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*"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."*  
EXECUTIVE ORDER NO. ONE

## Letter from the Chairman

Once again, we focus on recent advisory opinions issued by the Board. Advisory opinions are one of the most useful tools available to Public Officials to help them understand and comply with Executive Order Number One as they perform their public duties.

At its September 21 meeting, the Board approved preliminary opinions AO-01-001 through -005. This issue will summarize opinions -001 through -003. Remaining opinions will be discussed in a subsequent newsletter.

To request an advisory opinion from the Board, or to obtain a copy of the full text of an opinion included in this newsletter, please contact the Board's staff at (919) 733-2780.

George F. Bason 

## **ETHICS EDUCATION**

Due to the current State budgetary situation, we are temporarily unable to travel outside of the Raleigh area to make basic ethics education and awareness presentations.

If your board or agency is meeting in the area and you would like such a presentation, please call the Board's offices to make the necessary arrangements.

In the meantime, Board staff is always available for telephone consultations and conflict of interest questions.

## **"Advisory Opinions" on the Web**

In order to make the Board's advisory opinions more accessible to Public Officials and other interested parties, staff is in the process of putting all opinions from January 1998 forward, select older opinions, and other related information on the Board's web site.

This project will be completed in stages, with the first stage being a "*Comprehensive Index*" of most advisory opinions issued by the Board since its inception in 1977. This index is arranged alphabetically by general topic, issue, or organization/entity, as appropriate. Related topics are cross-referenced as much as possible. Researchers will be able to identify and examine all opinions addressing a particular issue or relating to a covered board or commission.

A new "*Topical Index*" is also available. It is organized according to common issues or recurring ethical themes (for example, "Conflict of Interest," "Gifts," and "Employer-Employee Relationships").

These and other indices will be updated periodically as the Board issues new opinions.

## **Board Meeting Scheduled**

Subject to the availability of funds, the Board of Ethics will meet on *Friday, December 7, 2001*, at 10:00 a.m. in room 2087 on the second floor of the Department of Administration building, 116 West Jones Street, Raleigh, NC. The primary purpose of this meeting is to address any outstanding preliminary advisory opinions and complaints, consider amendment of the Board's operating procedures, and conduct such other business as comes before the Board.

## QUOTABLE WISDOM

“Wise men learn more from fools than fools from the wise.”

Cato, Roman Statesman

“Perceptions of others are critical to the reputation of an individual or a public agency. Nothing is more important to public administrators than the public’s opinion about their honesty, truthfulness, and personal integrity. It overshadows competence as the premier value sought by citizens in their public officials and employees. Any individual or collective compromise with respect to these character traits can damage the ability of an agency to perform its tasks or accomplish its mission. The reputation of the administrator may be tarnished. Effectiveness may be destroyed. The best insurance against loss of public confidence is adherence to the highest standards of honesty, truthfulness and fortitude.”

American Society for Public Administration  
*Code of Ethics & Implementation Guidelines*  
(Adopted March 27, 1985)

## What is an “Advisory Opinion”?

Since 1977, “advisory opinions” have been an integral part the Board of Ethics’ effort to educate and assist covered “Public Officials” as they strive to conduct the public’s business in the best interest of the public. The issuance of advisory opinions is mandated by executive order. The current version is Executive Order Number One, which was issued January 12, 2001 (“EO One” or “the Order”). Section 5(d) of the Order requires the Board to answer questions relating to “real or reasonably-anticipated fact settings or circumstances.” The Board’s “Rules & Regulations” establish procedures for the request and issuance of advisory opinions. Opinions are intended to have prospective application only.

Those entitled to request an advisory opinion are (1) “Public Officials” as that term is defined by section 3 of the Order, (2) those responsible for appointing or supervising a Public Official, (3) Agency heads (which term includes the chair of each covered board), and (4) legal counsel for covered Agencies or boards.

The Board’s rules establish the procedure for issuing advisory opinions. First, the Board’s Executive Director drafts a preliminary advisory opinion which is reviewed by the Board Chairman. After incorporating the Chairman’s comments or suggestions, the preliminary opinion is sent to the requester and may be relied upon until the full Board meets and approves, disapproves, or modifies the opinion. All interested parties are notified of the final result.

The Board may decline to issue an opinion if (1) it determines that the request is frivolous, (2) the matter has already been considered and decided by the Board, or (3) the matter is not one with respect to which a ruling or determination would be appropriate.

All advisory opinions, both preliminary and final, are based upon the particular facts presented and issues raised in the specific request for an advisory opinion. As such, the scope of each opinion is limited to the request made and should only serve as a recommendation to the particular parties involved. They may, however, serve as a general guide to other individuals similarly situated.

