

Attorney/Trustee Serving As Hospital Counsel

Ethics Committee Formal Opinion

1/12/82

I. QUESTION PRESENTED

Whether an attorney has an ethical conflict in serving as both a member of the Board of Trustees of a nonprofit hospital and as counsel to the hospital simultaneously.

II. DISCUSSION

Although various code provisions may apply to the above situation given a specific fact pattern, DR5-101(A) applies generally to this inquiry and states as follows:

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The inquiry therefore becomes whether the pecuniary relationship between the hospital and the attorney acting as counsel will affect his professional judgment while acting as a director and vice versa.

The most common situation which could arise is that in which the Board of Trustees is required to take action which will require the services of corporate counsel in litigated or nonlitigated matters. Just as a board member acts as a fiduciary to the nonprofit organization, the attorney's fiduciary duty to the organization as counsel is "of the highest order." Smoot v. Lund, 369 P.2d 933, 936 (Utah 1962). If, in acting on the issues presented for Board

consideration, the attorney's judgment will, in any degree, be affected by the prospect of gaining legal business from the decision for himself or his firm, then the attorney must explain this fact and recuse himself from all deliberations. Consequently, if an attorney-board member finds that his judgment is so affected, he should resign either as counsel to the organization or as a board member.

The Ethics Committee believes that such a result tends to deprive nonprofit organizations of valuable input from the legal community into their operations. The Committee therefore recommends the following in order to avoid violations of Canon 5 and DR5-101(A) and to guard against the appearance of impropriety:

1. The attorney decline either membership on the Board or employment as counsel to the Board if there is any possibility that his professional judgment could be affected in any way;
2. The attorney explain fully the ramifications of his dual role to the nonprofit institution prior to accepting either position;
3. The attorney explain clearly all fee arrangements between the institution and himself or his firm;
4. The attorney employ sound discretion in determining whether recusal from consideration of Board matters and/or refusal to undertake legal representation of the institution in certain matters is appropriate on a case by case basis.