

## Hiring and Working with an Attorney

### When to Hire an Attorney

It may be tempting to wait on consulting an attorney until your land trust is served with a lawsuit or until matters have deteriorated to such an extent that a lawsuit seems inevitable. However, waiting until late in the process will leave your attorney scrambling at the last minute to learn the details of the case and research the relevant case law. Also, having an attorney's advice earlier in the process may help your land trust avoid simple pitfalls—such as failure to give adequate notice, failure to gather necessary evidence and documentation or failure to note critical conflicts of interest—that may become serious obstacles to success later on.

Your land trust should consult an attorney as early as possible and before a dispute gets out of hand. Legal action can prevent some damaging conduct—you don't always have to wait for it to evolve into a major problem. For example, if bulldozers are rolling, an attorney can assist you in obtaining a restraining order or an *injunction* to halt them, but it's better for all parties involved if you can stop the proceedings before bulldozers are dispatched. When not facing an emergency, your land trust should seek legal advice when you have:

- Documentation of a violation
- A preliminary assessment of which easement provisions have been violated
- Support from your board, if necessary

- If you receive any notice or suggestion of a legal action against the land trust

If the situation is complicated—for example, a violation is not clear or emotions are running high—obtain legal advice earlier. A land trust may make critical errors in **litigation** strategy, **risk** management and early dispute resolution if it does not have a competent attorney to represent it. It is worth the money to establish a relationship with a competent litigator before you face legal challenges so you have a trusted legal advisor with no conflicts of interest to turn to when a challenge emerges. You should *not* use the same attorney who drafted the **conservation easement** because it is impossible for that attorney to be dispassionate about the challenge and easement interpretation. There also may be a conflict in using the same counsel who drafted the easement (or other legal document) if that particular provision becomes the subject of the dispute. Attorneys who are land trust board members should also not represent the land trust nor give legal advice, but attorneys on the board can provide volunteer support to the outside legal team, which can greatly reduce the costs of dispute resolution.

## Finding the Right Attorney

There is an attorney for every kind of legal service. Lawyers can draft documents, negotiate disputes, structure transactions, give general advice, assist with **mediation** and represent you in court. The trick is finding an attorney with the right combination of expertise needed for you to prevail.

Above all, there are three critical qualities you must look for when hiring an attorney. He or she must:

1. Not represent others having interests contrary to those of the land trust without your written consent;
2. Provide expert advice based on relevant experience and training with appropriate **competency** in the specific area of law in question; and

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3. Refer your land trust to an expert, as necessary. If the attorney does not have expertise in a certain area (such as tax or criminal law), it is generally better for the attorney to refer you to a competent attorney within that area of specialization.

Ideally you want a lawyer who is both an expert in the matter at hand and familiar with land trusts and the unique array of law inherent in conservation. If you are unable to find a lawyer with all those skills—and there are not many litigators who also understand conservation—your best course is to hire a lawyer with the expertise you require and educate him or her about conservation. Be very clear about your budget realities and mission priorities. Be sure to ask for a significant discount as a tax-exempt charity.

Land trusts often deal with real estate and transactional attorneys. These attorneys have expertise in laws governing the purchase and sale of real estate, such as homes, businesses, farms, woodlands and conservation easements. However, if you are unsure of your current legal situation, you may want to meet with a general practice attorney. General practice attorneys are similar to general practice doctors; they will help you if possible, and if they cannot they will refer you to a specialist. The following is a more detailed list of the types of attorneys who could be helpful to your land trust depending on the situation. Note that many lawyers have more than one specialty or may be able to call on partners or associates when specialized skills are necessary.

#### **REAL ESTATE LAWYER**

A real estate lawyer manages transactions and disputes related to the purchase and sale of buildings and property, boundary line disputes, zoning and other land use regulations, mortgages, leases, financing of a subdivision and title insurance.

#### **TRANSACTIONAL LAWYER OR BUSINESS LAWYER**

A transactional attorney is an expert in **contract** negotiation, drafting and administration of business documents, such as employment contracts, partnership agreements, acquisitions and debt collection.

