

## **OPINION 2008-1**

### **SYNOPSIS**

An Attorney who has previously had and continues to have an active practice representing sellers, purchasers, and lenders in real estate transactions should not participate in a volunteer project to research the existence of unidentified corridors and public ways sponsored by a Town, if the Attorney might be put in the position of researching claims on properties with respect to which the Attorney has represented a client or is representing a client. If the Attorney proposes to be involved in the town committee's work, the Attorney should refrain from representing clients engaged in real estate transactions where the research on unidentified corridors may result in future claims of an encumbrance on the client's property.

### **FACTS**

An Attorney with an active real estate practice in a firm which also has an active real estate practice asks whether the Attorney may be a member of a Town Ancient Road Committee. By way of background, towns in Vermont are establishing volunteer or partly paid committees to research the existence of "ancient roads" or "unidentified corridors". The concept of unidentified corridors is an issue that has come to light in the last several years. There may be a number of public rights of way in existence in various towns throughout the State that may or may not be apparent from a physical inspection. Discovery of the location of these public rights of way in the land records is difficult because of the nature of the records regarding roads and the peculiar descriptions used in the 18<sup>th</sup> and 19<sup>th</sup> centuries to identify the location of the roads. The discovery of certain of these rights of way has lead to protracted litigation over the existence, scope and location of the public ways. The Legislature addressed some of the issues related to the finding and preservation of these public ways in Act No. 178 of 2005. At this time, those towns interested in preserving the unidentified corridors under the terms of the statute have embarked on a research project to identify and locate the records pertaining to the unidentified corridors in the town. The Attorney wishes to participate in this project for a particular town. The Attorney's skills are relevant to the project and the Attorney's knowledge of real estate law and title examination techniques will be a valuable contribution to the Town's project.

### **DISCUSSION**

Attorneys have a history of participating in public and governmental boards and volunteer activities related to legal topics. That participation may involve assisting in the capacity of an attorney or that participation may not involve the particular skills and talents specific to the practice of law at all. Where the participation involves the actual or potential practice of law, the opportunity to be involved in community and local government activities is tempered by the equally important principle that an attorney acting in any capacity public or private, advocate, counselor or volunteer is bound by the Rules of Professional Conduct and must remain in compliance with the rules in all aspects.

This particular issue presents an interesting application of the conflict of interest provisions of the Professional Conduct Rules including Rule 1.7 and Rule 1.9. The Attorney has an active real estate practice representing sellers and buyers of land clients engaged in real estate transactions in the town where there Attorney wishes to volunteer, representing lenders providing financing to persons purchasing or owning real estate in that town, and writing title insurance for the Attorney's clients insuring the status of the title to the property in that town. The Attorney has already represented a

number of persons selling or acquiring property in that town, as well as the lenders financing the transactions involving land in this town.

The skills acquired in a real estate practice such as land records research, understanding and interpreting documents, knowledge of the history and past practices in real estate transactions are all applicable to the volunteer effort to locate historical public ways through the use of the town records. Although the research process does not necessarily constitute the practice of law or representing a particular client; it is very difficult to separate just the research part of the project from the parts of the project that might constitute the practice of law. The scope of the Attorney's participation in the process determines the scope of the Attorney's professional obligation. Although the Attorney may appear to be engaged only in research, the very nature of the project involves the application of the skills specific to the practice of law. The project does not involve a specific engagement by the Town to provide legal advice, however the very nature of determining the scope of rights of the owners requires rendering advice of a legal nature to the Town or the Committee. The determination of the validity of the claimed rights of the public in certain ways requires the application of knowledge of statutes and and common law to develop a legal conclusion. This application of legal knowledge creates a potential for conflicts of interest in any situation where the Attorney has previously represented a client in a real estate transaction involving the land over which a public way may pass, or is presently representing a client in a transaction involving land that may become subject to a public way in the future which the client does not deem to be a benefit to the client.<sup>1</sup>

Where the Attorney actually gives advice of a legal nature to the Town or becomes obligated to do so, there are three potential conflicts that must be addressed if the Attorney continues to practice in the area of real estate transactions and participates as a researcher in the Towns effort to locate the records pertaining to the unidentified corridors. The work on the town committee may affect prior clients, present clients, and future clients.

Prior Clients. Rule 1.9<sup>2</sup> describes the circumstances under which an attorney may undertake the representation of a new client with an interest adverse to a prior client. Rule 1.9 permits the sequential representation of persons with opposing interests only after each client is notified of the proposed representation, there is a fair and complete disclosure of the potential consequences of the sequential representation, and each party then consents. In the present fact situation, the interest of the prior clients arises when the Attorney looks again at the title to a property now or formerly owned by the client for which the Attorney certified the title. By investigating the locations of previously

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1 Attorneys who are also agents for title insurance companies must also be aware of the terms of the agency agreement which may limit activities that may be contrary to the title insurance company's interests.

2 . **Rule 1.9. Conflict of Interest: Former Client**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation.

unidentified public ways, the Attorney may be put in the position of informing a client that there is a newly discovered potential encumbrance on the client's property, most likely not disclosed at the time of the original search. Landowners may not find the existence of a new public way to be a benefit to them, and the Attorney's efforts to locate the unidentified corridors may result in the former client being in the position of opposing the efforts by the Town to locate an unidentified corridor on the client's property. The existence of an ancient road may be determined to be a significant encumbrance on the title with significant financial and legal consequences for the client. Thus, before undertaking any work on behalf of the town committee that might affect a former client, the Attorney and the firm with which the attorney works must identify all the former clients with property in the specific town and notify each client with a proper disclosure of the nature of the Attorney's new work on behalf of the Town committee. To the extent each former client consents after the benefit of the notice and the disclosure, the Attorney may undertake work for the Town committee that might affect that client's property.

Present Clients. To the extent the Attorney continues to advise clients about real estate transactions in the town, the simultaneous work on the town committee and the representation of a client involved in a real estate transaction in that town would result in a conflict of interest under Rule 1.7.<sup>3</sup> The Attorney would be in the position of protecting the town's interest in a potential unidentified corridor, while trying to advise a client about the possible arguments against the town's positions regarding the location of the unidentified corridor. It would not be impossible for the Attorney to be put in the position where the client would ask how best to challenge the town's assertion of the location of a road on the client's property. This conflict will impose a limit on the Attorney and the firm, and once significant work for the Town committee is undertaken it would not be possible for the Attorney to represent clients in real estate transactions in the areas where the Town is asserting unidentified corridors or possibly in the entire town.

Future Clients. To the extent the Attorney continues to practice in a firm that concentrates in real estate transactions, the firm would be subject to the same conflict rules that would apply to the Attorney. The firm would be obligated to make the appropriate determination that the Attorney's continued work could not result in a conflict with the new client's interests. If that determination is made, then the firm would have to make the appropriate disclosures and obtain the consent of both the new potential client and the town. As with a present client, the Attorney and the firm with which the

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3     • **Rule 1.7. Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Attorney works may not represent any clients with interests that are or may be opposed to the Town's efforts to located the unidentified corridors without notice, disclosure and consent of both parties.

Working on the committee and continuing to represent clients creates potential conflicts of interest for the attorney because of the nature of the committee's work and the Attorney's representation of clients engaged in real estate transactions. The most cautious approach would be to refrain from being involved in the committee's work at all. If, however, the attorney chooses to work with the committee, he Attorney should refrain from researching claims involving land which was or is the subject of a transaction in which the Attorney represented a client.