

ETHICS OPINION 2010-06

Rule: 1.7
Subject: Representation of home owner's associations and membership on board of directors of road district formed by home owner's associations
Summary: Attorney may represent two home owner's associations and newly formed road district because no present conflict of interest exists

Attorney represents a home owner's association and a neighboring home owner's association, which together formed a road district in order to maintain neighborhood roadways. The homeowner's associations unanimously passed the petition for formation. The county auditor called a meeting, at which officers were elected to the board of the road district. Attorney was elected as an officer for the road district.

Rule 1.7(a) provides that an attorney may not represent a client if that representation would involve a concurrent conflict of interest. Such a concurrent conflict of interest exists when (1) "representation of one client will be directly adverse to another client" or when (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."

A present concurrent conflict does not exist on the facts presented, although a conflict could arise in the future. Attorney represented two homeowner's associations, which unanimously created a new legal entity that would provide service to Attorney's clients. As long as the two home owner's associations hold no differences of opinion regarding formation of the road district, and so long as the three entities—the two home owner's associations and the road district—continue to have the same interest, there is no present conflict. Moreover, the facts presented provide no indication that the personal interest of Attorney will materially limit Attorney's representation of any of the clients.

The committee notes that, in the future, a concurrent conflict of interest could arise if any of the three entities presents a position adverse to the others. However, under the facts presented, the potential for a future concurrent conflict of interest does not appear to exist at this time. A future concurrent conflict of interest is addressed in Rule 1.7(b)(4), which permits an attorney to represent a client with a concurrent conflict of interest when "each affected client gives informed consent, confirmed in writing." Attorney is advised that, if Attorney continues to represent the three entities, Attorney should be attentive to instances in which Attorney may need to recuse self from representation of the newly formed road district, or to seek written consent from these clients.

Neil Fulton, Chair
Ethics Committee
State Bar of South Dakota