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#### **LITIGATOR**

A litigator or trial lawyer represents clients in trials and appeals by preparing and presenting the arguments and evidence, examining witnesses and arguing in court. The litigator's objective is to persuade the judge or jury that your view of the case is correct. The litigator should also be prepared to advise you on the strengths and weaknesses of your case and to assist you if a negotiated or mediated settlement will be more to your benefit than a drawn-out and expensive trial.

#### **TAX LAWYER**

A tax lawyer may help your land trust with its nonprofit status, assist with **procedures** for accepting donations and address other state and federal tax issues.

#### **ENVIRONMENTAL LAWYER**

An environmental lawyer may be necessary if you have a dispute involving endangered species, development of a wetland area, pollution or other **brown-field** issues.

#### **CRIMINAL LAWYER**

You may need a criminal lawyer if something illegal occurs on your land trust property, such as dumping or logging, trespass, drug use or theft. Consulting a criminal lawyer in such instances may help your land trust better understand the criminal system and your available options. The case may involve a city or state prosecutor to determine criminal liability and punishment, such as jail or fines.

#### **PROBATE LAWYER**

A probate lawyer assists clients in estate planning and proving ("probating") and implementing a **will** or trust. If you or any other interested party need to go to court for the enforcement of a will or trust, a probate lawyer can assist in determining how the decedent's assets will be distributed according to his or her wishes.

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#### **GENERAL PRACTICE**

A general practitioner practices a broad range of legal disciplines, such as business law, real estate law, wills, family law and other fields. A general practitioner might be the best first stop for a land trust without a staff attorney. The general practitioner can advise you about when you need a specialist attorney.

#### **MEDIATOR**

A mediator may or may not be a lawyer. Mediators act as intermediaries between two or more disputants. A mediator assists the parties to reach an agreement if possible. Mediators may not be aware of the details of your specific dispute or the specific laws at issue, so you may need to educate them. Your lawyer may recommend that you try to mediate a dispute and may advise you in locating an appropriate mediator and assist you in presenting your issues to the mediator. Many conservation easements contain alternate dispute resolution language where mediation is the first remedy of choice if there is a dispute.

#### **WHERE TO FIND AN ATTORNEY**

One of the best ways to find a lawyer is by asking trusted friends, family or professional contacts to identify lawyers with whom they have worked successfully in the past. In some areas, a local bar association can refer you to an attorney who has a reputation for taking similar cases. You can usually find these local bar associations by contacting the clerk at your local courthouse or by contacting your state bar association. The *Yellow Pages* and the *Martindale-Hubbell Law Directory*, found in many public libraries, are good print resources. The Internet is another great resource for finding an attorney. The following is a list of online attorney locator resources:

- Land Trust Alliance attorney locator [<http://clearinghouse.lta.org/attorneys>]
- Lawyers.com [[www.lawyers.com](http://www.lawyers.com)]
- FindLaw [[www.lawyers.findlaw.com](http://www.lawyers.findlaw.com)]
- Martindale.com [[www.martindale.com](http://www.martindale.com)]

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- Avvo [[www.avvo.com](http://www.avvo.com)]
- AttorneyPages [[www.attorneypages.com](http://www.attorneypages.com)]

### THE PERILS OF THE BOARD MEMBER ATTORNEY

Many land trusts have one or more attorneys on their board, possibly with the thought that because the land trust cannot afford an attorney the board member can provide free advice. While this perspective is understandable, especially for new or small land trusts, there are six reasons why this practice can cause problems.

1. As a board member, the lawyer is not acting as the land trust's lawyer but as a leader of the organization with a duty of loyalty to the land trust. Therefore, the same professional obligations that a lawyer has when advising a client *do not apply*. For example, a lawyer who is advising a client has ethical duties under the rules passed by the state bar association that dictate the standards of practice in that state—these duties involve zealous representation and competence. As a board member, however, the lawyer has a duty of loyalty, rather than zealous representation. The board member's duty of loyalty to the land trust may give rise to obligations different from those of the lawyer hired to represent the land trust and protect its legal interests. For example, an attorney will not be able to represent the land trust at trial if a board decision in which he or she participated in as a board member is subject to litigation. Lawyer codes of ethics do not permit an attorney to represent the entity in litigation in such a situation.
2. Because of the loyalty between the land trust and the board member, the land trust will not be able to hold the lawyer board member accountable for his or her actions in a malpractice suit or a state bar association **complaint**, nor can the board fire the lawyer board member if the advice proves bad or if personalities interfere with professional actions.
3. Lawyer board members may not be experts in the specific area that the matter requires. If they do have the expertise, then they can

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best serve in a supporting role by acting as the liaison with the paid outside attorney, by helping the board collect records and by identifying issues to discuss with the outside attorney.

