
Coates' Canons Blog: How Risky Are Dual Legal Roles?

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Which of these three scenarios are violations of both the N.C. Rules of Professional Conduct and constitutional due process requirements?

1. Attorneys Smith and Williams are both partners in ABC Firm, which has over 50 attorneys. Smith is retained by the Carolina County school superintendent to help investigate alleged misconduct by Principal Pat. At Pat's hearing before the Board of Education, Smith helps present the case against Pat while Jones advises the board.
2. Wolfpack City employs two in-house attorneys, Thompson and Lowe. Thompson routinely provides advice to the zoning administrator, including advice regarding Taxpayer Terry's special use permit application. When Terry appeals the denial of that application to the Wolfpack Zoning Board of Appeals, Thompson assists the zoning administrator while Lowe serves as legal advisor to the board.
3. Blue Devil County employs private attorney Brand as its part-time county attorney. Brand works with the county manager to investigate allegations of misconduct by the tax assessor. When the manager recommends to the board that the assessor be removed from office, at the subsequent required public hearing Brand advises the board on the legal issues involved.

Would it surprise you to learn that the answer is probably "none of the above"? Although all three scenarios create risks and are best avoided, none is a per se violation of the ethics rules or due process requirements.

These scenarios are similar to cases that have passed ethical and constitutional muster before N.C. courts or the State Bar. From an ethical perspective, the issues involved are adversity and independence on the part of the attorney. From a due process perspective, the issue is impartiality on the part of the decision maker.

First, the ethical issues. NC RPC Rule 1.7(a)(1) says that a conflict exists if a lawyer represents two clients whose interests are directly adverse. And Rule 1.10 imputes most conflicts to all members of the same law firm, meaning if one attorney could not represent two clients because of Rule 1.7 then that attorney's firm could not either.

If a school board and the superintendent it employs were considered separate clients, then Smith, Williams, and the ABC Firm might face a conflict in scenario 1. Ditto for Thompson and Lowe in scenario 2 if the zoning administrator and the zoning board were separate clients and for Brand in scenario 3 if the manager and the board were separate clients. While it can be difficult to determine exactly who or what is the client of a government attorney, it seems likely that the attorneys in these scenarios have only one client each: the school board, the city (acting through its councilpersons), and the county (acting through its commissioners), respectively. In each case, the board conducting the hearing and the employee who made the initial decision or investigation are part of the same client. Nor are the opposing parties in the contested hearings clients of the attorney. Absent multiple clients, a conflict can't exist under Rule 1.7(a)(1).

But Rule 1.7(a)(2) states that a conflict can arise with only a *single* client if the representation of that client is "materially limited" by the attorney's responsibility to a third person or by the attorney's personal interest. It seems possible that the attorneys' independence could come into play in all three scenarios. The attorneys' close relationship with the officials who made the initial decisions or investigations could affect the legal advice they provide to the boards reviewing those decisions. In scenarios 1 and 2, the attorneys advising the boards understandably may feel compelled to support the legal advice given to the initial decision makers by their attorney colleagues. In scenario 3, Brand's advice to the board might be colored by the information he learned while assisting the investigation.

Even if the boards receive unbiased legal advice, the attorneys' dual roles could call into question the fairness of the

proceedings. And for that reason, in 2008 the N.C. State Bar strongly recommended that attorneys avoid scenario 1 and by implication scenarios 2 and 3 as well. "The dual representation . . . creates a perception of unfairness that undermines the public's confidence in the rule of law and the fairness of the proceeding." 2008 FEO 2. Attorneys were advised to recommend independent counsel for either the superintendent or the school board or, at a minimum, to set up an ethical screen between the two attorneys from the same firm.

But the State Bar ultimately concluded that scenario 1 did *not* create an ethical violation. I think its reasoning and conclusions would extend to scenarios 2 and 3. (Click [here](#) for an Alaskan ethics opinion reaching the same conclusion on scenario 2.)

Now to the due process concerns. When a governmental body sits as a quasi-judicial board and considers a case which may deprive a person of a property right, due process considerations require that the board be unbiased and impartial. *Crump v. Hickory Bd of Ed*, 326 N.C. 603 (1990). Determining when a hearing is quasi-judicial can be a complex task, but the *Crump* decision makes clear that an unbiased hearing in accord with due process principles is required whenever a board resolves disputed facts and selects among alternate sanctions/resolutions. With that in mind, I think all three scenarios involve heightened concern for due process.

In cases concerning the effect of attorneys on due process, N.C. courts have repeatedly concluded that dual legal roles do not by themselves violate due process requirements. A plaintiff must be able to prove actual bias on behalf the board or one of its members. See *Evers v. Pender Bd of Ed*, 104 N.C. App. 1 (1991)(lawyer participated in investigation of teacher and advised board during related hearing); *Hope v. Charlotte-Mecklenburg Bd of Ed*, 110 N.C. App. 599 (1993)(lawyers from same firm represented superintendent and school board at disciplinary hearing); *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58 (1996)(lawyers from state Attorney General's office represented both State Personnel Commission and UNC-W in contested hearing before commission); *Jordan v. Civil Service Bd for City of Charlotte*, 153 N.C. App. 691 (2002)(board chairperson was employed by attorney whose client was involved with the matter that gave rise to the discipline of a police officer now under review by the board).

Just because a dual role may not be a per se violation of the legal ethics or due process requirements doesn't mean that attorneys should not worry about advising different components of their government clients. As the State Bar emphasized, the attorney needs to be concerned with the effect of the dual roles on his or her independence and on public perception. And due process opinions demonstrate that the more intimately involved an attorney is with both the initial decision by a government and the government's review of that decision, the more likely an aggrieved party could demonstrate unconstitutional bias on behalf of the decision maker. See *Horn v. Township of Hilltown*, 337 A.2d 858 (Pa. 1975)(due process violation when attorney presented evidence at zoning board hearing as advocate for zoning staff and made evidentiary rulings on that same evidence as advisor to the board).

Links

- www.alaskabar.org/servlet/content/indexes_aeot__99_2.html