## RECENT ADVISORY OPINIONS

**AO-01-001 (February 15, 2001):** Among other things, the State Building Commission develops procedures for evaluating the work performed by designers and contractors on State capital improvement projects and is empowered to authorize specified entities to use a method of contracting that is not typically authorized in relevant statutes. The public agency seeking an exemption must apply to the Commission for such authorization. The University of North Carolina system (“the University”) formally asked the Commission to approve an alternative contracting method for approximately 30 projects to be constructed utilizing university bond funds. The applicable statute requires consideration of the University’s request on a project-by-project basis with individual votes on each project under consideration. In addition to two public members, Commission members are drawn from a broad range of the construction industry, together with local government and the university system. This includes members who are duly licensed in architecture, engineering, general contracting, electrical contracting, and mechanical contracting. Because most Commission members have these statutorily-mandated connections to various segments of the construction industry, the Attorney General’s office has interpreted relevant statutes and rules to require members to abstain from consideration of relevant projects *or* contracts in which they either have a direct or indirect interest **or** in which they intend to acquire an interest through future interviews or bidding.

**OPINION:** Commission members acted in accordance with ethical standards when they abstained from consideration and voting on particular projects given their present or anticipated interest in such projects. At a minimum, there is a significant appearance of conflict when a Public Official participates in a decision that either impacts or could impact his or her private interest. Sensitivity is heightened where a business or financial interest is involved. Section 7 (a) prohibits Public Officials from knowingly using their position in any manner which will result in a direct or indirect financial benefit to themselves or their businesses. The same reasoning applies to situations where a Commission member *intends* to acquire an interest in a project under consideration. To do otherwise would not only be intellectually and ethically disingenuous but also potentially counterproductive and damaging in the long run. Once the anticipated financial interest surfaced, both the process and the result could be called into question.

One Commissioner must be “an employee of the university system currently involved in the capital facilities development process.” This University representative has an inherent (and legislatively-mandated) **potential** conflict of interest between his personal, private financial interest (his employment in the University system) and his public duty on the Commission. This is as the General Assembly intended. Potential conflicts, in and of themselves, are quite common and perfectly acceptable. The challenge is for Public Officials to guard against taking action that causes the “potential” conflict to become an actual conflict. Here, that could happen if the University representative voted on the University’s petition for the use of an alternative means of construction. Again, at a minimum, it would create a significant *appearance* of conflict of interest for a Commissioner to vote on a request from his or her employer. The public could rightly question in whose best interest the decision was made: theirs or the employer’s? The reasonable assumption is that one’s primary loyalty lies with his or her employer in that situation, either from a general sense of loyalty, a fear of retaliation, or expectation of reward.

Since the General Assembly obviously intended to draw upon the knowledge, experience, and perspective of not only a University system employee but also one working in the very field being served by the Commission, to deny the University representative the very work experience called upon in the statute would not make sense. This does not mean, however, that statutorily-designated representatives of various interests have free reign on their respective public bodies. They must still recuse themselves when they are presented with the opportunity to judge their own work or the work of their employer or others with whom they are sufficiently connected or associated.

The last question involved whether the ban on influencing other members’ votes extends outside Commission meetings to include either direct or indirect **lobbying** on particular matters before the Commission. Generally, a Public Official’s disqualification due to an impermissible conflict of interest, particularly a financial conflict of interest, extends to trying to influence the decision or outcome other than through an official vote. This usually involves a **direct** attempt to influence the decision, but acting through an agent or proxy would likewise be prohibited, if not more difficult to prove. Thus, a Commission member who recuses himself or herself due to a conflict of interest should not “lobby” other Commissioners or staff on the particular matters at issue. The Board has assumed that for the most part any such “lobbying” effort would take place at the official meeting where the public decision-making (*i.e.*, voting) is taking place and in a direct, one-on-one fashion. Generally, this ban on trying to do indirectly what one is prohibited from doing directly does **not** extend to any incidental expression of opinion or preference in other contexts. For example, Public Officials do not forfeit their free or commercial speech rights upon undertaking public service, and Executive Order One does not mandate otherwise. Commission members are generally not prohibited from sharing their opinions, or their employer’s positions, with outside organizations or groups, particularly if that is part of their job. In the end, however, as in so many “ethical” situations, Public Officials and the boards and commissions on which they serve must be extremely sensitive to following not only the letter but also the spirit of the conflict of interest and appearance of conflict rules.

## Recent Advisory Opinions (continued)

**AO-01-002 (February 7, 2001):** The North Carolina Board for Licensing of Geologists (“the Board” or “Geologists Board”) is charged with, among other things, protecting the public health and welfare through regulation of the practice of geology in the state. The Board conducts its business at open public meetings as required by law. In the past, the Board has met in the offices of some of its members, and it plans to do so again in the future. These meeting locations and facilities have been provided by such Board members free of charge to the Board or the State of North Carolina. A geologist licensee has raised several questions about the legality and/or propriety of meeting in private offices, namely the offices of some of the Board’s members. Specifically, the licensee questions whether conducting public meetings in private offices violates the Open Meetings Law or otherwise creates an impermissible “perception” of impropriety.

