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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 Director

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 June 10, 2005, 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.

Perry Y. Newson, Executive Director 

ETHICS EDUCATION *"Have Order, Will Travel"*

We are once again able to travel outside of the Raleigh area to make basic ethics education and awareness presentations. If your board or agency would like such a presentation, please call the Board's offices to make the necessary arrangements.

In addition, Board staff is always available for telephone consultations on conflict of interest questions.

"But if you ask what is the good of education in general, the answer is easy: that education makes good men, and good men act nobly." Plato

"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.

Statements of Economic Interest Due

Covered Public Officials must update their disclosure statements ("Statements of Economic Interest") annually by **May 15**. If you have not yet filed your Long, Short, or Supplemental form, please do so at your earliest opportunity. Feel free to call the Board's offices with any filing-related questions you might have.

Board News

The Board is extremely pleased to welcome **Leigh Hayden** as its new Research Assistant. Leigh started with the Board on June 1 and shows great promise as a “quick study.”

Leigh is a native North Carolinian and Triangle resident. She completed her undergraduate degree at NC State University in May 1994. In May 1996, Leigh received a Master of Arts degree in Cultural Anthropology from the University of Memphis. Her graduate research focused on applied urban and medical topics including work on environmental justice and health assessment issues. She worked with the Mid-South Peace and Justice Center in evaluating their “Toxics Awareness Project” and provided research support for her Department’s growing environmental focus.

Since graduation, Leigh has continued her research in community outreach and health systems. She has also worked as an anthropology instructor and been involved in public and community non-profit projects. Leigh has three beautiful boys (13, 6, and 1) with her husband Joel. In her spare time, she enjoys family, dogs, and gardening.

Join us in welcoming Leigh to the Board of Ethics family.

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.

ADVISORY OPINION SUMMARIES

AO-04-001C: Commission for Health Services

- The Commission for Health Services (“CHS”) asked whether it was an actual, apparent, or potential conflict of interest for a sitting CHS member to act as a paid consultant to a private company, and to advise such company and its attorneys on a specific petition pending before the CHS for action, if the member does *not* appear at Commission meetings or related sub-committee meetings with representatives of the company or its attorneys, and does *not* engage in any discussions with Commission members or staff on the topic.

Facts (while all opinions are based on the specific facts presented, this one is particularly fact-sensitive):

- The Commission member was first hired by the petitioner as an expert consultant less than three months before the petition was filed.
- When the petition first came before the Commission, the member recognized a potential conflict situation and recused himself from consideration of the petition because of work done for the applicant-company.
- At the first meeting of an advisory sub-committee, the Commission member appeared as a consultant for the applicant.
- Commission counsel discussed his concerns with the Commission member, and the member agreed to refrain from any discussions with sub-committee members and staff regarding his client’s petition.
- At the next sub-committee meeting on the petition, the Commission member again appeared with the company and its attorneys.
- He did not speak to or participate in any discussions with the sub-committee members or staff regarding the petition during the meeting.
- He did discretely advise the attorneys for the company during the meeting.
- From that point forward, he did not attend any subsequent sub-committee meetings.

Board of Ethics’ Findings & Conclusions:

- Through his identification with and interest in his client, the member has a specific, substantial, and readily identifiable financial interest in all matters directly relating to the petition.
- The member in question has an *actual conflict* between his public and private interests.
- How to best redress the conflict is a matter for the member and the Commission.
- This was not a “fault” situation. The member did what he was asked to do as a covered Public Official.

For a more detailed discussion of this opinion, please see page 4, Recent Advisory Opinions.

AO-05-001: Hearing Aid Dealers & Fitters Board

- The North Carolina State Hearing Aid Dealers & Fitters Board (“HADF” or “the Board”) requested an opinion regarding its members’ involvement with in-house licensing examinations and instructional programs (continuing education).

Facts:

- The Board is required by statute to “[s]upervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses” and “[f]und, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary.”
- Any Board member’s involvement in examination or continuing education programs is as an agent or representative of the Board itself, not himself or herself individually.
- Participating Board members receive no payment, fee, or compensation other than the statutorily-allowed per diem and travel reimbursement.
- Members are not privately teaching examination review or continuing education courses for pay while sitting as Board members.

Board of Ethics' Findings & Conclusions:

- The HADF not only can but also *must* administer licensing exams and conduct appropriate continuing education and instructional programs.
- There is no undue financial gain involved, which distinguishes this case from several earlier BOE opinions.
- Under the present facts, the Board of Ethics found neither a conflict of interest nor a reasonable appearance of conflict.

