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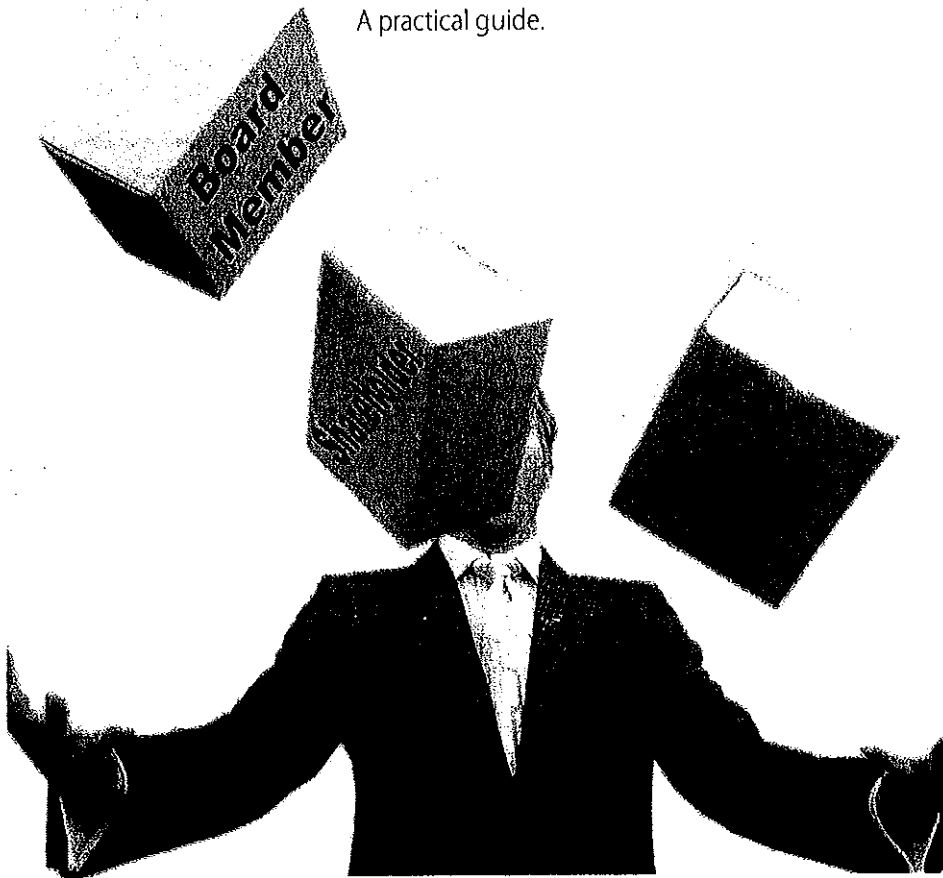
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Conflict of Interest Pitfalls For Co-Op, Condo Counsel

A practical guide.



BY ANDREW P. BRUCKER

ONE MIGHT BELIEVE that the relationship between an attorney and a client is a simple and uncomplicated matter. One client, one attorney, and a mutually satisfying bond of trust. However, in reality, nothing seems to be further from the truth in the world of New York cooperative and condominium housing. Acting as general counsel to a co-op or condo can be a hazardous road on which to venture. The simple relationship is complicated when the attorney takes on different and additional roles.

Adding to the confusion is the fact that effective April 1, 2009, the New York Rules of Professional Conduct (Rules) replaced the Code of Professional Responsibility (Code), which had governed the conduct of attorneys in New York since 1970. Though the Rules retain many of the features of the old Code, and in fact align New York with most of the United States (since the Rules are based upon the model created by the American Bar Association), there are certain differences between the Rules and the old Code.

Nevertheless, the ethical considerations in many

attorney-client relationships in the area of co-ops and condos still remain somewhat hazy, and continue to be a potential minefield for the uninformed.

The Attorney as Board Member

It is not unheard of in New York for a board member of a co-op or condo who happens to be an attorney to "volunteer" to act as counsel to that housing company in order to keep legal fees to a minimum.

Rule 1.7 ("Conflict of Interest") does not specifically prohibit a board member from also acting as the attorney for the housing company. The Rule states that the lawyer should not represent a client if a "reasonable lawyer would conclude that...the representation will involve the lawyer in representing differing interests..."

These words are easy to interpret when there are two opposing sides in a litigation, for obviously, the lawyer should not represent both. But what of the attorney who also acts as a board member? Are there differing interests?

This issue was the subject of a New York City Bar Opinion (NYCBA Eth. Op. 1988-5). In that opinion, the Ethics Committee noted that there was no prohibition

from this dual director/attorney role. However, it did note that there were some real dangers.

Taking advantage of his or her seat on the board in order to procure the appointment as counsel certainly would be improper. Further decisions that would affect the lawyer personally would be problematic, such as, for example, whether to commence a litigation that might result in a large legal fee; or a decision involving the personal liability of the directors. Even the decision to bring in special counsel to assist the board on a particular issue may be problematic. All of these are clear examples of conflicts.

