Comment [1]: “In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.”
- Exercise independent legal judgment and provide accurate legal opinions, however unpleasant

Return

Resources

Jurisdictional Rules Comparison Chart
(https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/)
State Bar Websites
Ethics Hotlines
Outside Ethics Counsel
Don’t forget your trusted, experienced colleagues

Questions?



Thank you!

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50 Shades of Ethical Gray

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Friday, January 31, 2025
10:30 – 11:40 AM

Some community association ("CA") ethical issues are black and white. For example, attorneys know that they cannot steal client funds. But there are so many ethical gray areas. These ethical gray areas arise out of the unique nature of CAs and the constituencies affiliated with CAs. CAs, as legal entities, and the developers, Board members, owners, and community managers may have divergent interests or motives, which can put CA attorneys in challenging ethical positions without clear answers.

We address some common CA ethical gray areas and provide a brief analysis of each issue under the American Bar Association Model Rules of Professional Conduct ("RPC").[1] Although all U.S. jurisdictions, except Puerto Rico, have adopted the RPC, each jurisdiction's rules of professional conduct often deviate from the exact language of the RPC.[2] Attorneys should review their jurisdiction's rules of professional conduct when considering ethical issues.

Ethical Gray Area #1 – Legal Opinions Supporting a Desired Outcome

Scenario: You represent an association and the board seeks an opinion from you on an issue. The association's governing documents prohibit short-term rentals, but a majority of the Board members rent their units on a short-term basis and owners are threatening to sue the association and its Board members for the short-term rental violations. In response, the Board members renting their units on a short-term basis contact the CA's attorney and request a legal opinion saying that the governing documents do not prohibit short-term rentals. How should you respond?

Applicable Ethical Rules:

(1) RPC 1.13 (Organizational Client)
(2) RPC 2.1 (Lawyer as Advisor)
(3) RPC 2.3 (Evaluation for Use by Third Persons)

Ethical Analysis

This scenario introduces the primary ethical framework for CA-side representation: RPC 1.13 (Organization as a Client). RPC 1.13(a) states that a lawyer, when employed or retained by an organization, "represents the organization acting through its duly authorized constituents." This means that attorneys retained by CAs represent the association, as an entity, and not the individual

[1] Courts in all U.S. jurisdictions, except Puerto Rico, have generally adopted the RPC. *See https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/* (last accessed Oct. 16, 2024).

[2] A comparison of each jurisdiction's rules of professional conduct to the RPC is available at https://www.americanbar.org/groups/professional_ responsibility/ policy/charts/.

Board members, officers, owners, or the management company.[3] Because the association is the client, CA attorneys' ethical obligations and duties are owed to the association.

This situation is not uncommon, as Board members, officers, owners, and community managers are often confused and believe that the attorney also represents them as individuals. When there is confusion over who the CA attorney's client is, CA attorneys should explain that they represent the association as an entity and not any of the individual Board members, officers, owners, or the community manager. *See* ABA Model Rule 1.13(f). But, when dealing with these constituents whose interests the lawyer knows, or reasonably should know, are adverse to the CA's interests like in this situation, CA attorneys *must explain* the identity of their client. *Id.* CA attorneys, therefore, should respond to a request for a specific legal opinion by: (1) explaining that the association is their client and, thus, their duties are owed to the association; (2) explaining that they will give accurate legal opinions based on the law and the governing documents; (3) exercising independent legal judgment; and (4) refraining from giving the Board members the specific opinion they want unless it is correct, based on the law and governing documents. CA attorneys can describe various proposed interpretations and give their opinions regarding the viability of those interpretations, but their opinions on each matter should be based on their independent professional legal opinion, not the desired outcome of those requesting the opinion.

This scenario also implicates RPC 2.1 (Attorney as Advisor). RPC 2.1 provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."

Comment 1 to RPC 2.1 is instructive; it states:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. ***Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront***. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. ***However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client***. (Emphasis added.)

Comment 2 to RPC 2.1 is also instructive, as it provides, in relevant part, "[i]t is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied." Thus, under RPC 2.1, CA attorneys must exercise independent legal judgment and provide accurate legal opinions, however unpleasant the opinions may be for the Board members who requested it.

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[3] *See* ABA Model Rule 1.13, Comment [1] (explaining, in relevant part, "An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations."); Restatement (Third) of the Law Governing Lawyers § 96 (Am. Law Inst. 2000).

