

## **2002 Formal Ethics Opinion 2**

July 19, 2002

### **Implications of Service on a Public Body or Non-Profit Board**

*Opinion rules that a lawyer may represent a party suing a public body or non-profit organization, although the lawyer's partner or associate serves on the board, subject to certain conditions.*

#### ***Inquiry #1:***

*Attorney A is a lawyer with Law Firm C. He was retained by the defendant in a condemnation lawsuit filed by D County pursuant to Chapter 40A of the North Carolina General Statutes. Subsequent to Attorney A's entering an appearance in the condemnation proceeding, Attorney B, who is also a lawyer with Law Firm C, was elected to the Board of County Commissioners of D County ("the Board").*

*The Board is the governing body of D County. Neither the Board nor its members are parties to the condemnation proceeding. However, the proceeding was filed at the direction of the Board and the Board has the authority to compromise or dismiss the action. Attorney B disclosed to the Board that Attorney A represents the defendant in the condemnation suit. He also advised the Board that he would refrain from consideration or comment, as a member of the Board, on the condemnation action. He promised to absent himself from meetings in which the matter is discussed and will not vote on any issue relating to the condemnation proceeding. After full disclosure from Attorney B, and upon the advice of its attorney, the Board unanimously resolved that it does not object to Attorney A's representation of the defendant in the condemnation proceeding, provided Attorney B continues to comply with the conditions previously noted. Attorney A's client, after the full disclosure, also has no objections.*

*May Attorney A continue as counsel for the defendant in the condemnation action while Attorney B serves as a member of the Board of Commissioners of D County?*

#### ***Opinion #1:***

*Yes, subject to certain conditions. Lawyers should be encouraged to serve on public bodies, whether by election or appointment, because, by education and experience, lawyers are uniquely qualified for such service. Any barriers to public service by lawyers should be removed if procedures can be established that preserve the ethical values of the profession.*

*To avoid the appearance of impropriety or undue influence, a lawyer who is elected or appointed to a public body must be screened in his law firm from participation in an action brought by another lawyer in the firm against the public body or any subsidiary of that public body. See Rule 6.5 and RPC 53. This means that the law firm must adopt reasonably adequate procedures, under the circumstances, to isolate the lawyer from participation in the discussion of the matter with the other members of the firm and from exposure to any confidential information relative to the matter. Sharing of the legal fee generated by the representation, while not specifically prohibited, is discouraged. Although receipt of the fee by the board member/lawyer may not materially affect his judgment or neutrality, screening from participation in the profit earned from the representation increases the isolation of the lawyer and thereby enhances the public's perception that the lawyer is not exercising undue influence on the other members of the board. Therefore, if practical, a law firm should adopt reasonable procedures for withholding the lawyer's share in the profit (after overhead) from the legal fee earned from the representation.*

*The lawyer serving on the public body must also make full disclosure to the body on which he serves and be screened from participation in the public body's deliberations on the matter. The lawyer must do the following:*

- (1) Disclose in writing or in open meeting to the governing body his relationship to the matter involved;*
- (2) Refrain from any expression of opinion, public or private, or any formal or informal consideration of the matter, including any communication with other members or the staff of the governing body;*
- (3) Absent himself from any discussion of the matter by the governing body; and*
- (4) Withdraw from voting on all issues relating to the matter.*

*CPR 290 and RPC 53. These safeguards will help avoid any inappropriate influence on the other members of the governing body and will protect the lawyer's neutrality. See Rule 6.5(b). Nevertheless, if the lawyer is named, in an official or individual capacity, as a party in the action, it is unlikely that the lawyer will be able to maintain his neutrality on the public body or within the law firm. Therefore, it is a disqualifying conflict of interest for the board member's law partner or associate to undertake the representation of any party in litigation or other adversary action if the board member is a necessary party to the action in either his individual or official capacity. See RPC 53.*

*In RPC 160, the Ethics Committee ruled that a lawyer whose associate is an appointed member*

*of a public hospital's board of trustees may not sue the hospital on behalf of a client. The opinion holds that permitting the lawyer to go forward with the suit against the hospital creates a conflict of interest. However, the opinion fails to distinguish between a suit against the hospital itself and a suit against the members of the board of trustees in their official or individual capacities. In dicta, it is implied that the holding in RPC 160 also pertains to a lawyer whose partner or associate is an elected member of a public governing body but the exact application of RPC 160 to this situation is unclear. For the reasons noted above, RPC 160 is overruled.*

***Inquiry #2:***

*May lawyers at Law Firm C accept new representation adverse to County D provided it does not involve litigation?*

***Opinion #2:***

*Yes, subject to the limitations set forth above, and further subject to the limitation that no lawyer in the firm may undertake the representation of a client if it is known or reasonably should be known that Attorney B will be named, in either his individual or official capacity, as an opposing party in the lawsuit. See RPC 53.*

***Inquiry #3:***

*May lawyers at Law Firm C accept new representations in litigation matters adverse to D County?*

***Opinion #3:***

*Yes, subject to the limitations set forth in Opinion #1 above.*

***Inquiry #4:***

*May lawyers at Law Firm C accept new representations in which the Board itself, or members of the Board in their official capacity, are adverse parties?*

***Opinion #4:***

*See Opinion #1 above.*

***Inquiry #5:***

Attorney X, another member of Law Firm C, serves on the board of a non-profit organization. Attorney Y, also of the firm, is representing a client with a claim against the organization. May Attorney X continue to serve as a member of the board if Attorney Y files an action against the organization on behalf of the client?

**Opinion #5:**

Lawyers should be encouraged to serve on the boards of non-profit organizations for the same reasons that they should be encouraged to serve on government bodies. Therefore, subject to the screening and disclosure conditions set forth in Opinion #1 above, a lawyer may continue to serve on the board of a non-profit organization although another member of the firm brings an action against the organization. RPC 160, as noted above, is overruled.

**Inquiry #6:**

Assume that the preceding inquiries concern representation of a client in a transaction rather than representation in an adversarial proceeding or litigation. If another lawyer in the firm serves on a board of the public body or non-profit organization that is a party to the transaction, may the representation continue if the lawyer serving on the board of the public body or non-profit organization follows the procedures set forth in Opinion #1?

**Opinion #6:**

Yes.