

Committee Opinion  
February 13, 1989

LEGAL ETHICS OPINION 1195

APPEARANCE OF IMPROPRIETY –  
STATE/LOCAL BOARDS: LEGAL  
SERVICES ATTORNEY'S  
APPOINTMENT TO BOARD AND  
HEARING EVICTION CASES NAMING  
THE BOARD AS LANDLORD WHERE  
THE TENANT IS REPRESENTED BY  
ANOTHER LEGAL SERVICES  
ATTORNEY.

You have advised that City Council wished to appoint a staff attorney with you Legal Services Corporation to the Board of Commissioners of a local Redevelopment and Housing Authority, which board has general policy-making authority. You advise further that the Authority owns and operates several federally subsidized housing projects, and your office frequently represents tenants in eviction actions listing the Authority as the landlord. You wish to know whether your staff attorney can accept this appointment if proper screening procedures are implemented in your office, and, if so, are there any special conditions or restrictions upon your representation of clients against the Redevelopment and Housing Authority.

Disciplinary Rules 5-101(A) [DR:5-101], DR:8-101(A) and DR:9-101(C) are the appropriate and controlling rules relative to your inquiry. The rules provide that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances. A lawyer who holds a public office shall not use his position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or the clients where he knows that it is obvious that such action is not in the public interest, nor shall he use his position to influence, or attempt to influence, a tribunal to act in favor of himself or a client. A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. (See DR:5-101(A), DR:8-101(A)(1) and (2) and DR:9-101(C))

Even though your office is prepared to implement procedures to screen the attorney/Board member from cases involving the Housing Authority, which procedures would include diverting housing cases to other attorneys in the office, as well as restricting access to information, supervision, and decision-making policies relative to the housing cases, there is still the appearance of impropriety due to the attorney's public position on the Board and business relationship with your office, which may only be obviated by the attorney/Board member's recusal from participation on the Board in cases where your office will represent a client in an action before or against the Board. The Committee believes that you should be mindful of your responsibility to be in a position to act in the best interest of the client and provide zealous representation, which would indicate availability of competent legal representation on behalf of the client. Thus, should the representation of a client require one of your attorneys to sue the members of the Housing Authority Board in their individual capacity, you may be faced with suing

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one of your own staff attorneys. Furthermore, it would be obviously improper to make litigation strategy decisions on behalf of clients, based upon the need to avoid naming members of the Board in their individual capacities.

While the Committee has not previously addressed the specific situation you have presented, it finds the views of its counterparts in Connecticut and Maryland, both of which operate under versions of the Model Code of Professional Responsibility, to be instructive. In two separate opinions, Maryland has found that a lawyer's representation of clients before any government agency with policy-making, budgetary or appointment authority is not permissible since it would create the appearance of impropriety that the law firm holds a special influence over the agency. More to the point, the opinions also apply the prohibitions to the lawyer/board member's partners and associates. (See Maryland Legal Ethics Opinions Nos. 86-47 and 86-65)

Most instructive is Connecticut Legal Ethics Opinion No. 86-6, which speaks directly to the situation of a Legal Aid attorney holding membership on either a local school board or a zoning commission. While finding the dual role tolerable if appropriate disqualifications are made, the opinion holds that:

“[w]hile the Code does not mandate that the attorney resign from her public position, the committee strongly suggests it as an appropriate means of avoiding the appearance of a conflict of interest in the public mind.”

The Committee refers you to LE Op. 409, which found membership on a school board's handicapped education committee impermissible by an attorney who represented children in hearings adverse to the school board unless all parties consented to the representation after full disclosure of all the facts and circumstances. As your internal memo suggests, consent from a Legal Aid client might not be truly free and volitional if the client believes she has no choice because she has little or no likelihood of securing other counsel.

Finally, to the extent that the Redevelopment and Housing Authority may act in a quasi-judicial capacity, the Committee would direct your attention to LE Op. 826 and LE Op. 617. In LE Op. 826, the Committee found that it was improper for an attorney to represent a client before a local health department, when that department was merely an extension of the state health department or regulatory board on which the attorney sits as a part-time Hearing Officer, since apparently the dual role takes place at the same level. However, this same representation would not be improper if the local health department were not an extension of the state department or regulatory board, and if the two matters were not substantially related. In LE Op. 617, the Committee found it improper for an attorney to represent either the child or the school division in a special education due process hearing when the part-time hearing officer is a member of the same law firm. (See also LE Op. 1123) Disciplinary Rule 5-105(E) provides that if a lawyer is required to decline employment or to withdraw for any employment under DR:5-105, no partner or associate of his or her firm may accept or continue such employment. You have indicated in your memorandum that the attorney in your office seeking the appointment

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to the Housing Authority Board previously represented clients in actions which can be considered the same or substantially related to those before the Board or whom the attorney/Board member may be required to take an adversarial position in the future in his capacity as a Board member. Thus, if the attorney would be precluded from representing a tenant in an eviction action because of his affiliation with the Housing Authority Board, there is the potential that all other attorneys in the firm would be forbidden to do the same. (See DR:5-105(D) and (E))

The Committee would opine that acceptance by the staff attorney of the appointment, to the Redevelopment and Housing Authority Board while simultaneously continuing employment with your firm is improper unless the attorney/Board member would propose to recuse himself from any actions before the Housing Authority in which your firm is also involved, as well as exercise the proper screening procedures as outlined in your memorandum, and provided the informed consent by the client has been obtained after full and adequate disclosure under the circumstances. The Committee knows of no other means by which to cure the conflict of interest other than refusing to accept any cases before or against the Housing Authority by your firm unless the staff attorney declined the appointment to the Housing Authority Board. For these reasons, and the fact that the consent from the Legal Aid client may not be truly free and volitional, declining the appointment is strongly suggested to avoid potential conflicts and the appearance of impropriety.

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