

You have indicated that a Virginia attorney represents a D.C. condominium which has been sued in D.C. Superior Court by a unit owner. The unit owner plaintiff noticed the deposition of the former condominium Board President, who is still a member of the Board of Directors and who will likely be the condominium's principal witness. When preparing for this deposition, the former Board President discloses to the authority information which indicates that he exceeded his authority as a member of the Board and contributed to the injury of which the plaintiff complains. The former Board President is informed that the lawyer represents the condominium and not him. The attorney has reason to suspect that, if the former Board President is advised to seek separate counsel, he will withhold or conceal any information which would further implicate him.

You have asked the Committee to opine as to several issues related to whether the attorney is required ethically to advise the former Board President to seek separate counsel. The appropriate and controlling Disciplinary Rules related to your inquiry are DR:5-105 which dictates that a lawyer must refuse to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer; DR:7-103(A)(2) which directs that a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client; DR:4-101(B) which provides that a lawyer shall not knowingly reveal or use a confidence or secret of his client; and DR:7-102(B)(1) which mandates that a lawyer who receives information which clearly establishes that a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

The Committee responds to your inquiries relative to the facts you have presented as follows:

1. As to whether the attorney must advise the former Board President to seek independent counsel, the Committee believes that DR:7-103(A)(2) is controlling. Thus, under the dictates of that Rule, the Committee opines that the attorney has a duty to advise the former Board President to seek independent counsel.

2. Because the former Board President and condominium have conflicting interests which can neither be reconciled nor cured by consent, the Committee opines that the attorney may not continue to prepare the former Board President for the upcoming deposition.

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3. As to whether the attorney may disclose to the condominium client the information learned from the former Board President during the course of the deposition preparation, the Committee opines that, unless the former Board President was advised that the attorney did not represent him and that any information divulged during the conference would not be treated as confidential, and although no attorney-client relationship may have arisen in other respects, the former Board President's meetings with the attorney created an expectation of confidentiality which must be protected by the attorney. Thus, the Committee opines that, under the dictates of DR:4-101(B), the attorney may not disclose to the condominium the information learned from the former Board President.

4. The Committee is of the view that in order to zealously represent the condominium, it would be necessary for the attorney to use the information learned from the former Board President during the deposition preparation. Since the attorney is prohibited from revealing or using such information, the Committee opines that the attorney's continued representation of the condominium would be compromised. The Committee believes that the attorney cannot both zealously represent the condominium *and* protect the confidentiality afforded the former Board President.

5. Finally, you have inquired whether the attorney must make disclosure, and if so, to whom, if, at the time of the deposition, the former Board President provides conflicting evidence or conceals evidence previously provided to the attorney. Having reached the conclusions in questions one through four above, the Committee finds this question to be moot as it relates to the attorney in question. For information as to the issue in general, however, the committee refers to LE Op. 1347, LE Op. 1367, and LE Op. 1451.

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Legal Ethics Committee Notes. – Rule 1.13 provides guidance for attorneys representing organizations who face this situation.