RPC 2.3 (Evaluation for Use by Third Persons) also applies to this scenario. RPC 2.3(a) provides: "[a] lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with client." Comment 4 to RPC 2.3, in relevant part, says: "[i]n no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule." Accordingly, because the CA attorney knows, or reasonably should know, that the Board members intend on disseminating the CA's attorney to others, RPC 2.3 applies to this scenario and prohibits the attorney from knowingly making false statements of material fact or law.

In short, this situation may be uncomfortable or put CA attorneys in the position of potentially being fired for providing their opinion. But CA attorneys must remember that their duties are owed to the association, not the Board members, and must put their duties to the association above their concerns about being retained.

Practice Pointer #1: When representing associations, add a section in your engagement agreement titled "Identity of Client and Authorized Representatives." In that section, state something to the following effect:

It is understood that Attorney is being retained to provide services to Client, an [enter state] non-profit corporation. If Client's corporate status should change, such as through its failure to file a statement of continued existence or by the dissolution of its corporate status, this Agreement shall continue to be binding upon Client's successor entity, association (incorporated or unincorporated), or organization.

It is important to note that Attorney is not being retained to represent any individual member of Client's Board of Directors ("Board"), any of Client's officers, Client's management company, or Client's community manager. Attorney's representation of Client can and sometimes will involve offering legal advice related to matters of particular concern to an owner, the owners, a particular Board member or officer, the collective Board, or Client's community manager, all as may be appropriate and necessary for the proper operation of Client and as may be requested by the Board. But that advice from Attorney does not change or otherwise affect the scope of Attorney's engagement as counsel for Client, only.

Unless Client otherwise indicates to Attorney, in writing, each Board member (present and future members) and, if a community manager is retained by Client, the community manager, are authorized representatives for Client and each shall have independent authority to communicate with and instruct Attorney on what action Attorney is to take and to seek counsel from Attorney for Client, without further confirmation or consultation from any of Client's other officers, directors, managers, or authorized representatives. Client agrees to notify Attorney, in writing, if any changes are made by Client related to the persons who have authority to direct Attorney and request services and counsel from Attorney.

Practice Pointer #2: At the onset of representation of a community association, meet with the Board members and explain that you represent the association, as an entity, and that you do not represent the Board members, owners, or management company. Boards change from year-to-year, so plan to meet with the Board every year or two, and provide this explanation to that Board (even if the Board members are the same).

Ethical Gray Area #2 – Joint Representation

Scenarios: (1) multiple Board members are sued and an attorney is retained to represent the association and the Board members; (2) an attorney is retained by multiple owners to sue an association and its Board members; (3) an attorney represents a master association and sub-association; (4) an attorney represents neighboring associations with reciprocal easements or shared obligations.

Applicable Ethical Rules:

(1) RPC 1.1 (Competence)
(2) RPC 1.3 (Diligence)
(3) RPC 1.7 (Conflicts of Interest: Current Clients)
(4) RPC 1.8(g) (Aggregate Settlements)
(5) RPC 1.13 (Organizational Client)

Ethical Analysis

CA attorneys represent the association first and foremost, but sometimes they also represent Board members, officers, management companies, community managers, and others affiliated with the association.[4] Similarly, attorneys may represent multiple owners in disputes with their own association and its representatives. Regardless of whether attorneys are representing multiple clients on the association side or the owner side, joint representation raises many ethical issues that attorneys must be aware of from the outset. Relationships with community managers will be discussed in the next section. Below, we explore some of the most notable issues regarding joint representation of associations, Board members, and owners.

1. Conflicts of Interest and Written Informed Consent

Representing multiple parties is rife with potential for conflicts of interest, which are governed by RPC 1.7 (Conflict of Interest: Current Client). Given the importance of RPC 1.7 to this scenario, the entirety of RPC 1.7 is recited below:

[4] *See* RPC 1.13(g) ("[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 any appropriate official of the organization other than the individual who is to be represented, or by the shareholders.").

(a) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client 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

(4) each affected client gives informed consent, confirmed in writing.

Attorneys should obtain informed consent, in writing, from all clients before undertaking any representation. The need for written informed consent is heightened when representing joint clients in a matter because of the duties owed to each client and the many conflicts that can arise in joint representation.

"Informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[5] The information needed to give the client informed consent varies based on the situation but, generally, attorneys must provide clients with "communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives."[6] When representing multiple clients in a matter, "the information must include the implications of the joint representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved."[7]

[5] RPC 1.0(e).

[6] RPC 1.0, Comment [6].

[7] RPC 1.7, Comment [18].

When required, informed consent must be confirmed by the client, in writing.[8] RPC 1.0(n) defines "writing" or "written" as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and electronic communications." If a client orally gives informed consent to a matter, the attorney must obtain written informed consent within a reasonable time after the oral consent is given.[9] Ultimately, attorneys should obtain all informed consent in writing, if possible, and the best practice is to do so through formal, signed agreements. Below are additional situations involved in joint representation and a discussion of the information attorneys should provide for each matter as part of obtaining their joint clients' informed consent.

2. Informed Consent Can Be Revoked

Informed consent may not be permanent because "[a] client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time."[10] If this happens, an attorney will need to evaluate whether the revocation of informed consent precludes the attorney from representing the other clients in the matter. Whether the attorney can continue with representation "depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result."[11] At the outset, attorneys should inform all clients, in writing, that they have the right to revoke their informed consent and terminate the lawyer's representation, at any time, as part of obtaining their informed consent to the joint representation.

3. Attorney Owes All Clients the Same Duties

When attorneys represent multiple parties, their obligations to each of their clients are the same: competency, loyalty, communication, independent judgment, diligence, confidentiality, impartiality, and all other duties imposed by the RPC and each jurisdiction's laws.[12] Attorneys

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[8] RPC 1.7, Comment [20]. *See also* Restatement (Third) of the Law Governing Lawyers § 122, Comment (c)(i) (Am. Law Inst. 2000) (case law interpreting whether attorneys provided enough information so that clients could have provided their "informed consent").

[9] RPC 1.0, Comment [1]

[10] RPC 1.7, Comment [21].

[11] *Id. See also* Restatement (Third) of the Law Governing Lawyers § 122, Comment f (Am. Law Inst. 2000) (examples of what constitutes "a material change in circumstances" or "material detriment").

[12] *See, e.g.*, RPC 1.1 (Competence) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); RPC 1.4 (Communication); RPC 1.6 (Confidentiality of Information); RPC 1.7, Comment [1] ("Loyalty and judgment are essential elements in the lawyer's relationship to a client."); RPC 1.7, Comment [15] ("representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation" to each client as required by RPC 1.1 (Competence) and RPC 1.3 (Diligence)); RPC 1.7, Comment [31] ("the lawyer has an equal duty of loyalty to each client … ."); RPC 1.7, Comment [33] ("Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyers as stated in Rule 1.16.").

should not undertake representation of multiple parties if the attorney cannot be impartial or meet the attorney's ethical obligations to each client.[13]

This does not change if one client agrees to pay all the attorneys' fees. In joint representation situations, one client, or even a non-client, may agree to pay all attorneys' fees for the engagement. This arrangement is permissible "if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."[14] But, if the attorney's representation of any client will be limited by the attorney's interest in accommodating the party paying the bill, the attorney must comply with the requirements of RPC 1.7(b), including determining whether the conflict is consentable in a way that would allow the attorney to proceed with the joint representation.[15] At the outset, attorneys should advise joint clients, in writing, of these potential issues and obtain their informed written consent before proceeding with a representation where one client or a non-client pays all attorney invoices for the joint representation.

Practice Pointer #3: Representing multiple clients always presents the risk that some or all the attorney's invoices will not get paid. In the engagement agreement, attorney should include a provision that says something to the following effect:

Clients may have an agreement among themselves as to how to pay Attorney's fees. Any agreement Clients may have among themselves is not binding on Attorney. By signing below, Clients agree that they are jointly and severally liable for payment of the amounts owed to Attorney under the terms of this Agreement; meaning, each Client is liable for the full amount owed Attorney under the terms of this Agreement. If a conflict arises among Clients regarding payment of the amounts owed Attorney under the terms of this Agreement, Clients shall notify Attorney of any such dispute and attempt to reach an agreement among themselves. In the event Clients are not able to resolve any such dispute and Attorney is not paid, Attorney may withdraw as counsel for all Clients.