4. The lawyer board member is likely to have strong personal opinions about the matter that may possibly conflict with the best, most objective professional advice in the matter, and he or she may be unable to separate emotions from independent advice. The remainder of the board may not be confident that the lawyer board member is giving dispassionate advice or, conversely, may rely on that advice without sufficient scrutiny.
5. Using a lawyer board member may nullify the protections of the attorney-client privilege because the lawyer and the client are not separate. Nullification depends on the capacity in which the lawyer is asked to give advice. All confidential communications made to a client by a lawyer are protected if that lawyer has acted in a legal rather than a business (or, in this case, board member) capacity. It can be very difficult to differentiate when the same person is acting in both capacities. You don't want to be forced to turn over confidential conversations and memos to the opposing party.
6. Other conflicts of interest can arise regarding decisions on payments to either the law firm or the lawyer, even for out-of-pocket expenses, on contracts or if individual board members are named in a lawsuit, including the lawyer board member. For example, a board may have erred and that error may contribute to the lawsuit. The lawyer board member may have inadvertently made decisions based on a conflict of interest or a personal bias that could be construed as ill intent. As a party to those decisions, the lawyer board member is not in a position to admit the error or to assist the board to rectify it. As an interested party, this board member cannot be objective, nor can the board member render any further advice because prior actions are now the subject of a dispute. At a minimum, the other board members may lack confidence in the lawyer board member's ability to separate personal interests from the best interests of the land trust.

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### *Interviewing Attorneys*

If, after careful consideration of all the risks and benefits, your land trust decides to use a board member as pro bono legal counsel, then your land trust board must take appropriate steps to preserve attorney-client privilege and manage conflicts of interest. You might review these ideas with your outside counsel:

1. Differentiate between legal advice and board-related duties, preferably through separate communications
2. Document the lines between actions and opinions as a board member and the legal advice provided as land trust attorney
3. Render legal advice in writing on the law firm's letterhead
4. Designate one staff person or the board chair as the sole requestor of legal opinions
5. Label documents to reflect confidentiality, identify privileged material and specify that the attorney is acting as the land trust attorney, not as a board member
6. Follow written procedures to protect confidentiality and privilege of legal communications
7. Follow written document retention policies and procedures

Be sure to identify and document the capacity in which the lawyer gives advice. As the lawyer's client, the land trust should clearly document in the minutes and in all communications between itself and the lawyer board member that the communications are privileged. Be certain that the record clearly indicates that the lawyer acted only in a legal professional capacity and not in a business capacity (i.e., as a board member). *The best practice, however, is to avoid using attorney board members for legal advice and to secure outside counsel.*

## Interviewing Attorneys

It is prudent to interview one or more attorneys before hiring one. This helps avoid inadvertent errors. Your attorney is in the best position to respond to all of the deadlines in a timely manner. If your attorney misses a statute of



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limitations deadline or fails to include a specific claim in the initial complaint or a specific defense in the **answer** to a complaint, you may not be allowed to pursue that claim or make that defense later with a replacement attorney. In addition, changing representation in the middle of a case creates extra costs because the new attorney will need to take time to review the case, conduct his or her own research and interview any staff or witnesses who have information. Finally, shopping for a new attorney when you already have an attorney can create conflict and may lead to your attorney withdrawing representation. Thus, it is wise to make sure you have the right representation from the very beginning.

When interviewing an attorney, you should also come to the meeting prepared with a list of questions. Below is a list of questions to help guide your search for a lawyer or law firm in case of litigation. Answers to some of these questions may be available on the attorney's website. For other questions, you will need to ask the attorney in person.

- Are you admitted to practice law in the appropriate state for the matter?
- What is the **statute of limitations** for this type of case?
- Are you a partner or associate in a law firm? How many partners and associates does the firm have? What are the firm's areas of specialization?
- Please explain your law practice in general. What types of cases do you typically handle?
- Do you specialize in a particular area of practice? If so, what area(s)?
- How many conservation easement transactions have you participated in and what was your role? (For example: Have you provided a **title** opinion? Reviewed an easement? Drafted and negotiated an easement from beginning to closing?)
- Do you know how conservation easements are valued in an appraisal?
- Have you ever represented a land trust?
- Have you represented landowners in donations of land, in partial interests in land or in **qualified conservation contributions**?