For more detailed presentation of this opinion, please see page 7, Recent Advisory Opinions.

AO-05-002: Hearing Aid Dealers & Fitters Board

- A member of the Hearing Aid Dealers & Fitters Board ("HADF" or "the Board") disclosed in her annual Statement of Economic Interest ("SEI" or "Statement") filed with the Board of Ethics that she occasionally does work for a fellow HADF Board member.

Facts:

- This was not the member's primary employment; however, she disclosed that she did over \$10,000-worth of work for her fellow Board member during the last reporting period.
- There was extensive discussion at the meeting as to whether the member was an employee or independent contractor in this situation.

Board of Ethics' Findings & Conclusions:

- The exact nature of the working relationship was irrelevant for this conflict analysis.
- Having an employer and employee serve on the same public body would create an actual conflict of interest.
- This type of conflict cannot be cured by having the Public Official remove himself or herself from the decision-making process (recusal) because it would effectively eliminate a seat on the public body and thus alter its legislatively-established makeup.
- The source of the actual conflict must be removed.
- This could be done in a number of ways, and the parties involved, including the covered public body, are in the best position to decide how that should best be handled.

For more detailed presentation of this opinion, please see page 9, Recent Advisory Opinions.

RECENT ADVISORY OPINIONS

AO-04-001C (July 8, 2004) (complements AO-04-001B): The Chairman of the Commission for Health Services ("CHS" or "the Commission") requested an advisory opinion on various conflict of interest/appearance of conflict questions related to a Commission member's private consulting work for a company petitioning the Commission for approval of its wastewater system. In order to address time-sensitive issues, the Chairman agreed to issue a temporary, interim opinion addressing the matters of the most immediate concern. The Board did so on March 5, 2004 (AO-04-001A). As contemplated at that time, a preliminary advisory opinion was issued on May 6, 2004 (AO-04-001B), which superseded and replaced interim opinion AO-04-001A. However, preliminary advisory opinion AO-04-001B did not address all of the questions posed in the original request. Instead, the Board Chair and Executive Director answered questions 1 through 3 and presented question 4 to the full Board pursuant to section VI (C) (2) of the Board's Internal Operating Procedures ("Procedures"). The Board met on June 16, 2004, and considered preliminary advisory opinion AO-04-001B and question 4 of the initial request. All parties attended the meeting and provided extensive input to the Board. The Board approved preliminary advisory opinion AO-04-001B with regard to questions 1 through 3 of the initial request. In addition, the Board approved the preliminary determination as to rulemaking with a clarification of the scope of recusal required in "general rulemaking." Finally, the Board tabled question number four for future resolution. At its meeting on June 10, 2005, the Board approved preliminary advisory opinion AO-04-001C which addressed question number 4 of the Commission's original request. All of the Commission's questions have now been answered, and advisory opinions AO-04-001B and AO-04-001C should be read in conjunction with one another.

RECENT ADVISORY OPINIONS (continued)

The relevant facts were set out in AO-04-001B, but will be repeated here for the reader's convenience. The Commission was created with the authority to adopt rules to protect and promote the public health and implement the public health programs administered by the Department of Health and Human Services ("DHHS" or "the Department"). As with many covered boards, the Commission has several members who must fill "designated seats": members who must come from a certain background or profession. One such member must be *either* a registered engineer experienced in sanitary engineering *or* a soil scientist. The gubernatorial appointee who is the subject of this opinion is a licensed soil scientist and an expert on wastewater systems. He was appointed to the Commission in April 2002. One of his clients is a wastewater systems manufacturer seeking Commission approval of its product as "an accepted wastewater system" pursuant to a recently-enacted law. Pursuant to this statute, the Commission makes the decision on whether to approve the manufacturer's product as an accepted wastewater system. While it was initially filed as a petition for rulemaking, the manufacturer's request was converted to a petition for approval as an accepted wastewater system. This is a very unique situation for the Commission in that most of what it does is traditional rulemaking. All parties agreed that the past and current situation is highly unusual.

The member in question was hired by the petitioner in August 2003 to assist it in regulatory matters *outside of North Carolina*. He continues to work with the petitioner on several out-of-state matters and states that he expects his relationship and work for the petitioner will be ongoing for the foreseeable future. In late October or early November 2003, the member learned that his client would be petitioning the Commission in the present matter. This client asked the member to work on the specific petition at issue here. The initial petition for rulemaking was filed on October 31, 2003, and first came before the Commission at its November 14, 2003, meeting, at which time the Commission member recused himself from consideration of the petition because of work done for the applicant-company. The Commission chair appointed a sub-committee to review the petition, consult with staff, and report back to the full Commission at its February 2004 meeting. Because the member in question had recused himself from voting on the petition due to his employment with the applicant, the chair intentionally did not include this member on the advisory sub-committee.

