

Advisory Opinion 1987-10

An attorney has requested an advisory opinion on a question presented by the following facts. The attorney, as a "hearing officer" for a public entity (hereinafter "Board"), was directed to make whatever preliminary procedural rulings and arrangements were necessary in a rulemaking procedure conducted by the Board pursuant to statutory authority. The attorney did not conduct any hearing, take testimony, submit findings or conclusions, or otherwise participate in any adjudicatory proceedings or on the merits of the rulemaking proceeding. While acting as a "hearing officer," the attorney ruled on only two matters, a motion to intervene and a motion for extension of time.

Following the Board's adoption of the rule, an appeal was taken to the New Mexico Supreme Court by various parties. The Board now intends to appoint the attorney as counsel for the Board on appeal. The appeal focuses exclusively on the substantive basis of the rule adopted by the Board and has absolutely nothing to do with the two rulings the attorney made. The attorney asks whether his acting as counsel on appeal violates the ethical rules.

A lawyer is prohibited from representing 'anyone in connection with a matter in which the lawyer participated personally as a judge or other adjudicative officer' absent consent by all parties. SCRA 1986, Rule 16-112(A). The committee is of the opinion that the attorney did not act as an adjudicative officer when he ruled on two preliminary procedural matters involving a regulatory, as distinguished from an adjudicatory, matter. We are supported in our opinion by the comment to model Rule 1-12, in which it is stated that the rule does not apply when a former judge exercised remote or incidental administrative responsibility that did not affect the merits of a particular controversy.

The committee would reach the opposite conclusion if either of the two preliminary matters involved issues raised on appeal. Since that is not the case, it is difficult to see how Rule 16-112(A) is implicated or how prejudice would occur with regard to any participant in the rulemaking process.