The Ethics Committee of the New York State Bar Association, in its Opinion 589 (1988) noted that "there is no per se rule of professional ethics that prohibits a lawyer for a corporation or other organization from also serving on its board..."; and though this was written prior to the adoption of the Rules, it clearly holds true today. However, the Committee stated that "in carrying out his or her role as counsel, the lawyer must exercise independent professional judgment free of compromising influences that arise in connection with service as a director."

Another problem arises to complicate the director/lawyer role. During discussions with fellow board members, are the statements of (and to) the director/lawyer legal communications or non-legal in nature? Are the lawyer's comments and opinions those of a layman director, or those of an attorney?

A layman director has his obligations to the shareholders, yet an attorney has different obligations and they are to the corporation, and not directly to the shareholders. Further, if the communications are non-legal, discussions between the director/lawyer and his other directors are not privileged communication. The possible loss of confidentiality may have extremely important ramifications in discussions between the director/lawyer and the other directors.

A second (and related) problem that exists is the fact that if the discussions or matters are non-legal in nature, the attorney may be called as a witness. Under normal circumstances, legal communications between the board and its attorney are not available through discovery, and the attorney cannot be made to testify in the matter. However, if the adversary can convince the court that the director/attorney was actually acting (and communicating) on non-legal matters, the communications may be obtained and testimony elicited.

It is clear, as noted by at least one court, that where attorneys serve as company officers, with mixed business-legal responsibility, blurring of lines between protected legal and unprotected non-legal communications is likely.¹

If the director/attorney is permitted to be called as a witness, Rule 3.7 provides that the attorney must withdraw (except in certain limited circumstances). This, however, might have minor consequences compared to the harm that such testimony may cause.

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When Lawyer Is Also a Shareholder

There is no specific provision in the law that requires a board member of a co-op or condo to be a shareholder or unit owner. Therefore, the dual relationship discussed above may be complicated by the added fact that the board member/attorney may also be a shareholder (or unit owner, in a condo). This brings about a whole new set of problems.

Decisions of the board can directly affect all shareholders, as when a special assessment (or a maintenance, or carry charge increase) is instituted, especially if the assessment is for a specific project or purpose. There are clearly three different points of view toward this type of decision.

For example, assume that the elevators in a building are old and clearly need repair, and the director/attorney/shareholder lives on the first floor. There is no doubt that as a shareholder only, he has the right to take the position that he does not want to spend the money (especially since as a first floor resident, he never takes the elevator). As a director, however, he may have a fiduciary duty to vote to undertake such repairs if the shareholders are suffering from the lack of elevator service.²

In addition, if the elevators are adversely affecting the value of the building and thus the resale value of the apartments, it could certainly be argued that he has a duty to repair the elevators, since protecting the value of a corporation's assets and therefore the value of the shares has always been considered an important role of a director. As an attorney, he may not have any opinion at all, since there is no law being broken.³

The Rules also contain language that is helpful in this situation. Rule 1.7 states that a lawyer shall not represent a client "if a reasonable lawyer would conclude that... there is significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interest."

The proposed commentaries to the Rules (which were not written by the authors of the Rules but which are extremely helpful nonetheless) perhaps express it best. According to the commentaries' general principles for Rule 1.7, "the professional judgment of a lawyer should be exercised... solely for the benefit of the client and free of compromising influences and loyalties."

In appreciation of the many tough issues that present themselves in this area, the New York State Bar Association opinion (quoted above) stated that "the potential for compromise of a lawyer's independent professional judgment... has led many commentators to condemn the practice."

Transactional Conflicts

One potential conflict that is very common to the co-op/condo bar occurs when general counsel to a housing company is asked to act as counsel to a party selling (or buying) an apartment in that housing company. In fact, this is undoubtedly the most common potential conflict for those who act as general counsel to housing companies.

As is often the case, those who work with, and for, co-op or condo boards earn the trust of those with whom they work. In fact, a "friendship" often results after many years of working together. Therefore, when directors (or former directors) sell their apartments, it is not uncommon for them to ask the housing company's attorney to act as their attorney in the sales transaction.

Is there a conflict of interest in representing this seller? Very possibly.

As the seller's attorney, one must work zealously to assure that the transaction is consummated. On the other hand, since most co-ops and condos require that the purchaser complete and submit a financial and personal package in order for the board to delve into his or her financial and personal background, the housing company's

general counsel must make sure that the review is thorough and the decision correct. But in the scenario above, the conflicted attorney is representing the seller (and not the purchaser), so is there still a problem? Unfortunately, the answer is probably yes.

As general counsel to the housing company, there are undoubtedly many times when the board reviews an application and must ask counsel for their thoughts or opinions. This is often the case in the author's practice. If this is a possibility, how could the board make this inquiry if the attorney, in working for the seller, is trying to help the transaction close?