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- Have you engaged in both litigation and mediation?
- In what capacities and how often?
- Are you familiar with §170(h) of the Internal Revenue Code and the accompanying *Treasury Regulations*?

If the attorney answers these preliminary questions to your satisfaction, provide details of your situation and pursue these more specific matters:

- If your land trust is in an area where public agencies fund the purchase of conservation easements, then questions specifically related to the purchase of development rights (PDR) might be appropriate, such as: Are you familiar with the PDR program administered by the local or state agency?
- How many cases like ours have you handled? What was the result? What were the similarities and differences? How long did the case last and do you expect our case to last the same amount of time?
- How likely is it that the possible violation will end up in court?
- Who will do the work, you or another person? Who will negotiate? Who will litigate the case if it goes to trial?
- How will you work with our land trust? How do you see your role in negotiations? How will you communicate with the landowner's attorney?
- What assistants do you use (associates, paralegals, investigators, administrative assistants)? What are their roles?
- Whom will you consult if you are uncertain about certain aspects of the case? Will there be additional fees for such consultation?
- What if we are not happy with a settlement that you ask us to agree to?
- How will you keep us updated on your communication with the other party and the progress of the case?
- How long do you expect it will take to resolve this matter?
- How do we contact you, and what do we do if you are not available? Who else should we talk to about questions related to our case?

## PAYING FOR LEGAL SERVICES

**Retainer:** A retainer is a small advance payment to ensure representation for legal services. A retainer is typically used for an organization that needs frequent legal advice.

**Contingent fee:** A contingent fee is an arrangement where the lawyer gets paid only if he or she is successful in court or favorably settles out of court. The payment is usually a percentage of what the client is awarded in court (a percentage of the recovery). Court costs and out-of-pocket expenses are usually the client's responsibility, regardless of recovery. Contingent fees work best when the land trust is a **plaintiff** because **defendants** don't usually get recovery, even when successful.

**Specific job:** An attorney may be able to give an approximation of the price based on the specific job being done. For example, for a purchase and sale agreement for a specific property or a title examination, the attorney may be able to give an approximate price in advance.

**Hourly:** Fees can also be a fixed dollar amount for each hour worked. The lawyer should estimate the number of hours expected to complete the case.

**Pro bono:** Services that a lawyer or law firm provides free of charge or at a reduced fee, as a matter of professional or community service.

When considering payment for legal services, keep in mind that a lawyer cannot guarantee that the case will be won. Much of an attorney's work is done when the client is not present (for example, legal drafting, negotiations and trial preparation). Also, the hourly fees paid to attorneys are not only for their work but also for office overhead, such as office space and administrative costs.

Other expense-related issues and questions include:

- Is there an absolute maximum fee?
- What if there are unexpected expenses?
- How will you keep us updated about the cost?
- What do we have to pay if we lose the case?
- What about payments to experts? Appraisers?
- What do we have to pay up front?
- What other expenses can our land trust be expected to pay (for example, copies, fax transmissions, long distance calls, travel expenses)? How are those calculated?
- Do you provide pro bono or discounted services for nonprofit organizations?

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### *What to Expect*

- What is your office policy on returning phone calls? How much time should we wait before expecting a call back?
- How do you charge your clients? A **retainer**, contingent fee, specific job or hourly rate?

While it may not be necessary to ask all of these questions at once, knowing the answers to these questions early in the lawyer's representation can ensure that the representation runs smoothly. You do not want to be surprised with high bills for services that could easily have been carried out by support staff with a lower pay grade, or with outdated news of the status of your case because the attorney did not share information with you, or with news that the statute of limitations passed and your case was not filed in time.

## What to Expect

### **THE ORIGINAL INTERVIEW**

Your first impression of an attorney will likely be formed by your initial visit to the office for an interview. In addition to your prepared questions, consider the courtesy of the lawyer and staff at the firm. If you feel your time is unimportant to the lawyer, it may be an indication of how the office will respect your needs later.