4. Confidentiality and Attorney-Client Privilege Concerns

The Attorney owes each client in a joint representation the same duties of confidentiality and loyalty, including "the right to be informed of anything bearing on the representation that

[13] *See, e.g.*, RPC 1.7, Comment [29] ("because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained."); Restatement (Third) of the Law Governing Lawyers § 122, Comment h (Am. Law Inst. 2000) ("When a lawyer purports to represent two or more clients in a situation, the lawyer must not favor the interests of one client over the other.").

[14] RPC 1.7, Comment [13]. *See also* RPC 1.8, Comments [14] and [15]; RPC 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."); Restatement (Third) of the Law Governing Lawyers § 134 (Am. Law Inst. 2000).

[15] *Id.*

might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit."[16] A conflict will arise if one client asks the attorney not to disclose certain information to other joint clients.[17] As part of the process of obtaining the informed consent of each client in a joint representation situation, attorney should "advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other."[18] Certain exceptions may exist that would allow an attorney to continue representing joint clients, such as if the joint clients, after being properly informed, agree that the attorney may keep certain information (obtained from one client) confidential from the others.[19] The exceptions are limited, though, and the best course of action is most likely for an attorney to withdraw as counsel for all clients if this situation arises.[20]

Communications between the attorney and joint clients are protected by the attorney-client privilege.[21] However, "the prevailing rule is that, as between jointly represented clients, the privilege does not attach."[22] This means that, if subsequent litigation arises between the clients, the communications between attorney and the joint clients will not be protected from disclosure by the attorney-client privilege in that subsequent litigation.[23] Attorneys should advise joint clients, in writing, of this issue before the onset of representation as part of obtaining their informed written consent to the joint representation.[24]

5. Settlements in Joint Representation

Before agreeing to represent multiple clients in a matter, the attorney should consider that they may be asked to enter into settlement discussions for those clients resulting in a global resolution of all claims. Since clients may have different goals or desired outcomes, attorney must notify clients, in writing, about the potential for this situation before undertaking the representation as part of obtaining the clients' informed written consent.[25] Additionally, "before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted."[26]

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[16] RPC 1.7, Comment [31], citing RPC 1.4. *See also* RPC 1.6 (Confidentiality of Information).

[17] RPC 1.7, Comment [31].

[18] *Id.*

[19] *Id.*

[20] *Id.* ("For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.").

[21] *See, e.g.,* Restatement (Third) of the Law Governing Lawyers § 75 (Am. Law Inst. 2000) (explaining, in Paragraph (1), "[i]f two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§68-72 and relates to matters of common interest is privileged as against third parties, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.").

[22] RPC 1.7, Comment [30].

[23] *Id*.

[24] *Id*.

[25] *See* RPC 1.8 (Aggregate Settlements), Comment [16].

[26] RPC 1.8, Comment [16]. *See also* RPC 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement

6. Withdrawal for Conflicts

In the course of litigation, adverse interests can arise between joint clients which cannot be resolved, including increased or unexpected costs, embarrassment, and differing opinions on how to proceed with the litigation or settlement.[27] These adverse interests can cause the joint representation to fail, which would require the attorney to withdraw from representation of all clients.[28] This situation and potential outcome should be disclosed, in writing, to all joint clients as part of obtaining their informed written consent.

7. Threats of Lawsuit or Ethical Grievance Against Attorney

One or more clients may disagree with the way a matter is proceeding and blame the attorney. In some situations, a client may be so upset that they threaten to bring a lawsuit against the attorney or file disciplinary charges against the attorney. If this happens, it would be difficult, if not impossible, for the attorney to meet the attorney's ethical obligations to all clients. At a minimum, it could materially limit the attorney's representation of the joint clients. In such situations, a concurrent conflict of interest exists under RPC 1.7(a)(2) that jeopardizes the attorney's ability to meet their obligations to the joint clients and the attorney ordinarily must withdraw as counsel for all clients.[29] Clients should be advised, in writing, that if such a dispute arises during the course of representation, it would jeopardize attorney's ability to proceed with representation of all the joint clients in the matter.

8. Representing Master and Sub-Associations

Representing master and sub-associations at the same time presents unique ethical questions for CA practitioners. In part, this is because the relationship between master and sub-associations can change over time. For example, at the onset of representation, master and sub-associations may be controlled by the developer/declarant. Later, control of one or more of the associations may be turned over from the developer/declarant to an owner-controlled board, with owner-controlled boards at odds with the developer/declarant. As another example, a director may sit on the board of directors for both the master and sub-association or the same management company may manage both associations, which raises confidentiality and loyalty concerns. As these examples illustrate, simultaneous representation of master and sub-associations can leave CA attorneys with head-spinning ethical quandaries. Going back to basics can help CA attorneys navigate these ethical quagmires; specifically, remembering that the organization is the client, not any individual director or manager, and the duty of loyalty and confidentiality that the attorney owes are the same for each client.[30]

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as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.").