At the first meeting of the advisory sub-committee, the Commission member appeared as a consultant for the applicant. After clearly disclosing his consultant role, he sat at the table with company representatives, he asked and answered substantive questions, he talked about various technical issues, he had direct discussions with the two sub-committee members, and he made recommendations. In short, he was a full participant in the meeting on behalf of his employer, the applicant. No objections to his involvement were raised before, during, or immediately after such committee meeting. Several weeks after the first sub-committee meeting, Commission counsel expressed concern about the member's participation in the sub-committee meetings. Counsel reviewed various Board of Ethics opinions and determined that the member's actions on behalf of the manufacturer might pose a potential conflict of interest or at least the appearance of a conflict. Counsel discussed his concerns with the Commission member, and the member agreed to refrain from any discussions with sub-committee members and DHHS staff regarding his client's petition.

At the next sub-committee meeting on the petition, the Commission member again appeared with the company and its attorneys. In discussions with Commission counsel before the meeting began, the member advised that he would not participate in the discussions or do anything that might be construed as attempting to influence the sub-committee members or department staff. The member said that he was only there to advise the attorneys for his client. Counsel reiterated his position that the member's attendance in his role as a private consultant might constitute a conflict of interest or appearance of a conflict. The member indicated that he did not believe his mere presence should be interpreted as influencing the sub-committee and that he did not believe that the Board of Ethics' advisory opinions prohibited attendance at the meetings. The member remained at the sub-committee meeting and sat with the company representatives behind the attorneys for the applicant-company. He did not speak to or participate in any discussions with the sub-committee members or staff regarding the petition during the meeting. He did discretely advise the attorneys for the company during the meeting. From that point forward, he did not attend any subsequent sub-committee meetings.

RECENT ADVISORY OPINIONS (continued)

OPINION: The Commission asked four questions relating to conflict of interest and the appearance of conflict in the context of the member's consulting work for the petitioner. As mentioned above, based upon the facts presented and information provided to the Board at its June 16, 2004, meeting, the Board answered questions 1 through 3 in advisory opinion AO-04-001B. These questions dealt with disclosure of potential conflict situations, the scope of recusal (including in rulemaking), and the extent to which the basic conflict rules apply to Public Officials serving on self-contained ad hoc advisory sub-committees. For complete answers to the first three questions and other general guidance, see AO-04-001B. Question number 4 is as follows:

“Is it an actual or potential conflict of interest, or the appearance of a conflict, for a sitting CHS member to continue to act as a consultant to the private company or a public entity, and specifically advise it and its attorneys on the petition before the CHS for action, if the CHS member does not appear at related committee meetings or the CHS meeting with representatives of the company or its attorneys, and does not engage in any discussions with commission members or staff on the topic?”

It bears repeating that while all advisory opinions are fact-specific, this one is particularly so. It applies to the specific member's situation as outlined above. Some of the key facts here are as follows. The Commission member was first hired by the petitioner as an expert consultant less than three months before the petition was filed. Therefore, he did not have what would generally be considered a long-standing employment relationship with the applicant. He was asked to work on the specific petition at issue here less than a month (and perhaps even a few days) before it was filed with the Commission. He did in fact work on the specific petition that was filed with the Commission. While he fills one of the Commission's "designated seats" (one member must be either a registered engineer experienced in sanitary engineering or a soil scientist), the position does not call for the type of very specific professional or even work experience which virtually guarantees that the person or his work will likely come before his board. The member is a nationally-known expert on wastewater systems whose opinion carries great weight with the Commission. While very unique and out of the ordinary, the proceeding before the Commission was quasi-judicial in nature, involving discretionary action impacting significant individual rights. Through his identification with and interest in his client, the member has a specific, substantial, and readily identifiable financial interest in all matters directly relating to the petition.

At a minimum, this situation creates a *significant* appearance of conflict. At some point in some cases, appearances can be so significant that the general remedy of recusal is an inadequate way to protect the public interest. Something more may be required. The Board does not need to resolve that issue here, however, because based upon the specific facts of this case, the member in question has an *actual conflict* between his public and private interests. How to best redress the conflict is a matter for the member and the Commission.