### **THE SECOND VISIT AS A CLIENT**

After interviewing several candidates and deciding on a lawyer who best fits your needs, arrange an appointment for a second visit. During the second visit, you should develop a contract or engagement letter with the attorney and explain your dispute in detail. Bring relevant documentation and a prepared summary of the dispute, as well as any questions you may have. After the lawyer knows the specifics of your case, consider asking:

- What are the weaknesses of our position? What are our strengths?
- What alternatives do we have in approaching a resolution with the landowner?

### THE CONTRACT OR WRITTEN FEE AGREEMENT

This agreement (sometimes known as an engagement letter) will formalize your relationship and determine the duties for both the attorney and your land trust. Each party should sign the agreement and keep a copy for future reference. As a matter of normal operations and good ethical practice, law firms prepare these agreements for their clients, but they can be negotiated.

Each contract or fee agreement should contain the following:

- **Scope of work.** Decide the actual services you authorize your attorney to perform.
- **Duties of attorney and client.** Include the responsibilities you will assume and the expectations you have for your attorney. For example, duties of the attorney may include informing you of progress on a weekly basis and responding to communication within 48 hours. Be sure you are comfortable with your assumed responsibilities. For example, your responsibilities will likely include paying bills within 30 to 60 days of receipt, providing documents and attending depositions as necessary. As the client, the land trust should set the tone of the case.
- **Billing rates.** Review other attorneys' rates in your area to determine an average hourly rate. Attorneys' rates depend on the attorney's experience, the location of the firm and the nature of the practice. In general, the larger the firm and the larger the city, the higher the fees. In 2012, hourly rates for partners in a medium to mega-sized urban firm typically range from \$300 to more than \$1,000 per hour for a partner and from \$150 to \$800 per hour for associates. Rates in smaller communities and smaller firms may range from \$200 to \$500 per hour.
- **Costs and expenses.** Determine how additional costs, such as the filing fees, court costs, photocopies and shipping, will be handled (as a separate, itemized charge or as part of the lump fee). You should also agree on how to calculate those charges.
- **Statements.** Establish when and how you will receive bills, the time for payment and what to do if you cannot pay a particular statement in full.
- **Discharge and withdrawal.** Establish whether you want to include an opt-out clause in the contract and determine under what conditions you can withdraw from the contract.
- **Termination or conclusion.** What happens after your issue is resolved? How do you know when it is resolved?
- **Deposit.** Establish whether you are required to place a deposit on the attorney's services and, if so, how much.
- **Insurance.** If insurance is paying for your fees, arrange those terms in advance with the attorney and the insurance company.
- **Commencement of services.** Indicate the specific date your attorney will begin work and make sure that the preliminary consultations are not part of the fees.
- **Contact information.** Make sure you have the contact information for your attorney and any assistants. Be sure you provide your attorney with the land trust's contact information, including the point person, the media contact and an additional backup person.

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### *Practical Pointers on Managing Attorneys*

- If there are available alternatives, what would a court think of each alternative?
- Is our plan of action measured proportional and appropriate?
- Are there other legal options available in this situation?
- What are the possible remedies available?
- What are our chances of success?

## Practical Pointers on Managing Attorneys

Remember that the attorney is working for you. You are in charge. The attorney provides your land trust advice and representation, but you make the decisions about what is best for your land trust. Your land trust is responsible for managing the attorney, asking the right questions, insisting on the highest ethical standards and setting the tone for the dispute resolution. For the most productive relationship with your attorney, you should:

- **Be honest.** Your attorney cannot operate without all of the relevant information. Be honest about your land trust's priorities and expectations for the resolution of the dispute.
- **Be organized.** Use your attorney's time efficiently. Come to meetings prepared with questions and any documents that may be relevant to your dispute, which will save you time and money. Keep an organized file of court documents and letters and e-mails from your attorney. Also, keep a file of your expenses, such as the lawyer's bills, court costs, expert fees and records of payments. If you feel you have been overcharged, let the lawyer know before you pay. Request copies of every document. Keep the file well organized to save time and money.
- **Stay involved and communicate effectively.** Have your attorney give you the positive and negative aspects of your case and keep you informed of progress. Clients who are fully informed may avoid huge problems by solving minor ones early on. You can stay informed by taking notes at meetings and during phone calls, by

reading contracts and agreements thoroughly and by asking questions as they arise. A common complaint about attorneys is that they fail to return calls or respond to e-mails promptly. Make it clear at the beginning of any engagement that you expect responses within 48 hours. If you have contacted your attorney and don't hear back in a couple of days, request that an answer be provided by a specific time. Do not wait for a crisis. If your attorney continues to be nonresponsive, find a new one. Be sure to schedule regular updates, especially during the active phases of the work. Track deadlines and make sure your attorneys are paying attention.