[27] *See, e.g.,* RPC 1.8(g); RPC 1.7, Comment [29].

[28] *See, e.g.,* RPC 1.7, Comment [29].

[29] *See* RPC 1.7, Comments [1], [4] & [10].

[30] *See* RPC 1.6, 1.7, and 1.13.

Because of the names used to describe master association and sub-associations, attorneys may think that the correct framework for addressing this issue is that of a parent-subsidiary corporation relationship. If a master association and sub-association are both still controlled by the declarant/developer, a parent-subsidiary framework may be appropriate under an "alter ego" or "unity of interest" analysis.[31] More often, however, master and sub-associations will be independently controlled by separate boards of directors. When that is the case, the relationship between master and sub-associations is more akin to a joint venture.

Master and sub-associations have similar interests, including the maintenance, prosperity, and overall well-being of a community. Interests often diverge, however, when discussions arise about who pays for what or whether the construction of improvements in the community will benefit the community and are worth the costs to the members. When these things happen, conflicts arise.[32] A conflict cannot be waived if the lawyer does not believe they will be able to provide competent and diligent representation to each affected client.[33]

When looking at the relationship between a master and sub-association as a joint venture, the comments to the RPC show that a conflict will exist in many instances, but the conflict may be consentable.[34] As Comment [8] to RPC 1.7 notes, "a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client." Even if a conflict exists, however, "a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional costs, complications, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them."[35]

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[31] *See* ABA Formal Op. 95-390 (1995) ("[t]he fact that the corporate client wholly owns, or is wholly owned by, its affiliate does not in itself make them alter egos. However, whole ownership may well entail not merely a shared legal department but a management so intertwined that all members of the corporate family effectively operate as a single entity; and in those circumstances, representing one member of the family may effectively mean representing all the others as well. Conversely, where two corporations are related only through stock ownership, the ownership is less than a controlling interest and the lawyer has had no dealing whatever with the affiliate, there will rarely be any reason to conclude that the affiliate is the lawyer's client."); California Compendium on Professional Responsibility, Part IIA, State Bar Formal Opinion No. 1989-113 ("In determining whether there is a sufficient unity of interests to require an attorney to disregard separate corporate entities for conflict purposes, the attorney should evaluate the separateness of the entities involved, whether corporate formalities are observed, the extent to which each entity has distinct and independent managements and board of directors, and whether, for legal purposes, one entity could be considered the alter ego of the other.").

[32] *See* RPC 1.7(a)(2) (a concurrent conflict of interest exists if, "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.").

[33] *See* RPC 1.7(b)(1).

[34] *See* RPC 1.7, Comments [8] and [28].

[35] RPC 1.7, Comment [28].

The CA attorney representing master and sub-associations may "develop the parties' mutual interests" by negotiating and drafting maintenance or reciprocal easement agreements between the parties, entering contracts with third parties, or negotiating settlement agreements with third parties. These arrangements create concurrent conflicts of interest, but the conflicts can be waived if the requirements of RPC 1.7(b) are met, including, among other things, obtaining informed consent, confirmed in writing by both the master association and sub-association.

9. Waiving Future Conflicts

There may be instances in which it is advisable for the CA attorney to proactively obtain conflict waivers, in writing, *before* a conflict of interest arises. A common situation to which this might apply in the CA context is with representations of a master association and one or more sub-associations, or the representation of neighboring associations. Given the proximity of and relationships between such associations, conflicts will likely arise and it would be beneficial for the CA attorney to have the associations' advanced informed consent and waiver of possible conflicts before a conflict arises. Under RPC 1.7, the validity of consents to waiving future conflicts depends on "the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding."[36]

Although it is impossible to create an exhaustive list of possible conflicts, some of the most common examples include conflicts regarding the maintenance of common areas, disputes related to written agreements or contracts between the associations, and disputes where a member makes allegations against more than one CA. The material risks involved can be explained, including the fact that if the conflict reaches the level of not being consentable, both parties will need to obtain their own counsel.

