

# 97 ETHICAL CONSIDERATIONS WHERE AN ATTORNEY OR THE ATTORNEY'S PARTNER SERVES ON THE BOARD OF A PUBLIC ENTITY \*

Adopted June 17, 1995.

## *Introduction and Scope*

The Ethics Committee of the CBA ("Committee") has been asked to provide guidance to lawyers and their firms concerning the ethical propriety of a lawyer's (or the lawyer's firm's) representation of clients before a governmental entity having quasi-judicial functions ("Board"),<sup>1</sup> when the lawyer serves on the Board. This Opinion addresses only the ethical issues raised by the Colorado Rules of Professional Conduct ("Rules") and does not address the applicability of the Colorado Code of Judicial Conduct, the Colorado Code of Ethics, C.R.S. §§ 24-18-101, *et seq.*, or any conflict of interest rules a governmental entity or agency may have promulgated.

## *Syllabus*

It is improper for an attorney who serves as a member of a Board to represent clients in matters over which the Board has jurisdiction. In most instances, it is likewise improper for the lawyer's firm to accept employment for clients in a quasi-judicial matter over which a Board of which the lawyer is a member has jurisdiction. The Committee recognizes that in some fact-specific circumstances, it may be possible to satisfy the applicable Rules allowing such representation by others in the Board member's firm.

## *Facts*

A lawyer is a member of a Board that makes regulatory decisions and performs quasi-judicial functions. Board members serve as public officers. Staff members make recommendations about issues before the Board, but the Board may or may not have authority to hire, fire or make other personnel decisions regarding such staff. The staff's recommendations may be vigorously disputed by local groups, and/or the party requesting government action by the Board. The Board's decisions do not always follow the recommendations of the staff.

## *Analysis*

The Rules do not directly address the ethical problems that a lawyer encounters when serving in dual roles: one as a lawyer representing a client before a Board and the other as a member of the same Board. An analysis of Rules 1.7(b) and 8.4(e) provides the basis for the Committee's conclusion that a lawyer cannot ethically represent a client before the Board on which the lawyer serves.

Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

A lawyer who serves on a Board has obligations and responsibilities to that Board, to his or her Board colleagues and to the public. (See comments to Rule 1.7 and Rule 8.4.) Those responsibilities will be hampered if the lawyer is permitted to represent clients before the Board since (1) the possibility that the government's interests will be fundamentally antagonistic to the client's interests is great, (2) the lawyer will be materially limited by the obligations and responsibilities he or she owes to the Board and

(3) the lawyer will be materially limited by the reciprocal courtesy (and lobbying) required of members of a deliberative body.

Rule 8.4(e) states:

It is professional misconduct for a lawyer to: . . .

(e) state or imply an ability to influence improperly a judge, judicial officer, government agency or official.

Lawyers who serve on Boards must be mindful of the public's perception of their ability to influence government. A lawyer is not permitted to engage in conduct which implies that the lawyer is able to influence improperly a governmental agency or official. Under these facts, where the lawyer is both a Board member and an attorney acting on behalf of a client in a matter before the Board, a great risk exists of public mistrust and public belief that improper influence has or will occur because of the lawyer's dual roles. The lawyer's involvement on the Board, even if the lawyer recuses himself or herself, may imply that the lawyer is able to influence favorably the other members of the Board with whom that lawyer interacts on a regular basis. Furthermore, in situations where the staff makes recommendations to the Board, the staff may feel pressured to act more favorably to the client's request because of the staff's relationship with the lawyer. As stated by the Iowa Supreme Court, the problem is the lawyer's

. . . conflicting loyalties when acting as a public servant as well as a private advocate [and]  
. . . the real potential for public misunderstanding and mistrust when attorneys serve in those dual roles.<sup>2</sup>

For these reasons, the Committee concludes that it would be improper for the lawyer to represent clients in matters before the Board and therefore a violation of Rules 1.7(b) and 8.4(e).

