

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/12
**Conflicts of Interest: Appearances Before City Land Use Boards or
Actions Against the City by Members of a Firm When
Another Member of the Firm Serves on the City Council**
February 9, 1989

RULE REFERENCES:

- *Rule 1.7
- *Rule 1.7(b)
- *Rule 1.8
- *Rule 1.10(a)
- *Rule 1.11A
- *Rule 1.11A(a)(1)
- *Rule 1.11A(a)(2)
- *Rule 1.11A(b)(3)
- *Rule 1.11A(c)
- *Rule 8.4(d)
- *Terminology-Consultation

SUBJECTS:

- *Adverse Effect on Professional Judgement
- *Adverse Representation
- *Attorney-Client Relationship
- *Confidentiality
- *Conflict of Interest
- *Consultation
- *Disqualification
- *Law Firms
- *Lawyer Official
- *Public Officials

CODE REFERENCES:

- *Canon 9
- *DR5
- *DR5-105(D)
- *DR9
- *DR9-101

ANNOTATION:

The present Rules of Professional Conduct do not contain a mandate to avoid even the appearance of impropriety. (Rule 1.11A; Rule 1.11A(b)(3); DR 9; DR 9-101).

A lawyer who is also a member of a city council is clearly a lawyer-official, who may not appear before the city council nor before any body whose members have been appointed by the city council. (Rule 1.11A; Rule 1.11(b)(3)).

Other members of a lawyer-official's firm may appear before the city council or before governmental bodies composed of members appointed by the city council provided that lawyer-official publicly disqualifies himself or herself and refrains from participating in any related city council matters. This includes the lawyer-official's public recusal from participation in the appointment process for all boards before whom members of the lawyer-official's firm may appear. (Rule 1.11A; Rule 1.11A(b)(3); Rule 1.11A(c)).

A lawyer-official would be precluded from representing a client in litigation involving the city in which that lawyer-official sits as a city councilor, due to the lawyer-official's responsibilities to a "third person", the city, 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 consented after consultation and with knowledge of the consequences. (Rule 1.7; Rule 1.7(b); Terminology-Consultation).

Appearances by members of a lawyer-official's firm before the governmental body of which the lawyer-official is a part, or before governmental bodies whose members are appointed by the governmental body of which the lawyer-official is a part, should be scrutinized on a case-by-case basis by the attorneys involved to insure that no prohibited conflict exists and that the circumstances do not imply an ability on the part of

either the lawyer-official or the members of the lawyer-official's firm to improperly influence the outcome of a matter. (Rule 1.7; Rule 1.8; Rule 1.11A(c); Rule 8.4(d)).

Other members of a lawyer-official's firm would be subject to the same limitations as the lawyer-official in representing clients in litigation with a governmental entity. (Rule 1.7; Rule 1.10(a)).

I. QUESTIONS:

- A. Does an impermissible conflict of interest arise when one member of a law firm is serving on the city council and another member of the same firm appears before a land use board in that city?
- B. Does an impermissible conflict arise when one member of a law firm serves on a city council and another member of the same firm represents the plaintiff in an action against the city?

II. BRIEF ANSWERS:

It is apparent that the lawyer/city councilor would be barred from appearing before local land use boards in the given municipality and from bringing an action against the city on behalf of a client. This prohibition extended, without qualification, to other members of the lawyer/city councilor firm under the former Code of Professional Responsibility. However, under present Rules, other members of the lawyer/city councilor firm may appear before that city's local land use boards provided the lawyer/city councilor has not acquired "inside information" by virtue of his or her public office, has publicly disqualified himself or herself from participation in any related vote or discussion (including all votes relative to the appointment of land use board members) and has otherwise acted in a manner consistent with Rule 1.11A so as to avoid undue influence. Similarly, no outright prohibition exists against other members of the lawyer/city counselor's firm maintaining actions against the city, but impermissible conflicts under Rule 1.7 are likely to arise in many instances.

III. RESPONSE:

The area of municipal law continues to be a fertile field for inquiries to this Committee regarding possible conflicts of interest. This field was plowed extensively under the former Code of Professional Responsibility to the point that many frequently occurring or contemplated issues in this area had been addressed. It would appear, though, that the adoption of the Rules of Professional Conduct, which include certain provisions without counterpart in the former Code of Professional Responsibility or the ABA Model Code, has sparked a new debate in this area.