Practice Pointer #4: When taking on new clients, or in reviewing a current client list, CA attorneys should determine if the CA is part of a master-planned community with master and sub-associations and, if so, whether the CA attorney or their firm already represents some of the related associations. If CA attorneys find relationships like these between their prospective or current clients, may want to consider providing their prospective/current clients with written notice of potential conflicts of interests that could arise and obtain a prospective waiver of those potential conflicts of interest, in writing.

Ethical Gray Area #3 - Relationship with Community Manager

Scenario 1: A dispute arises between the board and community manager and the board wants you, the association's attorney, to threaten legal action and, if necessary, file suit against the community manager and/or the management company on its behalf. What do you do?

[36] RPC 1.7, Comment [22].

Scenario 2: An association is involved in litigation and the opposing party seeks communications between the community manager and the association's attorney. What do you do?

Applicable Ethical Rules:

(1) Rule 1.6 (Confidentiality)
(2) Rule 1.7 (Conflicts of Interest: Current Clients)
(3) Rule 1.13 (Organizational Client)
(4) Rule 2.1 (Independent Professional Judgment)

Ethical Analysis

When CAs have professional management, the community manager and/or management company typically are hired as agents for the association, acting at the direction of the board. CA attorneys often work closely with the community manager and management companies, but CA attorneys do not represent the manager or management company as part of their representation of the CA.[37] Regardless, this close professional relationship between CA attorneys and managers often serves the best interest of the CA. When boards are dissatisfied with community managers, however, they may seek advice from the CA's attorney about options for terminating the management contract, selecting a new community manager, or even bringing claims against the community manager or management company. These scenarios put the CA attorney in a challenging situation, especially when considering that CA attorneys often obtain business referrals from community managers.

One applicable rule for Scenario 1 is RPC 1.13 (Organizational Client). It may seem obvious, but it is worth reiterating that the CA attorney represents the association and that the board makes decisions for the association. This means that, if the CA attorney is directed by the board to take action against a vendor, the CA attorney is receiving instructions from the client (i.e., the decision-makers for the association), regardless of the attorney's relationship with the community manager. The CA attorney must decide if they will take action, such as filing a lawsuit against or making demands of a community manager or management company.

Here are a few possible approaches for the CA attorney to consider in this scenario: (a) agree to implement all the board's directives; (b) agree to implement some, but not all, of the board's directives; or (c) do not agree to implement any of the board's directives. CA attorneys can simply take the approach that, because they serve as counsel for the association, they are obligated to comply the board's directions regarding the community manager. This the option (a) approach.

Suing community managers and their companies may not be in the interest of CA attorneys, however, as they often have strong professional relationships with managers and management

[37] *See, e.g., Barnett Management v. Columbia Reserve Homeowners' Assn.*, 2023 WL 8111901, 2023-Ohio-4220, ¶14-21 (8th Dist.) (finding that management company lacked standing to seek disqualification of CA attorney as counsel for the association in lawsuit against management company for alleged conflict of interest when CA attorney never had an attorney-client relationship with the management company).

companies. While this relationship does not create a conflict of interest under RPC 1.7,[38] it does involve business considerations that could adversely affect the CA attorney's ethical obligations to their association client.

As a result, CA attorneys may find themselves considering the option (b) approach as a middle ground. As discussed above, attorneys must exercise independent judgment and do not have to subject themselves to material harm.[39] Attorneys do not have to undertake every board request; attorneys are obligated to use their independent professional judgment.[40] Some CA law firms are comfortable with their attorneys advising boards regarding termination provisions in management contracts, advising boards on ways to address their concerns amicably, and/or ghost-writing termination notices for boards to utilize, but will draw the line at suing or otherwise making demands of management companies on behalf of associations. Other CA law firms may say that they will take action against community managers or management companies in response to board requests and write strongly worded letters, but give managers or management company executives a friendly "heads up" that the letter is coming and downplay the tone of the letter, potentially without the board's knowledge or approval. This approach should be avoided. The CA attorney's duties of loyalty, diligence, and judgment may be implicated in such a way as to give rise to the appearance of a conflict of interest, at a minimum.[41]

Ultimately, the CA attorney who does not wish to jeopardize their business relationships with community managers at the risk of ensuring their client's needs are met, should refer boards to another lawyer to undertake actions against the management companies and cooperate with the other attorney as needed. This is the option (c) approach.

