

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Advisory Opinion #1987-88/1  
**Conflict of Interest: Appearance Before a Governmental Board by a Temporary Board Member**  
November 10, 1987

**RULE REFERENCES:**

- \*Rule 1.1
- \*Rule 1.3
- \*Rule 1.9(a)
- \*Rule 1.11A
- \*Rule 1.11A(a)(1)
- \*Rule 1.11A(b)
- \*Rule 1.11A(b)(3)
- \*Rule 1.11A(c)

**SUBJECTS:**

- \*Conflict of Interest
- \*Government Representation
- \*Lawyer Official
- \*Public Officials

**STATUTORY REFERENCES:**

- \*RSA 71-B:6

**CODE REFERENCES:**

- \*Canon 9

**ANNOTATIONS:**

A lawyer may not appear before a governmental board on behalf of a client during the period of his or her temporary appointment to that board. (Rules 1.11A(a)(1); 1.11A(b))

A lawyer may not accept appointment as a temporary governmental board member when the lawyer is representing a client before the board in a wholly unrelated matter. (Rule 1.11A(b)(3))

The bar of Rule 1.11A(b)(3) is absolute, and cannot be waived. (Rules 1.9(a); 1.11A(b)(3))

Rule 1.11A(b)(3)'s disqualification of a lawyer-official requires disqualification also of the members of the lawyer-official's law firm. (Rules 1.11A(b)(3); 1.11A(c))

Frequent and recurring service as a temporary lawyer-official on a governmental board may, as a practical matter, preclude representation of client before the board. (Rules 1.1; 1.3; 1.11A(b)(3))

**BACKGROUND:**

An inquiry has been received by the Ethics Committee from an attorney who has been approved by the Supreme Court to serve as a temporary member of the Board of Tax and Land Appeals concerning the extent to which the lawyer may appear before the Board.

Under RSA 71-B:6, the chairman of the Board of Tax and Land Appeals, subject to the approval of the Supreme Court, may appoint temporary Board members to serve in the event of the disqualification or disability of a member or members of the Board. Subsection III of RSA 71-B:6 provides that "temporary board members shall serve with respect to such matter until the same has been fully disposed of before the board."

**QUESTION:**

- 1) Whether Rule 1.11A of the Rules of Professional Conduct precludes a lawyer who has been temporarily appointed to the Board of Tax and Land Appeals from appearing before the Board in a wholly unrelated matter?
- 2) Whether pending representation in a wholly unrelated matter precludes acceptance by the attorney of the temporary appointment to the Board?
- 3) If any conflict does exist, whether such conflict may be cured by full disclosure and approval by all parties involved?

## ANALYSIS:

Rule 1.11A of the New Hampshire Rules of Professional Conduct, which has no counterpart in the ABA Model Rules of Professional Conduct, governs the conduct of a "lawyer-official". A "lawyer-official" is defined in Rule 1.11A (a)(1) as "a lawyer actively engaged in the practice of law, who is a member of the governmental body."

Upon appointment as a temporary member of the Board of Tax and Land Appeals the attorney falls within the definition of "lawyer-official", and therefore must comply with the requirements of Rule 1.11A(b) for as long as the lawyer serves as a temporary member. Since RSA 71-B:6 provides that such members shall serve until the matter in question has been "fully disposed of before the board", for purposes of this Rule the attorney must be considered a "lawyer official" until the matter with respect to which the lawyer is serving as a temporary member has been fully concluded from the Board's standpoint, with no possibility of rehearing or reconsideration by - the Board, either *sua sponte*, upon motion of any party, or upon remand from any court or appellate body.

Rule 1.11A(b)(3) states unequivocally that "[no] lawyer-official shall . . . appear on behalf of a client before any governmental body of which the lawyer-official is a member or whose members have been appointed by the governmental body of which the lawyer-official is a member." (Emphasis supplied). This provision is dispositive of the first issue. The lawyer may not appear on behalf of a client during the period of the lawyers's temporary appointment to the Board.<sup>1</sup> For purposes of this Rule the Committee construes the term "appear" broadly to include any representation provided by the lawyer-official in connection with a matter pending before the body in question (e.g., counseling, preparation and filing of pleadings, motions and briefs, etc., in addition to physical appearances before the Board on the client's behalf).

The rationale behind this construction of Rule 1.11A is that an appearance by a lawyer in front of a Board upon which the lawyer serves, even on a temporary basis, would create the appearance of impropriety. This concern, as indicated in former Canon 9 of the ABA Model Code of Professional Responsibility, reflects the belief that a lawyer must promote public confidence in both the legal profession and the judicial system. Where a lawyer is a member of the Board and simultaneously appears before the Board, this confidence is eroded.

The same considerations dictate that the attorney may not accept appointment as a temporary Board member when the lawyer is representing a client before the Board in a wholly unrelated matter, since upon the lawyer's appointment, he would then be "appear[ing] on behalf of a client before [the] governmental body of which the lawyer-official is a member."

It should be further noted that the bar of Rule 1.11A(b)(3) is absolute, and therefore cannot be waived by disclosure to and approval by the parties involved. Compare Rule 1.9(a) (representation adverse to former client permissible with informed consent of former client).

Appearances by a lawyer in a firm with which the lawyer-official is associated are governed by Rule 1.11A(c). However, that provision requires disqualification by the lawyer-official with respect to the matter in question. Since temporary Board members are appointed on a case-by-case basis in any event, the practical impact of this provision in a case such as this is that a potential temporary Board member must refuse any appointment involving a matter in which any party is represented by a lawyer in a firm with which he is associated.

Finally, the Committee wishes to point out that while the bar of Rule 1.11A(b)(3) on its fact applies to the attorney only while actually serving as a temporary member, and therefore a "lawyer-official" for purposes of the Rule, a problem could arise if the attorney were called to serve as a temporary member on a frequent and recurring (albeit intermittent) basis. The same considerations noted above would come into play if the attorney were to alternate appearances before the Board on behalf of clients and services as a temporary member within a relatively brief time frame (e.g., a matter of days or weeks). Further, such conduct calls into question the attorney's ability as a practical matter to represent these clients competently and diligently before the Board (*See* Rules 1.1 and 1.3), since the same raises the possibility (if not probability) that the attorney will be unable to maintain continuity of representation throughout the matter and still comply with Rule 1.11A(b)(3).

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<sup>1</sup> It should be noted that the same result obtains under RSA.71-B:6, and 11 which bars members of the Board from representing any party before the Board.