The Board emphasized that it was not attempting to alter or intrude upon the general statutory framework for volunteer boards and commissions in North Carolina. The General Assembly has decided that relevant experience and knowledge count as much or more than trying to have a theoretically "bias"-free decision-making body. Covered boards and commissions are not intended to be like juries. The Board noted long ago and has repeated many times since that "bias" in the sense of a general preference or inclination is intentionally built into many a public body. But the allowable degree of bias varies with the type of public decision-making being done (quasi-legislative vs. quasi-judicial). There is a line that cannot be crossed in either context. Sometimes it is difficult to see that line, and its location varies in different situations. The best the Board can do is decide each case on its individual merits, and that is how this opinion should be viewed.

Finally, the Board emphasized that this was not a "fault" situation. The member in question recognized his initial conflict and recused himself at the first opportunity. In most situations, that is sufficient. Thereafter he complied with all subsequent directives from this Board and totally removed himself from the deliberative process, including sub-committee meetings. At the June 16, 2004, Board of Ethics meeting, the member agreed with the preliminary determinations and merely sought a clarification on the scope of recusal in rulemaking. His suggestion was reasonable and accepted by the Board. Therefore, there should be no "ethical" stigma associated with this decision. As with all opinions, it is intended for prospective application.

RECENT ADVISORY OPINIONS (continued)

AO-05-001 (May 19, 2005) The North Carolina State Hearing Aid Dealers & Fitters Board (“HADF” or “the Board”) requested an opinion regarding its members’ involvement with in-house licensing examinations and instructional programs (continuing education). The Board is the State’s primary licensing and regulatory body for the fitting and selling of hearing aids. It is unlawful for any person to fit or sell hearing aids unless first licensed by the Board or authorized as an apprentice under the supervision of a Board licensee. Among other things, the Board is required by statute to “[s]upervise and administer qualifying examinations to test and determine the knowledge and proficiency of applicants for licenses” and “[f]und, establish, conduct, approve and sponsor instructional programs for registered apprentices and for persons who hold a license as well as for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to the extent that the Board deems such instructional programs to be beneficial or necessary.” In addition, the legislature appears to give the Board several options for providing the “occupational instruction” required for license renewal: the Board can fund, *conduct* or approve, or sponsor such a course. Moreover, the legislature appears to set up a bifurcated system of Board-provided and non-Board-provided education services. For example, the Board can *provide* a continuing education make-up class or a license examination preparation course; or it can *approve* of an outside continuing education program provider. The Board is also authorized to set and collect a fee for “verifying and recording attendance at a continuing education program *not* provided by the Board.”

The Board conducts an annual two-day continuing education make-up program for the benefit of those licensees who did not complete their continuing education requirements for license renewal. The Board has a committee that selects the topics and the speakers for this program. When "short" a speaker(s), the Board Members and/or the Board’s Executive Secretary have served as presenters. A Board Member and/or the Executive Secretary also serve as the program monitor who registers the attendees, collects fees, and/or introduces the presenters. This program is “in-house” in the sense that it is not a private program or course provided by outside contractors, organizations, or individuals on a for-profit basis. Any Board member’s involvement is as an agent or representative of the Board itself, not himself or herself individually, and participating Board members receive no payment, fee, or compensation other than the statutorily-allowed per diem and travel reimbursement. Many Board members decline these modest allowances.

Board members may attend licensing examinations and administer and grade the practicum portion of the exam. However, only Board members are selected who are not competitors of either the particular applicant who is being graded or the applicant's sponsor. Board members do not prepare the actual exam questions, but they do determine what materials will constitute the questions, the format of the questions, and the number of questions that will be asked. The Executive Secretary actually prepares the exam questions and is the only one with access to them. Board members do not have access to the exam question bank. The Board has a committee that reviews the exam results *after* each exam, and another committee meets with the applicants who failed the exam and are seeking to renew their apprenticeship certificates. The two committees discuss the reasons the applicants thought that they failed the exam and they recommend changes to the exam. The full Board meets to hear the Exam Committee's report and discuss/vote on recommended changes. The Executive Secretary implements the changes.

The Board member who currently assists with the Board's licensing exam does not sponsor any registered apprentice or person who is preparing to take such exam; nor does she "sell" hearing aids in her current employment setting within the North Carolina Public School System. Therefore, she is not a competitor of any registered apprentice, sponsor, or examination candidate. Others assisting with and grading the exam are Board office staff who do not fit or sell hearing aids.