### Privileged Information

The attorney-client privilege is an evidentiary rule that protects both attorneys and their clients from being compelled to disclose confidential communications between them *made for the purpose of furnishing or obtaining legal advice or assistance*. The privilege is designed to foster frank, open and uninhibited discourse between attorney and client so that the client's legal needs are addressed competently by a fully prepared attorney who is cognizant of all the relevant information the client can provide. The attorney-client privilege may be raised during any type of legal proceeding—civil, criminal or administrative—and at any time during those proceedings—pretrial, during trial or posttrial. States have different rules, but privileges usually include communications between attorney and client, doctor and patient and husband and wife.

Not all components of the attorney-client relationship are protected by or encompassed within the attorney-client privilege. For example, the existence of the attorney-client relationship and the length of the relationship are not privileged pieces of information. Information such as the date of the communication and the identity of persons copied on correspondence are likewise not privileged. Participants in a meeting with an attorney, the length of a consultation and the documents relating to those meetings (for example, calendars or appointment books) are not necessarily protected from compelled disclosure. As for the fee

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arrangement between an attorney and a client, these documents are typically discoverable, except where such **discovery** would produce confidential communications with the client. In fact, the general nature of the services performed by the lawyer, including the terms and conditions of the retention, is generally discoverable or able to be made known to the opposing side. Also, a client cannot protect certain facts from disclosure simply by communicating them to his or her lawyer. If information may be gathered from another source besides the privileged communication, then the underlying information itself is not privileged. In other words, the attorney-client privilege protects communications made to obtain legal advice; it does not protect the information communicated. Clients and attorneys alike must bear this important fact in mind: Merely conveying something to an attorney will not prevent the underlying facts from compelled disclosure if they can be discovered from a nonprivileged source. The opposing party has the right to request access to all of your records and—unless you can prove that those records are privileged—will usually get them.

Because the attorney-client privilege often prevents disclosure of information that would be relevant to a legal proceeding, courts are cautious when examining **objections** based on the privilege. Most courts generally require that certain elements be demonstrated before finding that the privilege applies. Although the elements vary by state, courts often follow a five-part test to determine if the attorney-client privilege applies:

1. The person asserting the privilege must be a client or someone attempting to establish a relationship as a client
2. The person with whom the client communicated must be an attorney and must be acting in the capacity of an attorney at the time of the communication
3. The communication must be *exclusively* between the attorney and client
4. The communication must be for the purpose of securing a legal opinion, legal services or assistance in some legal proceeding and not for the purpose of committing a crime or fraud
5. The privilege may only be claimed or waived by the client



Clients may waive attorney-client privilege expressly by their words or implicitly by their conduct, but a court will only find that the privilege has been waived if there is a clear indication that the client did not take steps to keep the communications confidential. Privileges can be implicitly waived, meaning if you tell someone else the contents of a private discussion with your attorney, you are deemed to have waived privilege and that communication can be shared with the opposing party. An attorney's or a client's inadvertent disclosure of confidential information to a third party will not normally suffice to constitute **waiver**. If a client decides against waiving the privilege, the attorney may then assert the privilege on behalf of the client to shield both the client and the attorney from having to divulge confidential information shared during their relationship.

For all of its policy considerations and justifications, the attorney-client privilege has a very real practical consequence: The attorney may neither be compelled to nor may he or she voluntarily disclose matters conveyed in confidence to him or her by the client for the purpose of seeking legal counsel. Likewise, the client may not be compelled to testify regarding matters communicated to the lawyer for the purpose of seeking legal counsel.