Practice Pointer #5: Clarify your firm's position on disputes with management companies and inform boards of this position as necessary.

An applicable rule for Scenario 2 is RPC 1.6[42], which, in part, provides: "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[43] Further, "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[44]

[38] *Id.*
[39] RPC 1.7.
[40] RPC 2.1.
[41] *See, e.g.,* RPC 1.3 (the CA attorney must act with diligence and zeal in advocacy); RPC 1.7, Comment [1] ("Loyalty and judgment are essential elements in the lawyer's relationship to a client.").
[42] The rules regarding attorney-client privilege are often determined by each state's statutory law and case law governing the attorney-client privilege. For a general discussion of the attorney-client privilege in the corporate context, *see Upjohn Co. v. United States*, 449 U.S. 383 (1981).
[43] RPC 1.6(a).
[44] RPC 1.6(c).

As an agent for the CA, the attorney-client privilege likely applies to communications between the community manager and the CA lawyer.[45] Accordingly, the CA attorney should not produce their communications with the community manager and should take steps to protect those privileged communications. At a minimum, the CA attorney should research case law in their jurisdiction to see whether their communications with community managers are protected subject to the CA's attorney-client privilege.

There are a number of steps the CA attorney can take to protect privileged communications with community managers, including: (1) mark all communications with "privileged and confidential attorney-client communication; (2) add language in the engagement agreement between the CA law firm and CA stating that that the CA's community manager/management company is the association's agent for legal matters and, in that capacity, will be asked to discuss confidential association legal matters with the CA law firm; (3) either ensure that similar language is included in the CA's contract with the management company or, if not, have the board adopt a resolution stating that the manager/management company is the association's agent for legal matters and, thus, communications between manager/management company and the CA's attorney

<u>Practice Pointer #6</u>: If your firm is willing to review contracts between the associations and management companies, require that both sides sign a waiver of conflicts of interest before proceeding with the review.

are protected by the CA's attorney-client privilege; (4) should litigation arise, request that the board adopt a resolution authorizing the community manager and/or management company to serve as the association's agent in communications with CA legal counsel about the lawsuit and that those communications are intended to be protected by the attorney-client privilege; and (5) timely deny requests from opposing counsel and others who request communications between the manager/management company and CA attorney and, when doing so, state that those communications are subject to the CA's attorney-client privilege.

[45] *See Greenlake Condominium Assn. v. Allstate Ins. Co.*, No. 14-CV-01860-BJR, 2015 WL 11921419 (E.D. Wash. Oct. 10, 2015) (holding that communications between CA attorney and property manager were attorney-client privileged under Washington law); *Las Olas River House Condominium Assn. v. Lorh, LLC*, 181 So.3d 556, 40 Fla. L. Weekly D2714 (4th Dist. 2015) (reversing trial court decision finding property management company employees' inclusion on communications destroyed the attorney-client privilege, noting that communicating with association counsel was within the manager's contractual duties to the association, finding that the trial court should have conducted an in camera inspection of the documents at issue and determined whether each of the documents was privileged based on a certain test, and remanding the matter to the trial court to perform the required in camera inspection and analysis); *Dialysis Clinic, Inc. v. Medley*, 567 S.W.3d 314 (Tenn. 2019) (finding, in the landlord-tenant context, that the property manager for the landlord was the "functional equivalent" of an employee and, thus communications between the landlord's attorney and property manager were attorney-client privileged); AZ ST § 12-2234 (explicitly including communications with an agent of a corporation as within the scope of the attorney-client privilege in Arizona); but *see* NM R REV Rule 11-503 (not expressly identifying that the scope of the privilege extends to agents of a corporation).

Practice Pointer #7: The best way to ensure that communications between the CA attorney and community manager are protected from disclosure by the attorney-client privilege is to do all of the following:

(1) Add language in the engagement agreement between the CA law firm and association stating that that the association's community manager/management company is the association's agent for legal matters and, in that capacity, will be asked to discuss confidential association legal matters with the CA law firm. Then, state that the association intends for those discussions to be confidential attorney-client privileged communications.

(2) If you are asked to review a management contract and your firm is willing to do so (after obtaining waivers of conflicts of interests), make sure the contract has a paragraph saying that the association authorizes manager/management company to serve as its agent in communications with association legal counsel and that communications between manager/management company and association legal counsel are intended to be protected attorney-client communications.

