

ADVISORY ETHICS OPINION 97-14

SYNOPSIS:

Lawyer A must withdraw from any further participation as a member of a municipal zoning board in all proceedings related to a particular conditional use application, where Lawyer B, a member of Lawyer A's firm, represents clients who have challenged the zoning board's jurisdiction to reconsider an earlier decision that had been favorable to the interests of Lawyer B's clients. Similarly, Lawyer B has a non-waivable duty to withdraw from further representing clients in a matter on which Lawyer A had participated in a quasi-judicial capacity.

FACTS:

Lawyer A is a member of a municipal zoning board and participated in a board vote to deny conditional use approval to a municipal department which sought to construct a facility on public lands. Under relevant statutes and the municipal zoning ordinance, the applicant/department had 30 days to appeal the denial. Lawyer B, who is a member of Lawyer A's law firm, was previously retained by opponents of the conditional use, to provide representation in the event that any permits were issued to the municipal department. Subsequent to the denial of the conditional use, and prior to the expiration of the 30-day appeal period, the applicant/municipal department requested the zoning board to reconsider its denial. The zoning board, with Lawyer A. participating in the vote, agreed to reconsider and set a date for a public hearing. No appeal was filed within the 30-day appeal period. Lawyer B has now filed a suit against the applicant/department, seeking a court declaration that the original decision to deny the conditional use approval is final and that the zoning board lacks jurisdiction to reconsider its action.

ISSUES PRESENTED:

Another member of the law firm which employs Lawyers A and B requests our opinion on several ethical questions:

1. Must Lawyer A withdraw from the zoning board's reconsideration regarding the applicant/municipal department's request for conditional use approval?
2. Must Lawyer B withdraw from the court representation of the residents?
3. Can any ethical infirmity be obviated at this point by either the recusal of Lawyer A or the withdrawal from court representation of Lawyer B, and if so, which, if either, course of action is ethically required or ethically preferable?
4. Assuming that Lawyer B has had to withdraw from the court representation of the residents in the meantime, can at that point Lawyer B resume the court representation after the zoning board's reconsideration on the theory that the matter will have finally left the purview of the zoning board?

DISCUSSION:

Relevant Disciplinary Rules and Ethical considerations

DR 9-101 (A) (Avoiding Even the Appearance of Impropriety) states:

“(A) A lawyer shall not accept private employment in a matter upon the merits of which [the lawyer] has acted in a judicial capacity.”

E.C. 9-1 states: “. . . A lawyer should promote public confidence in our system and in the legal profession.”

E.C. 9-2 states “. . . When explicit ethical guidance does not exist, a lawyer should determine . . . conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.”

E.C. 9-3 states “After a lawyer leaves judicial office or other public employment, [the lawyer] should not accept employment in connection with any matter in which he [or she] had substantial responsibility prior to . . . leaving, since to accept employment would give the appearance of impropriety even if none exists.”

E.C. 9-7 states: “Every lawyer owes a solemn duty to uphold the integrity of [the] profession . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety.”

We are called upon to consider whether DR 9-101 (A) applies to either Lawyer A or Lawyer B under the facts presented. The Disciplinary Rules under Canon 9 require lawyers to avoid the appearance of impropriety. However, the specific Rules are directly applicable to a relatively narrow set of circumstances. Here, the relevant Ethical considerations inform the meaning of the Disciplinary Rules and convince us that DR 9-101 (A) requires Lawyer A to be recused from any further participation on the zoning board in the matter of concern to Lawyer B’s client; and Lawyer B must withdraw from representing the residents.

First, Lawyers A and B, as members of the same firm, must be considered a single entity for purposes of representation of residents who have challenged the zoning board’s actions. See DR 5-105 (D) (Disqualification of one lawyer under “a Disciplinary Rule” disqualifies the entire firm). Next, Lawyer B: (a) has accepted “private employment”, on behalf of the law firm, (b) “in a matter” (the conditional use application and whether the zoning board has jurisdiction to reconsider its unappealed denial of the application), (c) “upon the merits of which [Lawyer A] acted in a judicial capacity”.

As the requesting attorney notes, the zoning board is a quasi-judicial public body, and Lawyer A clearly acted on the merits of the very matter in which the firm now seeks to be involved. Therefore, we believe it is reasonable to apply DR 9-101 (A) to disqualify both lawyers from further participation in the particular zoning matter. The appearance of impropriety is simply too strong under the facts presented.

We do not believe that the ethical problem here can be waived or consented to in order to avoid withdrawal. Under other Disciplinary Rules, waiver and consent are available to disclose confidential information, See DR 4-101 (C) (I) (Lawyer may reveal confidences or secrets with client consent after full disclosure); and conflicting interests, See DR 5-105 (C) (Lawyer may represent differing clients and interest with consent after full disclosure).

DR 9-101 does not contain any waiver or consent provision. Moreover, because Lawyer A has acted in a quasi-judicial capacity on a governmental body, the situation presented is uniquely tied to the integrity of the legal system and the public’s perception of the integrity of the legal profession. Thus, we declined to apply the reasoning or result of our Opinion 87-7. (Waiver option is available to avoid disqualification of law firm in a matter in which one of its attorneys participated as an Assistant Attorney General, where the Attorney General’s Office consents; attorney is excluded from further participation in the matter; receives no remuneration from the firm’s work on the matter; and keeps information learned as public employee confidential).

CONCLUSION:

1. Lawyer A should withdraw from any further participation on the zoning board’s consideration of the conditional use application.
2. Lawyer B should withdraw from representing clients who have brought a legal action involving the same matter.
3. DR 9-101 (A) requires both Lawyer A and Lawyer B to withdraw.
4. At the conclusion of the zoning board’s reconsideration, Lawyer B (and the law firm) is disqualified from further representation of the residents on the matter that was the subject of the zoning board’s proceedings.
5. Under DR 9-101 (A), a lawyer cannot represent a party in an appeal from a decision of a municipal zoning board or planning commission, where another member of that lawyer’s firm has participated in the board’s or commission’s action in a quasi-judicial capacity. This disqualification does not depend upon whether the party represented by the lawyer seeks to overturn or uphold the board’s or commission’s decision in a de novo court proceeding.