

# N.C. BOARD



# OF ETHICS

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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

First, I am sorry to announce the departure of **Ms. Kathy Burnette** from our Board. As of October 1, 2002, Ms. Burnette will be joining the District Attorney's staff for the Ninth Judicial District. While we will miss Kathy's keen insights and valuable contributions, we wish her all the best in her new endeavor.

This issue of our newsletter once again focuses on recent advisory opinions issued by the Board. The three opinions reported in this issue were approved by the Board at its August 23, 2002, meeting in Raleigh. Until reviewed and approved by the full Board, opinions are "preliminary." They may, however, be relied upon until finally resolved.

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.

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 still 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.

## "Advisory Opinions" on the Web

In order to make the Board's advisory opinions more accessible to Public Officials and other interested parties, all opinions from January 1998 forward, select older opinions, and other related information are now available on the Board's web site.

In addition to all "recent" and other select opinions, a "*Comprehensive Index*" of most advisory opinions issued by the Board since its inception in 1977 is now available. This index is arranged alphabetically by general topic, issue, or organization/entity, as appropriate. Related topics are cross-referenced as much as possible. Researchers can identify and examine opinions addressing a particular issue or relating to a covered board or commission.

A "*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"), and includes summaries of select opinions.

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

## Have you updated your Statement of Economic Interest this year?

All covered Officials must file an updated Statement between April 15 and May 15 *each year*. See section 9 (b) of the Order. If you have any questions relating to the Statement, please call the Board's offices at 733-2780 and ask for Millie.

## **Board News**

We are extremely pleased to welcome **Jeanette C. Furney** as the Board's new Research Assistant. Jeanette comes to us with over 24 years experience in State Government. She was formerly employed by the Division of State-Local Relations, working in a unit known as the State Clearinghouse where she served as the Single Point of Contact (SPOC) for federal programs. She managed the N.C. Intergovernmental Review Process for federal grant applications and environmental impact statements.

Jeanette also assisted in the creation of and then managed a large database that was used to track notifications of intent to apply for federal grant/loan assistance. Her database was also used to track the review of environmental impact documents that were subject to the State and/or National Environmental Policy Act. In her duties as the SPOC, Jeanette had extensive contact with both public and private sector agencies and with all levels of state, federal, and local governments. Jeanette considers herself a "master multi-tasker."

When she is not busy multi-tasking on the job, Jeanette gets to exercise this strength at home. She is a wife and the mother of two boys, Nick (almost 13) and Zack (age 9). Her time away from the office is spent hanging out with her guys at the pool, watching them practice karate, reading, and surf fishing with the family.

Please make Jeanette welcome as a valuable part of the Board of Ethics team.

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## **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-02-001 (January 23, 2002):** The Executive Director of the North Carolina Real Estate Commission ("the Commission") asked about potential conflict of interest or appearance of conflict issues related to the possible appointment of an insurance industry representative to an informal advisory committee studying mandatory errors and omissions insurance for all licensed real estate brokers and salespersons in North Carolina. Among other things, the Commission licenses all real estate brokers and salesmen in the State. The Commission was considering the issue of whether real estate brokers and salespersons should be required to have errors and omissions insurance coverage as a condition of licensure. To assist in studying this issue, the Commission proposed to form an advisory committee comprised primarily of real estate practitioners. This advisory committee would have no statutory or regulatory standing or power, and the Commission would in no way be bound to act upon, follow, or even receive its recommendations. However, in order to obtain firsthand knowledge, information, and expertise regarding writing errors and omissions policies, the Commission wanted to appoint a representative of a North Carolina errors and omissions insurance provider as a non-voting advisor to such committee. This insurance representative could work for a provider which might not only be affected by any legislative or regulatory changes resulting from committee recommendations but also end up providing insurance coverage to brokers and realtors under any new system.

**OPINION:** The Board found that the Commission is free to appoint an insurance industry representative to its informal advisory committee under the present circumstances. The Commission was considering how to set up an information-gathering procedure at least several steps prior to any possible public decision on the ultimate issue. In other words, it was deciding how to obtain relevant information *before* taking official action based on that information. Absent some unusual or extenuating circumstance, the Board of Ethics has long stayed out of these types of internal operating or preliminary decisionmaking questions. The Board also noted that the General Assembly frequently creates boards or commissions whose membership is made up of extremely interested individuals, groups, or industries. The Real Estate Commission itself is an example: it must have at least three members who are "licensed real estate brokers or real estate salespersons." Knowledge and interest, both personal and professional, is often a prerequisite to membership, not a disqualifying factor. Officials must take extreme care, however, not to let their *potential* for conflict turn into an actual conflict by their actions in a particular situation.

Moreover, in exploring this kind of general policy-type question, the Commission is acting in a quasi-legislative manner, and the Board has determined on numerous occasions that Public Officials enjoy much more freedom as to their level of participation despite their "interest" in the matter at hand. Stated conversely, they are allowed to participate despite a generalized presumed "bias" one way or the other. Public Officials may not, however, participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others.

