

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1997-98/1
Conflict of Interest: Member of a Firm Appearing Before Governmental Board When
Another Member of the Same Firm is a Member of the Board
January 14, 1998

RULE REFERENCES:

*Rule 1.7	*Rule 1.11A (b)	*Rule 1.11A (c)
*Rule 1.8	*Rule 1.11A (b)(2)	*Rule 8.4
*Rule 1.11A	*Rule 1.11A (b)(3)	*Rule 8.4(d)
*Rule 1.11A (a)	*Rule 1.11A (b)(5)	

SUBJECTS:

- *Public Official
- *Lawyer-Official

ANNOTATIONS:

An attorney may appear before a quasi-judicial governmental board or agency on which an attorney of that same firm is a member, provided that (1) the firm's attorney member ("lawyer-official") does not sit or participate in any way in the proceeding; (2) no information obtained by the lawyer-official is used for the benefit of the firm's client; and (3) the firm may not state or imply to the client that anyone in the law firm has an ability to influence the board or agency. Rule 1.11A(b); Rule 1.11A(c); Rule 8.4(d).

QUESTION:

Is it proper for an attorney to appear before a quasi-judicial governmental board where another member of the attorney's firm is a named member of that board but neither sitting on nor participating in the case in any way?

RESPONSE:

Assuming no attempt is made by the member of the governmental board to influence that board in the matter and no use of information gleaned through the board member's participation on the board is used for the benefit of the client, the Rules of Professional Conduct do not prohibit the attorney from representing the client before the governmental board under these circumstances.

The rule most directly implicated by this inquiry is Rule 1.11A. This Rule had no counterpart in the ABA Model Rules of Professional Conduct and its stated purpose, according to the New Hampshire Comments to this rule, is to encourage participation on governmental boards by New Hampshire attorneys.

The attorney who is the member of the governmental board in this instance clearly is a “lawyer-official” as that term is defined in Rule 1.11A(a). That attorney is prohibited from appearing before the governmental board on behalf of any clients. Rule 1.11A(b)(3). In contrast, other attorneys within that lawyer’s firm are not barred from representing clients before the governmental board in question so long as the lawyer-official publicly disqualifies himself or herself, refrains from participation in the matter and otherwise conducts himself or herself in accordance with Rule 1.11A(b). Rule 1.11A(c). No information obtained by the lawyer-official as a member of the board may be utilized for the benefit of firm clients nor may the lawyer-official attempt to influence the outcome of the matter. Rule 1.11A(b)(2) and (5).

The provisions of the conflict of interest rules, Rules 1.7 and 1.8, do not appear to be applicable to the facts presented. It should be noted, however, that the provisions of Rule 8.4(d) must be observed by both the lawyer-official and all members of that attorney’s firm. No one in that firm may state or imply an ability to influence the governmental board. While it is possible that a prospective client may infer an ability to influence the board by virtue of the lawyer-official’s status as a named member of the board, the Committee believes that Rule 8.4 is not invoked except by some overt act beyond mere membership by the lawyer-official on the board. However, should any member of the lawyer-official’s firm become aware of a client’s or prospective client’s belief that the firm has some ability to influence the governmental board, the attorney involved should take appropriate steps to dispel such notions.

This opinion is based solely on the New Hampshire Rules of Professional Conduct. No opinion is expressed as to the propriety of the conduct under any other rules, statutes, laws, or policies.