**OPINION:** The Board of Ethics is not charged with giving legal interpretations of potentially applicable statutes like the Open Meetings Law, and definitive interpretation of this and any other applicable laws lies with the Board’s legal counsel. Any conflict between a provision of the Order and other North Carolina law is resolved in favor of the law. The question of any potential “perception” of impropriety does fall within the scope of the Board of Ethics’ authority. The Board did not see anything in the current situation that would indicate the reasonable possibility of either an impermissible financial conflict of interest or appearance of conflict. In the future, there *could* be a conflict of interest if the Geologists Board voted to compensate members for the use of their offices for public meetings, but that does not appear to be the case here. Far from it, in these tight budget times, it appears that certain Public Officials are saving the State money by donating the use of private office space for public meetings with no expectation of any personal or professional gain.

**AO-01-003 (March 22, 2001):** The North Carolina Board of Mortuary Science (“MSB” or “the Board”) is required by statute to offer continuing education courses to its licensees during the calendar year. The Board has done so with great success for many years. While the primary goal is not to make a “profit,” the Board has made a relatively small amount of money on these courses in the past. Last year, one of the two relevant North Carolina trade associations approached the Board about co-sponsoring the continuing education program. The Board agreed after inviting the other trade association to also take part in the program. As a result, the Board and the two trade associations have co-sponsored two such programs, splitting expenses and any resulting profits. The Board licenses and regulates members of the two trade associations, but otherwise has no direct regulatory contact with the associations themselves. No Board members are currently serving as officers, directors, or leaders of the relevant trade associations, although most are members of such associations.

**OPINION:** Public Officials must make every effort to avoid even the appearance of a conflict of interest. This is a flexible, open-ended standard applicable on a case-by-case basis. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the Official’s ability to protect the public interest, or perform public duties, is compromised by personal interests. The “personal interests” that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. An appearance of conflict may exist even in the absence of a true conflict of interest.

The danger here lies in the possible perception that because the MSB and the trade associations are “partners” in the continuing education programs, association members will enjoy some advantages or benefits that non-members do not. Others may perceive a closer connection between the public regulator and the private organization than there really is. Yet another potential appearance is that the MSB is somehow encouraging individuals to join an association. Any one of these perceptions, if reasonable, would undermine public confidence that the MSB is acting in the best interest of the public as a whole as required by Executive Order Number One. In addition, voting to share “profits” with a private organization with which a board member is closely associated could run afoul of section 7 (a) (1) of the Order.

However, board members are NOT barred from any and all involvement with trade associations. Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a *potential* conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.” Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles.

## **"Statements of Economic Interest" Due-Dates**

All **new** employees or appointees who are covered by Executive Order Number One must file their Statement as soon as reasonably possible, the intent being to have a conflict evaluation prior to or contemporaneous with the commencement of public service where feasible.

All **currently serving** Public Officials who submitted a Statement under former Executive Order 127 were to resubmit a **new Statement** on or before **May 15, 2001**. See section 9 (e).

Thereafter, all covered Officials must file an **updated Statement** between **April 15 and May 15** each year. See section 9 (b).

If you have any questions relating to the Statement, please call the Board's offices at 733-2780.

### ***ATTENTION "AGENCY HEADS"***

Help us help you.

We depend on **you** to let us know who the exempt employees, appointees to non-advisory "boards," and other "Public Officials" under section 3 of Executive Order One are so that we can make sure they receive the necessary financial disclosure forms and other important information.

We will be glad to help you comply with sections 4 and 6 of the Order, but we need to know whom to contact. We are only as good as our database in this respect.

### **IMPORTANT INFORMATION ON-LINE**

The Board of Ethics' **newsletters** and other key information is available **on-line** at the Board's web site:

**[www.doa.state.nc.us/doa/ethics](http://www.doa.state.nc.us/doa/ethics)**

Alternatively, you can access the Board's web site through the North Carolina home page. Just click on "NC Agencies" at the top of the page and "go" to the Department of Administration "Quick Link." Then select "Boards and Commissions" where you will find the Board of Ethics listed. The Board of Ethics' "home page" will give you access to Executive Order Number One, the Board's Rules and Regulations, Statement of Economic Interest forms, and all newsletters.

***NOW AVAILABLE:*** A comprehensive Advisory Opinion Index along with select Advisory Opinions and a "Topical Index" is available for on-line information and research.

**WE ARE ALWAYS AVAILABLE FOR TELEPHONE CONSULTATION IF NECESSARY.**