

2009 FORMAL ETHICS OPINION 8

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SERVICE AS COMMISSIONER AFTER REPRESENTING PARTY TO PARTITION PROCEEDING

Adopted: January 21, 2011

*Opinion provides guidelines for a lawyer for a party to a **partition** proceeding and rules that the lawyer may subsequently serve as a commissioner for the sale but not as one of the commissioners for the **partitioning** of the property.*

Inquiry #1:

Attorney is retained by a person with an interest in property to represent him in a proceeding to **partition** the property pursuant to Chapter 46 of the North Carolina General Statutes. N.C. Gen. Stat. §46-6 authorizes the court to appoint a disinterested person to represent any person interested in the property whose name is unknown and who fails to appear in the proceeding. May Attorney represent the existing client and also agree to be appointed to represent any unknown person with interest in the property?

Opinion #1:

No. There is a potential conflict between the interests of the existing client and the interests of the unknown person(s). One of the critical issues in a **partition** proceeding is whether the property should be sold or **partitioned**. *See, e.g.*, N.C. Gen. Stat. §46-22(c)(party seeking sale has burden of proving, by a preponderance of the evidence, that actual **partition** cannot be made without substantial injury to the interested parties). If Attorney has an existing client with a specific interest in the proceeding, Attorney cannot be disinterested as required by N.C. Gen. Stat. §46-6 or exercise independent professional judgment as required by the Rules of Professional Conduct when evaluating and representing the interests of the unknown person(s). The potential conflict cannot be resolved by consent because the unknown person(s) is unavailable to consent. Rule 1.7.

Inquiry #2:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property and, pursuant to N.C. Gen. Stat. §§1-399.4 and 46-28, appoints Attorney as the commissioner for the sale.¹

May Attorney serve as the commissioner and collect a commission from the public sale?

Opinion #2:

Yes, provided Attorney concludes that he can serve fairly and impartially and, further provided, Attorney terminates his representation of any person with an interest in the property.

The role of the commissioner is a neutral one with fiduciary responsibilities to all of the owners of the property. However, a commissioner conducting a public sale has limited discretion because he must follow the specific procedural requirements for judicial sales set forth in Chapter 1, Article 29A of the General Statutes. Attorney may, therefore, serve as commissioner for the sale upon determining that he can fulfill the role impartially, without bias for or against any of the parties to the **partition** proceeding, and upon terminating his representation of any person with an interest in the property. In the similar situation of a lawyer serving as a trustee on a deed of trust in foreclosure, the ethics opinions also allow the lawyer to relinquish the representation of the lender or the debtor to serve in the impartial fiduciary role of trustee for the foreclosure. *See* RPC 46, RPC 82, RPC 90.

N.C. Gen. Stat. §46-28.1 permits any party to a **partition** proceeding to file a petition for revocation of the order confirming the sale provided the petition is filed within 15 days and is based upon grounds that are specified in the statute. Therefore, the client's legal needs may not end with the entry of the order of sale and the appointment of a commissioner. Anticipating that a client might desire additional legal representation after the sale, at the beginning of the representation the lawyer must notify the client of the lawyer's intention to seek to withdraw from the representation upon the entry of an order of sale in order to be appointed by the clerk as commissioner. *See* Rule 1.4. After the entry of the order of sale and before seeking the permission of the clerk to withdraw from the representation to serve as the commissioner for the sale, the lawyer must obtain the client's informed consent, confirmed in writing, to withdraw from the representation to serve as commissioner. *See* Rule 1.16.

At the beginning of the representation, if Attorney does not intend to serve as a commissioner for the sale, he does not have to communicate with the client about potential service as a commissioner. If the circumstances change and Attorney subsequently decides to seek the appointment, failure to notify the client at the beginning of the representation will not prohibit Attorney from subsequently asking for the client's informed consent to withdraw to serve as a commissioner.

Inquiry #3:

At the conclusion of the proceeding, the clerk of court orders a private sale of the property pursuant to N.C. Gen. Stat. §§46-28 and 1-339.33. May Attorney be designated as the person authorized to make the private sale pursuant to N.C. Gen. Stat. §1-339.33(1)?