The Executive Secretary is the Board’s only instructor for the Board-sponsored training classes for registered apprentices and exam-preparation instructional programs. She has no competitors as she does not actively fit or sell hearing aids. She does not tutor apprentices or conduct paid or unpaid apprentice training or exam preparation classes for anyone other than the Board pursuant to her personal services contract.

OPINION: The Board of Ethics noted that while definitive legal interpretations of applicable statutes are for the Board and its counsel, there appears little doubt that “the Board” not only can but also *must* administer licensing

RECENT ADVISORY OPINIONS (continued)

exams and conduct appropriate continuing education and instructional programs. Properly fulfilling one's statutory obligations and duties in the proper context cannot be deemed a conflict of interest. There is perhaps a question of what the General Assembly meant when it directed "the Board" to perform these functions, but these and other similar questions are beyond the scope of Executive Order Number One. The Order's basic rule of conduct for covered Public Officials is that they must perform their official duties in a manner to promote the best interests of the public. This encompasses avoiding both conflicts of interest and the appearance of conflicts of interest. Conflict of interest rules are aimed primarily at avoiding undue **financial** gain as a result of one's official position. The basic conflict provision is found in section 7 (a) (1). A Public Official shall not knowingly use his or her position in any manner which will result in financial benefit, direct or indirect, to not only the Official or his family but also a business, organization, or group with which the Official is associated. Moreover, a Public Official cannot use or disclose information gained in the course of, or by reason of, his official responsibilities in a way that would affect a personal financial interest of the Public Official, a member of the Official's family, or a person with whom or business, organization, or group with which the Public Official is associated.

Since none of the Board members involved in the examination or continuing education programs here receive any payment or compensation for their services, there is no undue financial gain involved. Nor are any members privately teaching examination review or continuing education courses for pay while sitting Board members. This distinguishes the present case from several earlier BOE opinions.

In 1989, the BOE Chairman issued a series of letters addressing the extent to which members of the North Carolina State Board of Cosmetology Examiners could conduct outside seminars or make presentations to current or prospective licensees for a fee. Noting that the Public Official was clearly identified as a member of the Cosmetology Board, the Chairman told one member that he was "in a conflict of interest situation" when he accepted a fee for presentations attended by persons who are or will be licensed by the board he was representing. In a follow-up letter to the same Official, the Chairman wrote,

"Again, it is the position of the Board of Ethics that you are in a conflict of interest situation when you appear before persons who are licensed or about to be licensed by [your board] wherein you are paid a fee when you allow yourself to be identified as a board member...."

In the final word to this Official, the Chairman wrote,

"When a board member appears privately for pay, or for board sponsored seminars with state compensation, before a group which is subject to the board's jurisdiction, it is impossible to completely erase the fact that he or she is a board member. Thus, because of the potential for conflict of interest on the part of the board member, it is recommended that the member not appear privately for pay before individuals who must be licensed by the board."

The BOE was faced with a similar question in 1998. In AO-98-020, the BOE was asked whether a member of the Board of Examiners for Engineers and Surveyors could participate in continuing education for profit or accept fees for speaking to trade and other associations. The easy case involves a Public Official overtly using his or her board position to promote private educational programs. This could occur through advertising or other promotional materials and would clearly constitute "using" a public position for private gain in violation of the Order. However, such overt promotion is not necessary for there to be a prohibited appearance of conflict. The BOE concluded that board members should not appear privately for pay before individuals who must be licensed by their board, either as providers of continuing education programs or as speakers before organizations whose members are licensed by the board.

The same Engineers and Surveyors board member became the subject of yet another opinion, this one involving teaching outside examination review classes for a fee. While the licensing exams were prepared by a national organization rather than the Engineers and Surveyors board, board members had access to the exams, routinely reviewed them, and sometimes participated in preparing portions of them. Relying on the confidentiality provision of section 7 of the Order, the BOE stated that board members could not teach licensing exam review classes under these circumstances:

RECENT ADVISORY OPINIONS (continued)

“[Exposure to the confidential licensing exam] may cause the members of the profession and members of the public to question the ability of these Board members to teach exam review classes in an unbiased manner and could compromise the integrity of the exam process. Therefore, to allow members to teach these classes would create a conflict of interest.”

These situations can create significant *appearance* of conflict issues covered by section 7 (b) of the Order. 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. An appearance of conflict may exist even in the absence of a true conflict of interest.

