

# New York State Bar Association

## Committee on Professional Ethics

Opinion 767 – 10/8/03

Topic: Part-time public official or employee;  
Conflicts of interest; Advertising

Digest: Certified impartial hearing officer may not represent clients in hearings in same school district or if other conflict of interest exists; may include certification in advertising.

Code: DR 1-102(A)(5), 2-101(A), 5-101(A), 8-101(A)(2), 9-101(B)(1), (3)(a), (C), EC 8-8, 9-1, 9-2, 9-4, 9-6, Canon 9

CJC: N.Y. Comp. R. & Regs. tit. 22, §100.6(B)(2), (C).

### QUESTION

A lawyer is certified by the New York State Commissioner of Education as an impartial hearing officer (“IHO”) to hear disputes between school districts and parents of students with disabilities regarding the identification, evaluation and educational placement of such students.

1. May the lawyer, in addition to acting as an IHO, also in private practice represent parents in such hearings?
2. May a lawyer so certified refer to the certification in advertising?

### OPINION

#### *Background*

The inquirer practices primarily in the area of special education law, representing parents of students with disabilities. When those parents disagree with a determination made by a school district regarding the education of their child, they are entitled to a hearing before an IHO. To be eligible to serve as an IHO, a person must (1) be a New York lawyer in good standing with a minimum of two years practice and/or experience in the

areas of education, special education, disability or civil rights, or have been certified as an IHO on or prior to September 1, 2001; (2) have access to the support and equipment necessary to perform the duties of an IHO; (3) be independent, not be an officer, employee or agent of the school district or of the board of cooperative educational services of which such school district is a component or an employee of the State Education Department, not have a personal or professional interest in conflict with his or her objective in the hearing, and not have participated in the formulation of the recommendation to be reviewed; and (4) be certified by the Commissioner of Education as an IHO. To be certified as an IHO, the individual must (1) successfully complete a training program conducted by the Department of Education, (2) attend periodic update programs, and (3) annually submit a certification that the IHO meets the foregoing eligibility requirements. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(x).

Each school district is required to maintain a list setting forth the name of each IHO certified by the Commissioner of Education who is available to serve in the district. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e). The list is prepared by the New York State Department of Education for each county so that individual school districts do not have the discretion to add or subtract names from the list. An individual IHO may request that his or her name be removed from the list for a particular school district. Appointment of IHOs by a school district may only be made from that district's list and the appointments are made on a rotating basis by alphabetical order. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e)(ii).

If a particular IHO declines appointment or fails to respond to a request to serve within 24 hours or is unreachable after reasonable efforts, the next IHO on the list will be offered the appointment. N.Y. Comp. Codes R. & Regs. tit. 8, §200.1(e)(ii).

*Question One: May a lawyer certified as an IHO also represent parents of students with disabilities in private practice?*

The inquirer is considering applying to the New York State Commissioner of Education to be certified as an IHO, but desires to maintain a current practice of representing parents of students with disabilities. Although we see no need for a *per se* prohibition against a lawyer who acts as an IHO from also representing parents of disabled students before individual school districts, there are instances in which the inquirer would be precluded from representing parents of a disabled child in a particular matter or acting as an IHO.

Representing parents in a school district which includes the lawyer on its list of certified IHOs.

DR 1-102(A)(5) provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Canon 9 exhorts a lawyer to avoid even the appearance of impropriety. EC 8-8 states: "A lawyer who is a public officer . . . should not engage in activities in which the lawyer's personal or professional interests are or foreseeably may be in conflict with the lawyer's official duties." EC 9-1 provides: "Continuation of the American

concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.” See also EC 9-2 (improper conduct by lawyers erodes public confidence in the law); EC 9-4 (public confidence in legal system undermined by lawyer stating he or she can circumvent procedures designed to accomplish impartiality); EC 9-6 (every lawyer has a duty to uphold the integrity of the profession).

For the same lawyer to one day be an adjudicator and the next day be an advocate in the same school district presents an appearance of impropriety and is prejudicial to the administration of justice. The lawyer acting as an IHO is a part-time public official. If the lawyer could simultaneously represent clients in the same school district, positions the lawyer advocates for those clients could easily influence decisions made in the school district as an IHO, thereby bringing the lawyer’s professional interests in conflict with the lawyer’s official duties. The lawyer acting as both an adjudicator and an advocate in the same school district certainly would diminish the faith of the public that justice could be obtained in that school district and would not promote public confidence in either our system of justice or the legal profession. Consequently, if a lawyer who is on the list of IHOs for a particular county desires to represent clients in a school district within that county, he should arrange to have his or her name removed from the list for that school district.<sup>1</sup>