Though it seems clear that there is a potential conflict of interest, a reference to Rule 1.7 may be helpful. Since every sale does not require the board's use of its lawyer to review the application (or any other aspect of the sale), it would seem that a written consent by the board would be sufficient. However, it is advisable to include in the consent, a provision that deals with the question of what would happen if there is suddenly the need by the housing company for the attorney to function as its counsel.

If general counsel should be approached by a purchaser, it brings about a different set of ethical problems. As the counsel for the co-op or condo, he may be aware of items that are confidential in nature.

For example, the attorney may know that there is now a serious problem with the boiler, and that a major repair and a hefty capital assessment against the unit owners (or shareholders, in the case of a co-op) to fund a boiler replacement is to take place in the near future. This is information that a purchaser would want to know. However, as counsel to the housing company, such information cannot be passed along. Likewise, the attorney may have information about the purchaser that the board would want to know, such as a prior felony conviction for a violent crime.

Acting as general counsel to a co-op or condo can be a hazardous road on which to venture; the simple relationship is complicated when the attorney takes on different and additional roles.

As the old saying goes, "You can't ride two horses." Therefore, representing a purchaser in a co-op or condo in which the attorney acts as general counsel is a very difficult task, and more than just problematic. Can the conflict be waived? Probably, but the consent signed by both the purchaser and board should outline exactly what role the attorney will play, and what can and cannot be expected of him or her.

Written Waivers

As noted previously, conflicts can often be resolved if they meet the four-prong test of Rule 1.7. In short, the Rules states that notwithstanding the conflict, representation is permitted if

- (i) the lawyer reasonably believes that he can provide both with "competent and diligent representation,"
- (ii) such representation is not prohibited by law,
- (iii) the representation does not involve cross claims in the same matter by one client against the other, and
- (iv) each affected client gives informed consent, confirmed in writing.

However it is important to note that explaining potential conflicts is often best discussed in person, or on the telephone. This being the case, a long letter from the lawyer with a full explanation, which is to be countersigned by the client, can often be awkward.

It is for this reason that the Rules actually set forth a more realistic manner in which the attorney can obtain the

client's written consent to a possible conflict. The Rules state that "confirmed in writing" may be a writing from the lawyer promptly transmitted to the client confirming the client's oral consent.⁴ And this confirmation may be sent electronically by the attorney.⁵

Just Who Does Counsel Represent?

One of the very unique aspects of representing co-ops or condos is the close relationship the attorney has with its shareholders (or its unit owners, in the case of a condo).

It is not uncommon for counsel to personally know dozens of shareholders in the co-op. Some might be past board members, some just friendly souls who communicate with the attorney at every annual meeting, while others may be shareholders who had a problem in the past and with whom the attorney dealt directly. This is somewhat different than acting as general counsel to General Motors, where there is understandably a wall between the corporate counsel and those shareholders.

Due to this relationship, it is not uncommon to hear at a co-op (or condo) annual meeting the comment, "Who do you represent?"

Most commonly, this is heard when counsel stands up and explains (and supports) the position of the board, and it is typically asked by those in attendance who do not agree with what counsel is saying. The answer to the question, though not to the liking of those asking, is quite simple.

If a lawyer is retained by an organization, the entity, and not those who may own shares (or interests) in the housing company, is the attorney's client. In fact, Rule 1.13 specifically states that should there be any doubt, "the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents."

Conclusion

Acting as counsel to a cooperative or a condominium housing company is a rather unique experience. Boards typically consist of volunteers who come from all walks of life, some with real estate experience, but most without; some with business experience, but most without; some have served on boards before and understand the concepts of "business judgment" and fiduciary roles, but most have not.

What boards do seem to have in common is the need to trust a third party to help them through the complexity of New York City multiple dwelling governance. As that third party who is charged with this assignment, any other role undertaken by the counsel to the housing company can only complicate this relationship.

Though there have been many ethical opinions on the issue, and though there is a new set of professional conduct rules to which one may refer, there is no absolute prohibition from wearing numerous hats. However, any attorney who wishes to attempt such multiple representation had best look carefully at the risks and rewards, as well as the current thinking on the topic, and tread lightly before doing so.

1. *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y. 2d 588, 540 N.E. 2d 703, 542 N.Y.S. 2d 508 (1989); and see *Spectrum Systems Int'l Corp. v. Chemical Bank*, 157 A.D. 2d 444, 558 N.Y.S. 2d 486 (1st Dept. 1990).

2. Clearly, the director (and the board) could claim that the so-called "business judgment" protects them from those who disagree with their decision not to repair the elevators.

3. As an attorney, however, he might be required to remind all of the directors of their fiduciary obligations.

4. NEW YORK RULES OF PROF'L CONDUCT R. 1.7 cmt. 20 (Proposed Draft 2009)

5. NEW YORK RULES OF PROF'L CONDUCT R. 1.0 (x) ("writing" includes electronic transmission).