One such appearance of conflict prevented a Public Official from performing outside reviews for a fee. A new appointee to the Board of Dietetics/Nutrition asked whether she could continue to act as a paid “certified reviewer” of weight control programs. Certified reviewers evaluated programs and recommended either approval or denial to the full board. The Official acknowledged that she could not participate in her board’s decision regarding any program on which she had performed a certification review. The key question was whether she could continue to perform certified reviews at all. The BOE concluded that,

“Your participation in the Board’s certification decisions regarding reviews conducted by other certified weight control program reviewers while independently performing reviews yourself could, at a minimum, create the appearance of a conflict of interest. Conducting program reviews while an active Board member could appear to give you a competitive advantage over the other certified reviewers.... Thus, to completely remove any appearance of conflict of interest, you should refrain from conducting program reviews during your tenure with the Board.”

The common, and perhaps key, factor in all of the preceding cases is that the Public Officials were performing or seeking to perform outside, independent services somehow connected to their boards’ public functions *for pay*. There was a clear financial interest aspect of each situation. In the present situation, Board members are not engaging in outside teaching activities, whether continuing professional education or license exam preparation, for pay. Instead, they are performing their statutorily-mandated duties as part of their public service. Safeguards are in place to ensure that members neither benefit themselves nor harm competitors. Thus under the present facts, the Board of Ethics found neither a conflict of interest nor a reasonable appearance of conflict.

AO-05-002 (June 13, 2005) A member of the Hearing Aid Dealers & Fitters Board (“HADF” or “the Board”) disclosed in her annual Statement of Economic Interest (“SEI” or “Statement”) filed with the Board of Ethics (“BOE”) that she occasionally does work for a fellow Board member. This is not the member’s primary employment. However, the employee-member stated that she received more than \$10,000 in salary from the employer-member during the last reporting period. The filing member felt that this work for her co-member could cause a possible appearance of conflict. Agreeing with her initial assessment, the BOE’s Executive Director referred the issue to the full Board of Ethics at its June 10, 2005, meeting and suggested that the BOE issue a formal advisory opinion on the issue of one Public Official working for another while they both serve on the same public body.

There was extensive discussion at the meeting as to whether the member was an employee or independent contractor in this situation. Ultimately, the Board of Ethics concluded that the exact nature of the working relationship was irrelevant for this conflict analysis. For this opinion, the member who is the subject of this opinion was referred to as an “employee” regardless of her actual legal status.

OPINION: The Order’s basic rule of conduct for covered Public Officials is that they must perform their official duties in a manner to promote the best interests of the *public*. This encompasses avoiding both conflicts of interest and the appearance of conflicts of interest. 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. An appearance of conflict may exist even in the absence of a true conflict of

RECENT ADVISORY OPINIONS (continued)

interest. The employee-member here correctly perceived that serving on a regulatory-licensing board with her employer creates, at a minimum, the appearance of a conflict of interest. The Board of Ethics has noted as much in prior opinions. In the context of an employee-Public Official being in the position of passing on the formal request of his outside employer, the Board of Ethics stated,

“[A]t 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.**”

The BOE also pointed out that the interests of employers and employees are usually equated for conflict of interest analysis.

In the present situation, the BOE felt that a reasonable person could legitimately question whether the employee-member was acting independently in the public’s best interest or as her employer wished. Whether true or not, there could be a reasonable perception that the employer-member really has two votes on the public body due to his real or perceived influence over his employee.

The Board of Ethics has previously found that this situation involves more than an appearance of conflict, however. In 1987, the BOE was asked whether there would be an actual or potential conflict if a direct or indirect employer-employee relationship existed between two board members. The BOE found that there would be an *actual conflict* if such a relationship existed:

“An employer-employee relationship between board members would present a financial interest, the very existence of which creates a conflict with the public interest.”

After extensive deliberation and discussion at its June 10 meeting, the current Board of Ethics came to the same conclusion that having an employer and employee serve on the same public body would create an actual conflict of interest. Moreover, this type of conflict cannot be cured by having the Public Official remove himself or herself from the decision-making process (recusal) because it would effectively eliminate a seat on the public body and thus alter its legislatively-established makeup. The source of the actual conflict must be removed. This could be done in a number of ways, and the parties involved, including the covered public body, are in the best position to decide how that should best be handled.

Finally, the Board of Ethics thanked the filing Public Official for her sensitivity to the ethical ramifications, both real and perceived, of her public service and commended her for her comprehensive and forthright disclosure.

Character cannot be developed in ease and quiet. Only through experience of trial and suffering can the soul be strengthened, vision cleared, ambition inspired, and success achieved.

-- Helen Keller, American social activist and author (1880-1968)