(3) If you represent an association in a lawsuit, request that the board adopt a resolution authorizing manager/management company to serve as the association's agent in communications with CA legal counsel about the lawsuit and those communications are intended to be protected by the attorney-client privilege.

Ethical Gray Area #4: Representing a Director after Board Service

Scenario: An owner who previously served as a director on the board of a community association comes to you wanting to take legal action against a community association.

Applicable Ethical Rules:

(1) Rule 4.2 (Communications with Person Represented by Counsel)
(2) Rule 4.4 (Respect for Rights of Third Persons)
(3) Rule 1.6 (Confidentiality of Information)

Ethical Analysis

In representing a former director of a community association attorneys should be cognizant of issues and ethical pitfalls that they may encounter.

One issue that arises in the context of attorneys representing owners, some of whom may be former Board members, in matters against the CA involves a CA's attorney claiming that the attorney represents the CA, including all its past and current Board members. Under this claim, the CA attorney may attempt to prohibit all communications with all past and current Board

members and other CA representatives. This blanket representation claim is not supported by the Rules of Professional Conduct and actually puts the CA attorney a precarious ethical position.[46]

Ultimately, if a CA's attorney says that an attorney cannot talk to any former board member without their permission, that does not bar the attorney from communicating with all former Board members.[47] However, "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization."[48] The attorney-client privilege is held by the CA and a lawyer representing a director should not use that director to attempt to waive the attorney-client privilege of the CA and/or learn information and obtain documentation that is the subject of the CA's attorney-client privilege.[49]

Accordingly, before interviewing a former Board member, an attorney should disclose the attorney's identity, explain that the attorney represents a client adverse to the CA, inform the former Board member not to disclose any confidential or privileged communications that the former Board member had with the CA's attorney, and not give the former Board member any advice other than to seek counsel in the matter if they have any questions or concerns.[50]

Practice Pointer #8: When representing a former director of a community association, attorneys should provide notice, in writing, to the former director that the director should not share any information that may be protected by the association's attorney-client privilege, to include any documents or correspondence received from the association's attorney. If an attorney receives records that are attorney-client privilege, the attorney should treat them as records inadvertently disclosed under RPC 4.4.

[46] *See, e.g.,* ABA Formal Op. 95-396 (1995) ("[A] lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization."); Ohio Board of Professional Conduct Opinion 2016-5 (citing to ABA Formal Op. 91-359 to support its conclusion "that communication with a former employee, even one whose prior acts or omissions may be imputed to the corporation, is permissible under Prof.Cond.R. 4.2").

[47] RPC 4.2, Comment [7]. *See also* ABA Formal Op. 91-359 (1991) (RPC 4.2 does not prohibit communication with any former corporate constituent and, thus, a lawyer may communicate directly with an unrepresented former constituent of a corporation without the knowledge or consent of the corporation's lawyer); Ohio Board of Professional Conduct Opinion 2016-5 ("communication with a former employee, even one whose prior acts or omissions may be imputed to the corporation, is permissible under Prof.Cond.R. 4.2").

[48] RPC 4.2, Comment [7], citing to RPC 4.4.

[49] RPC 4.4. *See also* ABA Formal Op. 91-359 (1991) (With respect to any unrepresented former employee or constituent of an organization, the potentially communicating adversary attorney must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent their communications, as a former employee with their former employer's counsel, are protected by the privilege (a privilege not belonging to or for the benefit of the former employee/constituent, but rather the employer/organization)).

[50] *See* Ohio Board of Professional Conduct Opinion 2016-5.

Closing Thoughts

The ethical gray areas previously discussed highlight only a few of the ethical gray areas that CA attorneys face in this unique area of law. Unfortunately, the RPC, ethical opinions, and case law offer little guidance on how to navigate many of these issues, other than universally stating that whether a conflict exists depends on the circumstances of each matter. For many situations, a robust conflict waiver signed by clients before representation should be able to resolve most potential ethical issues. As previously discussed, however, some conflicts are not waivable. For some situations, the advice of Jiminy Cricket from the song "Give a Little Whistle" - "always let your conscious be your guide" - may be useful in helping CA attorneys avoid ethical violations. If a CA attorney is uncertain about the ethical issues and implications involved in certain representations, they should consider seeking an ethical opinion from the state bar (if the bar is willing to provide advisory opinions), seeking an ethical opinion from outside ethics counsel, or declining the representation.