

NEW HAMPSHIRE BAR ASSOCIATION

Ethics Committee Formal Opinion #1995/96-4

Conflicts of Interest: Litigation Against Town When Attorney Serves on the Town Planning Board and Participation in Amendments to Town Ordinance as a Member of the Planning Board When Attorney's Clients

May be Either Adversely or Favorably
Affected by Amendments to the Zoning Ordinance.

December 13, 1995

RULE REFERENCES:

*Rule 1.7
*Rule 1.11(d)
*Rule 1.11A
*Rule 1.7(b)
*Terminology-Consultation

SUBJECT:

*Adverse Representation
*Conflict of Interests
*Consultation
*Disqualification
*Lawyer Official
*Public Officials

ANNOTATION:

A lawyer who is also a member of the town planning board is clearly a lawyer-official, who may not represent a client in litigation involving the town in which the lawyer-official sits as a planning board member, due to the lawyer-official's responsibilities to a "third person", the town, or by the lawyer-official's own political interests. This is so, unless the lawyer-official reasonably believes that the representation would not be adversely affected and the client has consented after consultation and with knowledge of the consequences. (Rule 1.7; Rule 1.7(b); terminology-consultation).

A lawyer who is also a member of the town planning board qualifies as a lawyer-official and may not participate in any hearing or vote as a planning board member on a matter in which the lawyer or his or her clients have an interest. (Rule 1.11A(b)(1) and (b)(5)).

I. QUESTIONS:

- A. Does an impermissible conflict arise when a lawyer serves on a town planning board and represents the plaintiff in an action against the town?
- B. May an attorney serving on a town planning board act on zoning ordinance amendments which either adversely or positively affect the interests of that attorney's clients?

II. BRIEF ANSWERS:

Rule 1.11A of the New Hampshire Rules of Professional Conduct defines "lawyer-official" as "a lawyer actively engaged in the practice of law, who is a member of the governmental body." "Governmental Body" means "any state or local governmental agency, board, body, council, or commission." Rule 1.11A(a)(2) In this case, the lawyer is certainly a lawyer-official.

The first question involves the lawyer-official's ability to represent clients as plaintiffs in litigation against the town in which the lawyer participates as a member of the planning board. Litigation against the town raises issues under Rule 1.7(b). The lawyer-official could find himself or herself in a situation where the representation of a client involved in litigation against the town in which that lawyer-official sits as a planning board member would be limited by the lawyer's responsibilities to a "third person", the town, or by the lawyer-official's own political interests. Consequently, the lawyer-official would be precluded from representing a client in such a situation unless the lawyer-official reasonably believed that the representation would not be adversely affected and the client consented after consultation and with knowledge of the consequences. See N.H. Rules of Professional Conduct, "Terminology" at p.2 (defining "consultation"). See New Hampshire Ethics Opinion No. 1988-89/12.

With regard to the second question, the lawyer-official sitting on the planning board would be subject to Rule 1.11A(b)(1) and (b)(5) in participating in planning board decisions. 1.11A(b)(1) states "no lawyer-official shall participate in any hearing, debate, discussion or vote, or in any manner otherwise attempt to influence the outcome of any matter in which he or she has an interest;" (b)(5) states "no lawyer-official shall . . . use his or her official position to influence or attempt to influence any governmental body to act in favor of the lawyer-official or the lawyer-official's clients or clients of the firm with which the lawyer-official is associated." "Interest" is defined under Rule 1.11A(a)(3) to mean "a direct, personal and pecuniary interest, individually or on a client's behalf, in a matter which is under consideration by the governmental body of which the lawyer-official is a member." Matter is not defined in Rule 1.11A, however, matter is defined in Rule 1.11 which states at Rule 1.11(d) "as used in this Rule, the term "matter" includes: (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and (2) any other matter covered by the conflict of interest rules of the appropriate government agency." (emphasis added) Since this definition is restricted to Rule 1.11 it is not clear whether it was intended to apply to Rule 1.11A. If it were to apply to Rule 1.11A it would seem to imply that undue influence would be limited to matters which were limited to a specific party as opposed to general legislative activities.

Notwithstanding this limitation, it would appear that to the extent that the lawyer represents a client with a known interest in the legislation, the lawyer-official would be precluded by Rule 1.11A(b)(5) from attempting to either encourage or discourage the passage of particular legislation. A substantial question arises under Rule 1.11A(b) (5) as to what extent a lawyer-official must inquire of the lawyer's clients, as well as those of the lawyer's firm so that the lawyer cannot be said to be exerting influence on a governmental body to act in favor of such clients. There is no simple answer. Much like our conflicts of interest analysis, each client and the scope of representation provided to that client must be examined against the participation of the lawyer-official on a governmental body. Thus, in an instance where the lawyer-official is voting to recommend a zoning change, general representation of a client who might benefit from the change on property owned by that client may not invoke the prohibitions under Rule 1.11A(b) (5). On the other hand, ongoing representation of that client in the development of that client's real property may invoke such restrictions.

In the past, this Committee has opined about the scope and breadth of Rule 1.11A(b) (5), especially when a lawyer-official is serving a governmental body in a non-judicial capacity. In Opinion 1988-89/3 (lawyer as town moderator) and 1988-89/8 (lawyer as legislator), we cautioned lawyer-officials to be mindful of the restrictions of Rule 1.11A(b) (5) and the possibility that the public might construe a lawyer's action as constituting improper influence. We have also stated that despite the removal of language requiring that a lawyer avoid an "appearance of impropriety" when the current Rules of Professional Conduct were adopted, the phrase remains one relied upon by the New Hampshire Supreme Court. See In Re Wehringer's Case, 130 N.H. 707 (1988) (decided under the Code, but see dicta at page 719 and 720). See also Opinion 1988-89/8. Finally, because adherence to the Rules is scrutinized by the Professional Conduct Committee in hindsight, thoughtful inquiry about the lawyer-official's involvement in any Planning Board matter and the impact upon clients of that lawyer and the lawyer's firm is highly recommended. Complaints are often made months or years after the allegedly improper influence took place.

This opinion is not intended to comment on the independent judicial standards for recusal by public officials found at the cases of Atherton v. Concord, 109 N.H. 164 (1968) and Winslow v. Holderness Planning Board, 125 N.H. 262 (1984) and the cases cited therein.

IV. CONCLUSIONS:

In Rule 1.11A, it is noted that members of the New Hampshire Bar should be encouraged to serve State and local governments. Attorneys contemplating such service, however, should bear in mind that litigation against the governmental body served by those attorneys will likely be precluded in most instances. Further, an attorney contemplating such service should be aware that he or she may be forced to step down and decline to participate in certain governmental matters in order to avoid exercising undue influence on behalf of his or her clients.