

Should Associations Allow Members to Retain Their Legal Counsel?

Q: Members of our association want to use the association's legal counsel because they recognize she is experienced and knowledgeable. Should we let them?

A: Associations often have long-standing legal counsel — an individual or an outside law firm — that have developed valuable expertise in the legal matters most germane to the association's focus and activities. Access to the expertise and advice of the association's counsel may be one of the key benefits of membership. The resulting interaction between association members and the association's legal counsel, while generally beneficial, can raise a number of questions regarding the nature and scope of the attorney-client relationship, and regarding the circumstances, if any, under which an association should consent to allow its counsel to be retained individually by a member.

As a general rule, legal counsel for the association represents the association and not its individual members. The client is the association as a legal entity, even though it necessarily acts through its officers, directors and members. Thus, the mere status of being a member of an association does not create an attorney-client relationship between the member and the association's counsel. A clear manifestation and affirmation of a direct attorney-client relationship needs to be made before an association's counsel can be deemed to act on behalf of an individual member as well.

The corollary to the general rule regarding representation is that the attorney-client privilege belongs to the association and not its individual members. In that regard, the privilege covers communications between the association's counsel and the "control group" of the association, which is comprised of the association's management team(s) that have the authority to act upon the advice of counsel on behalf of the asso-

ciation. Those limitations on the scope of the privilege can be significant because the association's counsel is not prohibited from representing the association in a matter adverse to a member. Nor does the association's counsel have a duty to protect or represent one member of the association over another. Accordingly, association members need to bear this in mind when choosing what to disclose (and not to disclose) to counsel for the association. Specifically, it should not be assumed that a member's individual disclosures made to an association's counsel are protected by the attorney-client privilege. In order for the privilege to attach, a direct and separate attorney-client relationship needs to be established through some affirmative action and agreement between the association's counsel and the individual member.

There are exceptions, however. Specifically, an association's lawyer may be deemed to have entered into an attorney-client relationship with a member, even in the absence of any formal agreement or engagement letter, where the member has submitted confidential information to the lawyer with the reasonable belief and expectation that the lawyer was acting as the member's counsel. Most important is whether the member of the association disclosed actual confidential information to the association's lawyer, and the surrounding circumstances and expectations. In that regard, the member's belief must be "minimally reasonable," which is often assessed based on the following factors: (a) whether the lawyer has affirmatively assumed a duty of representation to the member; (b) whether the member already had separate counsel; (c) whether the lawyer had previously represented the member; and (d) whether the member relied on the lawyer's advice in any specific manner. Also relevant is the overall size of the association. The larger the membership, the less likely it is that an attorney-client relationship will be inferred between the

This Law Review was written by Timothy A. French and edited by Jed Mandel, founding members of Chicago Law Partners LLC. CLP serves as the Association Forum's general counsel.



association's counsel and an individual member.

Associations therefore should be very careful in deciding whether to allow their counsel to represent individual members. Consent to such individual representation is more appropriate where the individual member seeks legal advice with respect to matters in which the association as a whole is not directly involved, thereby reducing the risks of any potential conflicts of interest between the association and the member. The association and the member also should agree in writing in advance that if any conflict of interest develops through unanticipated events, the association's counsel may withdraw from representing the member while still continuing to represent the association.

Finally, the association, and its legal counsel, should be sensitive to the perception that its legal counsel is no longer providing neutral, independent advice when that lawyer is representing a member.

In sum, the association's counsel does not as a general rule represent the individual members of the association, and individual members' communications with or disclosures to an association's counsel are not generally covered by the attorney-client privilege, unless the member is acting as a part of the association's "control group" when making the disclosure. Accordingly, and while there are certainly important exceptions to the rule, association members need to bear in mind that their association's lawyer is just that. Similarly, the association needs to be judicious in assessing when, if ever, to consent to having its counsel also act as counsel for an individual member. ▣

The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.