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## REPRESENTATION OF PUBLIC BODY, CONFLICT OF INTEREST

Adopted June 3, 1972.

Revised May 18, 1997.

### *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 public or quasi-public body (“governmental body”), when the lawyer serves as counsel to the governmental body. 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*

A lawyer representing a governmental body assumes certain responsibilities of a public or quasi-public official and thus, having the same ethical responsibilities as a public official, may not represent a client where such representation results in a conflict of interest or implies improper influence of a government agency or official. For example, a County Attorney may not represent an applicant for a liquor license or a subdivider presenting a subdivision plat or represent a client in other matters before the Board of County Commissioners. Similarly, a County Attorney may not represent a property owner through whose land the county wishes to acquire a road easement. A lawyer may not act as counsel for a Special District as well as represent an employee in presenting a claim for workers’ compensation benefits against the District.

The County Attorney’s firm will generally be disqualified from representing the liquor license applicant, the subdivider, or the property owner in the above examples; the firm of the Special District lawyer’s firm will similarly generally be disqualified from representing the employee for workers’ compensation benefits.

The reference to specific examples made throughout this opinion is for the purpose of illustration only and is not to be considered exclusive.

### *Facts*

A County Attorney represents an applicant for a liquor license or a subdivider in presenting a subdivision plat or in other matters before the Board of County Commissioners. A County Attorney represents a property owner through whose land the county wishes to acquire a road easement. A lawyer for a Special District represents an employee of such a district in presenting a claim for workers’ compensation benefits against the District.

### *Opinion*

The general rule on conflicts of interest is provided by Rule 1.7(a):

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.

Since representation of clients in matters before the governmental body is directly adverse to the interests of the governmental body, the lawyer for the body may not represent such clients without client consent.<sup>1</sup>

Further, a lawyer representing a governmental body has assumed obligations and responsibilities to that governmental body and has the same ethical responsibilities as a public official.

Rule 1.7(b) states:

- (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interest, unless:
  - (1) The lawyer reasonably believes the representation will not be adversely affected; and
  - (2) The client consents after consultation. . . .

*See also* comments to Rule 1.7 and Rule 8.4. Those responsibilities to the governmental body will be hampered if the lawyer is permitted to represent clients in matters affecting the interests of or pending before the governmental body, since the possibility that the governmental body's interests will be fundamentally antagonistic to the client's interests is great, and the lawyer will be materially limited by the obligations and responsibilities he or she owes to the governmental body.

Rule 8.4(c) states:

It is professional misconduct for a lawyer to:

- (c) State or imply an ability to influence improperly a judge, judicial officer, government agency or official . . .

Attorneys who serve as public lawyers 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 improperly influence a governmental agency or official. Where a lawyer is acting as a County Attorney and acting on behalf of a client in a matter pending before the Board of County Commissioners or requiring other official county action, a great risk exists that the public will believe that improper influence has or will occur because of the lawyer's dual roles. The lawyer's involvement with the Board of County Commissioners, even if the lawyer recuses himself or herself; may imply that the lawyer is able to influence favorably the members of the Board of County Commissioners to whom the lawyer normally provides legal advice and counsel, or to favorably influence other county officials with whom the lawyer interacts on a regular basis. 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. *See Iowa Ethics Opinion 91-49, page 324.*

For these reasons it would be improper for the County Attorney to represent an applicant for a liquor license, a subdivider presenting a subdivision plat, a property owner through whose land the county wishes to acquire a road easement, or a client in other matters before the Board of County Commissioners. Such representation would violate Rules 1.7(b) and 8.4(e).

Since the County Attorney and the lawyer for the Special District are disqualified from representing the clients in the specific examples described, the question arises whether under Rule 1.10, the partners and associates of the County Attorney or Special District lawyer 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.

While, under certain limited circumstances a waiver might be obtained from the governmental body (see comment to Rule 1.11), even if the firm was successful in avoiding the conflict under Rule 1.10, the County Attorney or Special District lawyer's firms would be precluded by Rule 8.4(c) from representing the client.

The concern raised by Rule 8.4(c) 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 the client in

these specific examples creates the implication that by hiring the law firm, the client will obtain treatment more favorable than that which the client would otherwise receive. While the implication of improper influence under Rule 8.4(c) created by the County Attorney or Special District lawyers partner or associate appearing before the Board of County Commissioners or the District might be overcome in unique circumstances, under the general facts described in the specific examples the law firm should prudently assume disqualification.

**NOTE**

1. 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.