The Board advised that if the Commission still felt, in an abundance of caution, that naming an insurance industry representative to its informal advisory committee might create an unacceptable *appearance* of conflict, it could perhaps accomplish the same purpose in another manner (it might ask all or a larger group of insurance providers to submit comments in writing or at a "public hearing," or both; or it could seek and receive input from any industry trade groups), but determining precisely how the Commission decides to set up a procedure or process for exploring options and gathering information is outside the Board's area of expertise and jurisdiction.

**AO-02-002 (April 24, 2002):** The Board of Massage & Body Work Therapy ("BMBT") inquired whether it would be a conflict of interest for a board member who is also the owner of a massage and bodywork therapy school to participate in a disciplinary action involving a former student at such member's school.

**OPINION:** The Board of Ethics has previously determined that the "personal interests" that can give rise to an impermissible appearance of conflict are broader than strictly financial or familial interests. Specifically, the Board has found that covered "personal interests" can include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding. Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and of course the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative).

## RECENT ADVISORY OPINIONS (continued)

**AO-02-002** (continued). Because a disciplinary action against a license-holder is quasi-judicial in nature, legal impartiality is required, and the member must avoid both conflicts of interest and bias. What constitutes legal bias is a question of law for the BMBT and its counsel. However, North Carolina courts have found that legal bias may include (1) preconceptions about facts, policy, law, *a person*, a group, or an object, (2) a personal interest in the outcome of some determination, (3) a fixed opinion that is not susceptible to change, (4) an undisclosed *ex parte* communication, or (5) a close familial or *business relationship* with an applicant.

While it had not been provided with sufficient facts to definitively answer the specific question at hand, the Board noted that it had touched on a similar question in an earlier opinion to the BMBT. In March of 2000, the Board stated that a school owner/BMBT member “should recuse himself from participating in discussion or voting when matters specifically involving ... the licenses of his school’s students come before the BMBT.” This statement, while arguably *dicta*, points to a general rule that absent strong extenuating circumstances or mitigating factors, a school owner/member should not be involved in a quasi-judicial disciplinary proceeding involving one of his or her school’s former students. At a minimum, such involvement could cause an appearance of conflict of interest. In addition, given that reasonable people could conclude that a school owner would not want his school’s reputation impacted by a negative finding against one of his former students, the burden would be heavy indeed to show a sufficient lack of “personal interest” in the outcome of the disciplinary proceeding.

**AO-02-003 (May 30, 2002):** A member of the North Carolina Medical Board (“NCMB”) inquired whether it would be a conflict of interest to *serve* on both the NCMB and the Board of Directors of a private, non-profit political action committee (MEDPAC), so long as he did not solicit contributions from any member of the medical profession having an individual matter pending before the NCMB. The NCMB regulates the practice of medicine and surgery in North Carolina. Among other things, the NCMB licenses all doctors and surgeons in the State, promulgates rules regarding the practice of medicine and surgery, and conducts disciplinary hearings involving licensed physicians. As a MEDPAC board member, the Public Official seeks contributions from North Carolina physicians, but only those physicians who do not have an individual matter (either disciplinary or rulemaking) pending before the NCMB.

**OPINION:** The Board first reiterated that it was not an impermissible conflict of interest for a Public Official to *serve* on a non-public body, like an advocacy organization or trade association, as well as a covered public board such as the NCMB. The Board has long found that the governors’ ethics orders do *not* prohibit participation in other professional activities. Such dual service does, however, create a significant *potential* for conflict of interest of which the Official must be very aware. Secondly, the Board determined that if done with extreme sensitivity to the potential for conflict between the public office and private fundraising, soliciting monetary contributions from licensees does not appear to be prohibited by Executive Order Number One. It does, however, create a future appearance of conflict that would necessitate recusal should a solicited licensee appear before the NCMB.

The main question before the Board was whether soliciting contributions on behalf of MEDPAC while serving on the NCMB constituted “using” a public position to further a private interest under section 7 (a) of the Order. It certainly *could* be if the Official in any way connected the solicitation to the public office. Some examples would be sending the solicitation on NCMB letterhead, signing a personal solicitation letter as a member of the NCMB, or even mentioning in the solicitation that the Official is a member of the NCMB. These situations did not apply in the present case. Therefore, if the Official scrupulously avoided any connection or implied connection between his public position on the NCMB and a totally separate and distinct solicitation clearly on behalf of MEDPAC, soliciting donations from physicians did not fall within the scope of intentionally using an official position in a manner which will result in a personal financial benefit. Doing so, however, creates a high *potential* for conflict, and one must be extremely careful of how it is done.

Moreover, reasonable people could conclude that the Official’s ability to be totally neutral and unbiased could be compromised when physicians whom he has solicited on behalf of MEDPAC appear before him in his official capacity with the NCMB. This perception would exist regardless of whether the solicited physician actually made a donation to MEDPAC. Therefore, in order to “make every effort to avoid even the appearance of a conflict of interest,” the Official was advised not to take part in a proceeding directly and substantially involving any physician licensed and regulated by the NCMB whom he has solicited for donations on behalf of MEDPAC or any other organization.

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***QUOTABLE WISDOM***

“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 impaired. A career or careers may be destroyed. The best insurance against loss of public confidence is adherence to the highest standards of honesty, truthfulness and fortitude.”

American Society of Public Administration’s “Code of Ethics & Implementation Guidelines”

# "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** by **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.

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