

2008 Formal Ethics Opinion 2

April 25, 2008

Roles of School Board Lawyers in Administrative Proceedings

Opinion holds that a lawyer is not prohibited from advising a school board sitting in an adjudicative capacity in a disciplinary or employment proceeding while another lawyer from the same firm represents the administration; however, such dual representation is harmful to the public's perception of the fairness of the proceeding and should be avoided.

Inquiry:

A student who is suspended from public school for more than ten days may appeal the suspension to the school board. Similarly, when a certified employee of a school system is dismissed, the employee may appeal the dismissal to the school board. An administrative hearing is held, with the board sitting in a quasi-judicial capacity, to determine whether the decision of the administration should be upheld.

Lawyers with ABC Law Firm have extensive experience and special expertise in education law. School Board retains Law Firm to provide all legal representation to the board and, through the board, to the administration of the school system.

Lawyer A and Lawyer B are both education lawyers employed by ABC Law Firm. May Lawyer A represent the administration in a suspension case against a student in an appeal to the board while Lawyer B advises the board on the legal and procedural issues that arise during the hearing? Similarly, may Lawyer A represent the administration in a dismissal case against an employee in an appeal to the board while Lawyer B advises the board?

Opinion:

This inquiry presents an interesting technical issue of professional responsibility relative to whether there is a conflict of interests created by this form of dual representation. The opinion concludes there is no conflict of interests but that this form of dual representation should be avoided to foster the public's perception of the integrity and fairness of the process.

Rule 1.7(a) provides, in part, that it is a concurrent conflict of interest if the representation of one client will be directly adverse to another client or the representation of one or more clients may be materially limited by the lawyer's professional responsibilities to another client or a former client. Under Rule 1.10, a conflict of interest for one lawyer in a firm is imputed to the other lawyers in the firm unless it is a personal conflict of interest.

It is not a concurrent conflict of interest for one lawyer in a firm to present the administration's position to the school board while another lawyer in the same firm advises the board on the legal and procedural issues that arise during the hearing. Both lawyers, whether acting in the role of prosecutor or the role of advisor, represent the school board and not the student or employee appearing before the board. The arrangement described in the inquiry, therefore, does not present a conflict of interest relative to the student or the employee because no duty of loyalty is owed to them by the lawyers with ABC Law Firm.

Although it is assumed that there is no due process prohibition on the dual representation described in this inquiry and no opinion is expressed on this legal issue, see *Hope v. Charlotte-Mecklenburg Board of Education*, 110 N.C. App. 599 (1993), it is clear that the dual representation creates a perception of unfairness in the minds of students (and their parents) and employees appearing before the board. During the public comment period on this proposed opinion, numerous commentators stated that respondents, upon learning that the board will be advised by a lawyer who works in the same firm as the lawyer who will be presenting the administration's position, conclude that the board will receive legal advice that is biased in favor of the administration and, for this reason, the proceeding cannot be fair and impartial.

In Rule 0.1, Preamble: A Lawyer's Professional Responsibilities, it is observed that "[w]ithin the framework of [the] Rules [of Professional Conduct],..., many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional moral judgment guided by the basic principles underlying

the Rules." One of the basic principles underlying the Rules is the duty of a lawyer, as an officer of the court, to uphold the legal process and to seek improvement in the administration of justice. Rule 0.1, cmts. [5] - [6]. As noted in comment [6] to the Preamble, "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in constitutional democracy depend on popular participation and support to maintain their authority." This admonition applies to administrative proceedings as well as to judicial proceedings. The dual representation described in this inquiry creates a perception of unfairness that undermines the public's confidence in the rule of law and the fairness of the proceeding. For this reason, lawyers are **strongly** urged to avoid such dual representation and to recommend that the school board obtain other legal counsel to either advise the board or represent the administration.¹

Endnote

1. In the event lawyers in the same firm do not heed the admonition of the Ethics Committee to avoid this form of dual representation, it is recommended that the lawyers protect the integrity of the adjudicative process by avoiding communications between themselves about a pending disciplinary or employment proceeding. Screening the lawyers from each other would avoid the appearance that the lawyer presenting the administration's position may influence the lawyer advising the board of education and would be consistent with the prohibitions on improper communications about a pending matter with a judge or other adjudicative official or body in Rule 3.5(a). See Rule 1.0(l) ("'screened' denotes the isolation of a lawyer from any participation in a professional matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.")