Opinion #3:

Yes, subject to the conditions set forth in Opinion #2.

Inquiry #4:

If Attorney is appointed the commissioner for a public sale or the person authorized to make the private sale, may Attorney purchase the property at the sale?

Opinion #4:

No. As the appointed commissioner or the person appointed to conduct the private sale, Attorney has a duty to oversee the sale of the property in a fair and impartial manner. Advancing a personal interest by bidding on or making an offer on the property violates this duty. *See* 2006 FEO 5 (county tax lawyer who is appointed commissioner may not bid at tax foreclosure sale).

Inquiry #5:

At the conclusion of the proceeding, the clerk of court orders the public sale of the property but appoints another person as commissioner for the sale. May Attorney bid at the sale on his own behalf?

Opinion #5:

No. This would be a conflict of interest between the lawyer's self-interest in purchasing the property at the lowest price and the client's interest in selling the property for the highest price. Rule 1.7(a)(2). However, Attorney may bid on the property if he is doing so on behalf of the client.

Inquiry #6:

At the conclusion of the proceeding, the clerk of court orders the **partition** of the property. May Attorney agree to be appointed as one of the three commissioners responsible for dividing the property?

Opinion #6:

No. A commissioner for a **partitioning** must exercise discretion in determining how to divide the property, thus directly affecting the interests of the various parties to the proceeding. Moreover, there remain opportunities for Attorney to advocate for his client's interests in the event the commissioners seek input from the parties or in the event of an appeal. Attorney cannot, therefore, serve as an impartial commissioner. Rule 1.7(a).

Inquiry #7:

Assume that Attorney formerly represented one or more of the parties in a separate but related **partition** proceeding (i.e., a prior proceeding involving the same property that did not result in **partition** or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as one of the commissioners to conduct the sale or to **partition** the property?

Opinion #7:

Yes, provided Attorney determines that he can act impartially. *See* Opinion #1 and Rule 1.7.

Inquiry #8:

Assume that Attorney formerly represented one or more of the parties in a separate but related **partition** proceeding (i.e., a prior proceeding involving the same property that did not result in **partition** or sale), but does not represent any of the parties to the current proceeding.

May Attorney serve as the court-appointed lawyer for any "unknown owner" pursuant to N.C. Gen. Stat. §46-6?

Opinion #8:

Yes, with the informed consent, confirmed in writing, of Attorney's former client(s). Rule 1.9(a) prohibits a lawyer who has formerly represented a client in a matter from representing a new client in the same or a substantially related matter if the interests of the new client are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Inquiry #9:

Assume that Attorney formerly represented one or more of the parties in a separate but related **partition** proceeding (i.e., a prior proceeding involving the same property that did not result in **partition** or sale), but does not represent any of the parties to the current proceeding.

May Attorney purchase the property at the sale?

Opinion #9:

Yes, unless Attorney received confidential information from a former client relative to the property that Attorney could use to the former client's disadvantage when bidding on the property. Rule 1.9(c)(1).

If a lawyer no longer represents a former client, the lawyer's only duties to the former client are to avoid adverse representations of others in the same or a substantially related matter and to avoid using confidential client information to the disadvantage of the former client. Although the **partition** sale may be substantially related to the prior **partition** proceeding, a lawyer who is purchasing for his own interest is not engaged in the representation of an adverse party and, therefore, the prohibition on representations adverse to a former client in Rule 1.9(a) is inapplicable. However, the prohibition on using the confidential information of a former client to the disadvantage of the former client would apply unless, as Rule 1.9(c)(1) permits, the information has become generally known.

Endnote

1. 1. Although the procedure for judicial sales of property set forth in Chapter 1, Article 29A, of the General Statutes provides for the appointment of only one commissioner, it is still the custom in some judicial districts for the clerk of court to appoint three commissioners. The conditions on service as a commissioner for the public sale of property set forth in this opinion apply equally to a lawyer who is appointed by the clerk to serve on a panel of commissioners.