## Conflicting Legal Advice

It is not uncommon to receive conflicting legal advice because attorneys interpret the law differently depending on their perspectives and the facts and circumstances of the case. When you are faced with different opinions, ask questions! Ask enough questions to illuminate the rationale behind and the distinctions between the apparently conflicting aspects of the advice received so that you can fully assess each side's merits. This section provides guidance to enable you to make the best decision in light of your responsibilities to the land trust.

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#### RESPONDING TO CONFLICTING LEGAL ADVICE

The first step in resolving conflicting legal advice is to communicate with each attorney who provided an opinion. Ask questions and evaluate how they reached their legal conclusions. Consider asking your attorneys the following:

- **On what facts is your opinion based?** It is important for the attorney to have all the facts in order to arrive at an educated opinion. One potential source of conflicting advice can be traced to incorrect or absent information about the facts of the case. Provide your attorney with a complete and detailed summary of the situation so he or she can appropriately offer guidance. Include all known parties involved, all relevant property conditions, all current and proposed uses of the property, all known conflicts and any other potentially relevant facts. It is important to consider surrounding facts beyond the situation itself, including the legislative environment, community attitudes, political influences, impact on private property rights and economic costs. Evaluate the impact each action will have on your responsibility as a land trust to uphold public confidence and to support conservation efforts. Discuss with your attorney how these factors might alter the legal opinion provided.
- **What assumptions have you made about the issue?** Similar to the basic facts of your situation, any assumptions should be explicitly communicated. Everyone makes assumptions, whether consciously or not; having a shared understanding is vital to assessing the legal and ethical standards in play. For example, you may assume your attorney is aware that the land trust wants to sue the subsequent owner but has absolutely no desire to disturb the original donor, while in reality the attorney believes he can add the original donor to the suit and have a much better chance of winning a big settlement. Such unrevealed assumptions could be the culprit behind conflicting legal opinions.
- **What is the governing legal doctrine?** Numerous laws affect the operation of a land trust, whether common, federal, state or local law.

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All parties should be in agreement about what laws may apply and the potential results under each. Has the attorney considered the impact of a bordering state's regulations? Is there a model code to consider or rely upon? Has a recent case been decided in this area? Explore all possibilities, because the land trust may have to select one legal opinion based on the strength of the supporting laws or regulations. Further, any experience unique to the attorney, as well as attorney opinions about what the attorney thinks the law *should be* as compared to what the law states with a neutral analysis of gaps and uncertainties, should be clearly communicated to the land trust. Legal precedent for conservation easements is lacking, and legal theories can be highly susceptible to multiple interpretations. Ensure that each attorney is explaining his or her legal basis and interpretation so the land trust can evaluate the reasonableness of each assessment. Ask whether there is any decided case that says exactly what the attorney espouses.

### **FURTHER CONSIDERATIONS**

If, after all lines of inquiry have been exhausted, the land trust is still faced with conflicting legal advice, consider the following factors when choosing the appropriate legal course of action.

First, assess the expertise of the attorneys who have provided the conflicting opinions. A lawyer with expertise in a specific area should have a carefully reasoned response to your question, which may be highly detailed but, at the same time, may ignore larger, overarching issues. A generalist may be able to provide insight into the bigger picture but fail to ask critical questions or recognize the subtleties of an issue. A land use attorney and a tax attorney can both bring valuable perspectives to the table, but be careful in listening to a land use attorney's advice on a tax matter and vice versa. Consider whether the attorneys could cooperate and utilize a diverse knowledge base in responding to your legal issues collaboratively.

Second, consider the **risk tolerance** (ability to accept negative results) of any particular attorney and how it fits with your land trust's risk tolerance. If the

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attorney has a different risk tolerance, explore what in the *law* led the attorney to that judgment and apply the organizational risk tolerance analysis to that consideration.

Make sure your attorney understands your risk tolerance and risk assessment process and has factored that into any legal opinion provided. The board should have a separate discussion about its own collective willingness and capacity to accept a negative result (risk tolerance).