Since the lawyer is disqualified from representing a client before a Board, the question arises whether, under Rule 1.10, the lawyer's partners and associates are also precluded from such representation.

Rule 1.10 provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

. . .

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Although the Committee believes that in most circumstances, the firm would be disqualified from representing the client before the Board under Rule 1.10(a) because the lawyer/member is disqualified, the Committee recognizes that, especially if the conflict is minor and the firm is large, it may be possible to erect a confidentiality wall, obtain appropriate consent (where possible) and take other action to avoid the conflict.<sup>3</sup> Nevertheless, even if the firm were successful in avoiding the conflict under Rule 1.10, the Committee concludes that, in most circumstances, the firm is precluded by Rule 8.4(e) from representing the client.

The concern raised by Rule 8.4(e) about the lawyer's own conduct similarly applies to the representation of clients by other lawyers in the lawyer's firm. The law firm's representation of a client inherently creates the implication that by hiring the law firm, the client will obtain treatment more favorable than that which the client would otherwise receive. Such an implication disqualifies the firm even if the lawyer/ Board member is recused from any participation (either in discussions with the staff or directly with any Board members) in the matter. While it is conceivable that, under some circumstances, there would be no implied or actual ability to influence the Board's decision, the Committee nonetheless believes these circumstances are very limited. Other jurisdictions which have addressed this issue have reached the conclusion that the law firm is prohibited from representation of clients on matters before the Board. [*See* Maryland Ethics Opinion 91-15 (addressing ethical issues when a lawyer serves on municipal board of appeals) and Iowa Ethics Opinion 91-49;<sup>4</sup> *see also* CBA Ethics Opinion 48.<sup>5</sup>]

The Committee recognizes that in limited circumstances, the conflict under Rules 1.7(b) and 1.10 may be waivable, and the implication of improper influence under Rule 8.4(e) (raised by the lawyer serving on the Board and the lawyer's partner appearing before that Board) may be overcome. These circumstances would be unique to the specific facts at issue.

## NOTES

1. Examples of the types of governmental boards include planning commissions, liquor license boards, city councils, boards of county commissioners and boards of adjustment. This is not an all inclusive list.

2. Iowa Ethics Opinion 91-49, page 324.

3. The Comment to Rule 1.11 recognizes that statutes and government regulations “may circumscribe the extent to which [a] government agency may give consent” in potential conflict situations. The client's consent is also needed under Rule 1.7. *See also* CBA Ethics Opinion 88 for a complete discussion of confidentiality walls [“Use and Misuse of ‘Chinese Walls,’” 21 *Colo. Law.* 1371 (July 1991)].

4. Iowa Ethics Opinion 91-49 analyzes the lawyer's conduct and the issue of the firm's imputed disqualification under various provisions of the Code of Professional Responsibility rather than Rules 1.7(b), 8.4(e) and 1.10. Nevertheless, the Opinion provides useful guidance because it specifically addresses a factual situation similar to the one raised in this matter. The Opinion concludes that representation of a client by a law firm in matters before a governmental entity on which one of the members of the law firm serves violates both DR 5-105(A) because the lawyer's loyalties associated with public office could dilute the firm's loyalty to the firm's client and DR 8-101(A)(2), since it could be implied that the lawyer holding public office is using that position to influence the board in favor of the firm's client.

5. 1 *Colo. Law.* 19 (Aug. 1972). This opinion concluded, based on various provisions of the Colorado Code of Professional Responsibility, that neither the lawyer nor the lawyer's firm may ethically represent a client before a governmental entity whom the lawyer represents. Although the facts in CBA Ethics Opinion 48 differ from the facts discussed herein, the opinion recognizes that a grave danger exists if the lawyer could influence the governmental entity he or she serves, in order to assist the firm's client.

\* With the changes effective January 1, 2008, the term “consent after consultation” was changed to “informed consent.” “Consultation” only required “communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to “informed consent,” its definition now “denotes the agreement by a person to a proposed course of conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” See Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that “the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision.” Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

\* On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, Conflict of Interest: Current Clients, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion. The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).