### Related Proceedings

DR 9-101(B)(1) provides that a lawyer may not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee. Similarly, DR 9-101(B)(3)(a) states that a lawyer serving as a public officer or employee shall not participate in a matter in which the lawyer participated personally and substantially while in private practice. Consequently, a lawyer could not represent the parents of a child if the lawyer previously was an IHO in a matter in another school district concerning the same child and disability. Similarly, a lawyer could not act as an IHO in the matter if in another school district the lawyer previously represented the

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<sup>1</sup> The Code of Judicial Conduct prohibits a part-time judge from practicing law in the court on which he or she serves, N.Y. Comp. Codes R. & Regs. tit. 22, §100.6(B)(2). However, the Code of Judicial Conduct does not apply “to administrative law judges *unless adopted by the rules of the employing agency*”, N.Y. Comp. Codes R. & Regs. tit. 22, §100.6(C) (emphasis added). It is uncertain (1) if the term “administrative law judge” as used in the Code of Judicial Conduct encompasses IHOs certified by the Commissioner of Education, and (2) whether the Department of Education or the school district is the “employing agency” of IHOs. In any event, we are unaware of either the Department of Education or any school district having adopted the Code of Judicial Conduct. If the Code of Judicial Conduct is applicable, we believe that the group of all individuals certified by the Commissioner of Education to be IHOs does not constitute a “court” thereunder but that the group of IHOs designated on a list maintained by a particular school district does constitute a “court.” See N.Y. State 543 (1982) (neither attorney who serves as hearing officer in proceedings to review small claims real property tax assessments nor the attorney’s firm may represent private clients in such proceedings in the same jurisdiction); N.Y. Comp. Codes R. & Regs. tit. 22, §122.10(c), (d). Consequently, we would reach the same result under the Code of Judicial Conduct as we do under the Code of Professional Responsibility.

parents of the child regarding his or her disability.

### Matters involving other certified IHOs.

If a lawyer continues to represent parents of disabled students after being designated an IHO, there will be times when the lawyer will be representing those parents before other certified IHOs. There will also be matters in which a lawyer is acting as an IHO when other lawyers who are designated as IHOs may be representing private clients before the lawyer. We do not believe it is necessary for a lawyer to decline to represent a client in a particular matter merely because the IHO assigned to that matter may have appeared before the lawyer in a prior matter which is now concluded or may in the future appear before the lawyer. Similarly, we do not believe it necessary that a lawyer serving as an IHO recuse himself or herself in a matter merely because the lawyer appearing on behalf of the parents may in the past have served or may in the future serve as the IHO in a matter in which the first lawyer appeared or may appear as the lawyer.

However, it would be impermissible for one lawyer to be hearing a matter as the IHO when another lawyer in the matter is acting as an IHO in a matter in which the first lawyer is appearing on behalf of a party. It similarly would be impermissible for a lawyer to be representing parents in a hearing if the IHO is appearing before the lawyer in another matter in which the lawyer is the IHO. DR 5-101(A) provides that, as a general matter, a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own business or personal interests. DR 8-101(A)(2) states that a lawyer holding public office shall not use the public position to influence or attempt to influence a tribunal to act in favor of a client and Canon 9 states that a lawyer should avoid even the appearance of professional impropriety. Even though both lawyers may be of the highest integrity, the appearance of each acting as a judge while the other is acting as a lawyer in concurrent matters is too unseemly.

In such cases, it would be best for the IHO in the matter arising second to decline the matter so the private client need not find new counsel for the hearing.

*Question Two: May a lawyer utilize the IHO certification in advertising?*

It would not be improper for a lawyer to advertise certification as an IHO provided that the advertising is not false, deceptive or misleading. See DR 2-101(A).

DR 9-101(C) prohibits a lawyer from stating or implying that the lawyer is able to influence improperly or upon irrelevant grounds any tribunal or public official. Consequently, it would be improper for the lawyer to imply to any private client, whether through advertising or otherwise, that the lawyer's designation as an IHO would enable the lawyer in any way to influence a school district or another IHO.

## CONCLUSION

1. A lawyer certified as an IHO by the New York State Commissioner of Education to hear disputes between school districts and parents of students with disabilities regarding the identification, evaluation, or educational placement of students with disabilities may also in private practice represent the parents of students with disabilities in such hearings, but not (a) in any school district in which the lawyer acts as an IHO, (b) if the lawyer previously acted as an IHO in another school district concerning the same child and disability, or (c) in any matter in which the IHO is concurrently appearing as a lawyer in a matter in which the inquiring lawyer is acting as the IHO.

2. A lawyer may use in advertising the fact that the lawyer has been certified as an IHO.

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