### **THE ROLE OF THE BOARD IN RESOLVING CONFLICTING LEGAL ADVICE**

The board is ultimately responsible for resolving conflicting legal advice. The board members' duties of loyalty and due care require that they act:

- In good faith
- With the care an ordinarily prudent person in a like position would exercise under similar circumstances
- In a manner they reasonably believe to be in the best interests of the land trust

When these duties are appropriately exercised, the board can insulate itself from a lawsuit based on the action taken. Any decision about conflicting legal advice must be based on a reasonably prudent assessment of the circumstances. When making any decision for the land trust, carefully consider the land trust mission and its written policies, risk management practices and all the legal advice provided (whether conflicting or not). Fully assess all facts or opinions, even if they may be difficult or unpleasant for the board to discuss. By communicating clearly with your attorney, you enable yourself to make the most well-informed decision possible regarding your land trust's legal options, while still fulfilling your duties to the organization.

Regardless of your attorney's area of expertise or risk tolerance, ensure that he or she is familiar with *Land Trust Standards and Practices*. Any legal advice provided should include an evaluation of these standards. While land trusts commit to following them, *Land Trust Standards and Practices* are not governing law. An attorney should take particular care to consider *Land Trust Standards*

*and Practices* when providing a legal opinion. The attorney should state both the law and the effect that *Land Trust Standards and Practices* have on additional considerations for a land trust.

## Multiple Representation Arrangements

A multiple representation arrangement occurs when an attorney represents numerous clients in the same lawsuit or transaction. Under the ethical rules governing the legal field, such an arrangement is permissible if the attorney reasonably believes he or she will be able to competently and diligently represent each client. An attorney should always consult the specific rules of their jurisdiction to ensure compliance with all ethical rules and laws. (See Rule 1.7 of the American Bar Association's Model Rules of Professional Conduct.) [[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_7\\_conflict\\_of\\_interest\\_current\\_clients.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients.html)] Each client must give—in writing—informed consent to this arrangement. The attorney may not represent a claim by one client against or adverse to another client.

A multiple representation arrangement is an attractive economic option for co-holders of a conservation easement, for example, where it is easy to assume that all parties are working toward the same goals. However, conflicts between the parties may not be obvious until after the joint representation is underway, resulting in difficulty and costs if new counsel is required. In addition to ethical concerns, the board must consider whether this type of arrangement will honor the policies and standards it follows. A land trust should not enter into this type of arrangement without fully discussing potential problems. Prior to entering into any multiple representation arrangements, all parties should consider their interests and their goals and then create a memorandum of understanding or other statement that clearly describes each party's roles and responsibilities. Such an agreement should also answer some basic questions: How does each party's interest match with the other potential parties involved? What result is each side seeking? How long do the parties anticipate the lawsuit or negotiation

## HIRING AND WORKING WITH AN ATTORNEY

### *Multiple Representation Arrangements*

will last? What are the ethical standards for each party? Answering these types of basic questions before entering into a representation agreement helps to avoid conflict later on.

Land trusts can also avoid these problems by establishing some basic agreements early on. First, if your land trust co-holds conservation easements with another entity, it is worthwhile to draft a detailed memorandum of understanding that outlines the roles and responsibilities of all parties with respect to easement **stewardship** and **enforcement**. With that in place, joint representation is easier, although, after writing such an agreement, the parties may realize that they do have distinct interests and perspectives that make separate representation preferable.

Even if the parties choose to engage separate counsel, they can still share information and collaborate on enforcement. If the parties' interests are aligned, there are other types of arrangements that can save resources. One such option is the joint agreement, where the attorneys for separate land trusts enter into a written agreement to coordinate a cohesive strategy. Parties are able to share **privileged information**, reduce duplicative efforts and potentially save costs. Be sure to consider designating one lead counsel to streamline efforts and create a clear chain of command. The joint agreement can allow withdrawal if common interests ultimately diverge or unanticipated issues arise.

The final option available is a hybrid approach, in which all parties have their own counsel. They then jointly select an outside attorney to represent them as a group for the lawsuit or transaction. Similar to a joint agreement, this arrangement allows for streamlined efforts directed through the same channel. The separate counsel ensures that all parties coordinate responses and tactics. This method can be particularly effective where the parties already have in-house counsel. For an in-depth discussion of the ethical considerations of this arrangement, see "Ethical Issues Encountered in Multiple Representation Arrangements" by Gray T. Culbreath in the spring 2010 issues of *FDCC Quarterly*. [[http://www.thefederation.org/documents/QuarterlyV60N3\\_Spr10.pdf](http://www.thefederation.org/documents/QuarterlyV60N3_Spr10.pdf)]