

ADVISORY ETHICS OPINION 89-16

SYNOPSIS:

An attorney may act as a member of the Zoning Board of Appeals for his town and also represent the town in an appeal *de novo* from an action taken by that board, where there is no inconsistency between the Board's decision and the town's position in the *de novo* proceeding and where it is not obvious that the attorney ought to be called as a witness at the *de novo* hearing.

FACTS:

Attorney A sits on a town Zoning Board of Appeals. That Board recently reviewed the application of a local business that sought to increase its commercial space. Attorney A participated in the Board's decision to deny the application. The matter is now before the Superior Court for a *de novo* hearing. Attorney A represents the town in the Superior Court proceeding. Attorney B, counsel for the local business, has requested Attorney A's withdrawal from the case. Attorney B has indicated that Attorney A may be called as a witness. Attorney B has also questioned Attorney A's independent professional judgment and has suggested that the continued representation of the town by Attorney A will create an appearance of impropriety. The only purpose for which Attorney A could be called as a witness would be to testify about the proceedings before the Board. Attorney A has no personal interest in the outcome of the case and believes that his testimony would be cumulative, uncontroverted and available from any other member of the Zoning Board of Appeals.

ISSUE:

Should Attorney A withdraw as counsel to the town in the Superior Court proceeding?

ANALYSIS:

DR 5-102(A) provides that an attorney must withdraw as counsel in pending litigation if he learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client DR 5-102(B) also requires withdrawal when a lawyer learns or it is obvious that he or a lawyer in his firm maybe called as a witness other than on behalf of his client and it is apparent that his testimony may be prejudicial to his client.

The facts before us present no obvious basis for a claim that Attorney A ought to be called as a witness in the *de novo* proceeding. The Superior Court action provides the aggrieved local business with a new forum in which to seek relief without reference to the proceedings below. Since Attorney A has no unique knowledge of the matter, the vague suggestion of his participation as a witness is not sufficient to trigger the mandates of DR 5-102. Any other interpretation would invite abuse by encouraging opposing counsel to demand pretrial withdrawal for tactical purposes. In the absence of any explanation as to the need to call Attorney A as a witness, there is no ethical requirement to withdraw.

Similarly we have been presented with no facts which would substantiate Attorney B's claim that Attorney A's independent professional judgment has been compromised in any way. DR 5-101 prohibits the acceptance of employment where an attorney's independent professional judgment may be affected by the attorney's own financial, business, property or personal interests. DR 5-105 imposes a similar requirement where an attorney is likely to become involved in representing differing interests. On the facts before us, we perceive no conflict between Attorney A's dual roles as a member of the Zoning Board of Appeals and town attorney. On the contrary, it would appear that the position of the Zoning Board of Appeals is completely consistent with the position taken by the town and that no personal interest of Attorney A is implicated.

We are not troubled by DR 9-101(A) which provides that "[a] lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity" does not apply to the facts before us. Traditionally, DR 9-101(A) has been applied to judges. In *Powers v. State Department of Social Welfare*¹, the Kansas Supreme Court did extend the rule to apply to an attorney who had been appointed to act as a referee at a Department of Social Welfare hearing. As referee, he was called upon to exercise judicial powers including taking testimony, hearing evidence and reporting his findings. The attorney then went on to represent the Department of Social Welfare on appeal. The Court was not able to condone the attorney's conversion from impartial decision-maker to advocate.

¹ *Powers v. State Department of Social Welfare*, 208 Kan. 605, 493 P.2d 590 (1972).

The role of a Zoning Board of Adjustment is not that of a neutral decision-maker. The Board of Adjustment performs an executive function of town government and speaks for the town. It is only upon the commencement of a *de novo* appeal that an impartial decision-maker becomes involved in the process.

Based on the foregoing there is no inconsistency between the attorney's actions at the town level and his role as advocate on appeal. We do not believe that our refusal to apply DR 9-101(A) on the facts before us will undermine public confidence in the judicial process or in the legal profession.

Under the facts presented we perceive no appearance of impropriety and in the absence of a violation of a specific disciplinary rule, Attorney A may continue to represent the town in the *de novo* proceeding.