In NH Op 81-2/30, the first question presented above was answered in the affirmative. Relying upon former Disciplinary Rule 5-105 (D), the Ethics Committee concluded that other members of a firm may not appear before a city council of which one member of the firm is a member even where the council member abstains from any discussion or voting on the matter in question. The related issue of whether or not members of that firm may appear before the planning board or zoning board of adjustment of that city was also answered "no." Noting that the city council has the power to appoint and remove members of such boards and has budgetary control over such boards, the Ethics Committee remarked that the possibility of conflict in such a situation is substantial and that Canon 9, regarding avoidance of the appearance of professional impropriety, required this result. See also the decisions noted under Rule 1.11A, NH RULES OF PROFESSIONAL CONDUCT.

The Ethics Committee opinions cited above and in the notes under Rule 1.11A of the Rules of Professional Conduct (Rules) were all decided under the prior New Hampshire Code of Professional Responsibility. In general, the Ethics Committee focused on prior Disciplinary Rules 5 and 9 and, in particular, on DR 9-101 (regarding avoidance of even the appearance of impropriety) in responding to these earlier inquiries. The present Rules of Professional Conduct do not contain such a mandate to avoid even the "appearance of impropriety."¹ Rule 1.11A of the New Hampshire Rules of Professional Conduct now governs generally the conduct of a "lawyer-official." Under Rule 1.11A(a)(1), a "lawyer-official" is defined as "a lawyer actively

engaged in the practice of law, who is a member of the governmental body." "Government body" is defined in Rule 1.11A(a)(2) to mean "any state or local governmental agency, board, body, council or commission."

On at least three occasions, the Ethics Committee has rendered advisory opinions involving the application of Rule 1.11A. However, the inquiring attorney in each such instance wished to know whether he or she, as a member, alternate member or temporary member of a governmental body, could also appear before that body or related governmental bodies. In each instance, the Ethics Committee readily was able to answer "no" given the clear direction found in Rule 1.11A(b)(3). See generally NH Op.1987-88/1, 1987-88/5 and 1987-88/7. Thus while the ethical considerations applicable to appearances before governmental bodies by members of a firm which includes a member of a governmental body or a related governmental body were addressed under the former Code of Professional Responsibility, the instant inquiry presents a case of first impression for this Committee under the present Rules of Professional Conduct.

A lawyer who is also a member of a city council is clearly a "lawyer-official" as that term is used in Rule 1.11A. Consistent with the ethics opinions which have been rendered under both the Code of Professional Responsibility and the present Rules of Professional Conduct, it is equally clear that this lawyer-official may not appear before the city council nor before any body whose members have been appointed by the city council, Rule 1.11A(b)(3). With respect to other members of the lawyer-official's firm, though, a somewhat more liberal rule obtains. Pursuant to Rule 1.11A(c), other members of the lawyer-official's firm may appear before the city council or before governmental bodies composed of members appointed by the city council provided the lawyer-official publicly disqualifies himself or herself and refrains from participating in any related city council matters. The Ethics Committee construes this to mean not only that the lawyer-official must publicly disqualify himself or herself and refrain from acting upon any matter brought before the city council by a member of the lawyer-official's firm or any discussion involving matters related to the clients of the firm, but also that the lawyer-official should publicly recuse himself or herself from participation in the appointment process for all boards before whom members of the lawyer-official's firm may appear.

The Committee's affirmative answer to the first question presented above must be qualified not only by the limitations contained in Rule 1.11A(c) but also by reference to Rules 1.7, 1.8 and 8.4(d) as well. The Committee does not believe that these rules would operate as an outright prohibition against members of a lawyer-official's firm appearing before the governmental body of which the lawyer-official is a part or governmental bodies whose members are appointed by the city council of which the lawyer-official is a part. Such appearances should be scrutinized, though, on a case-by-case basis by the attorneys involved to insure that no prohibited conflict exists and that the circumstances do not imply an ability on the part of either the lawyer-official or the members of the lawyer-official's firm to improperly influence the outcome of the matter.

The second inquiry presented above involves a thornier issue. Rule 1.7, and in particular subsection (b) thereof, takes on greater significance in the resolution of this second issue. The lawyer-official would clearly find himself or herself in a situation where the representation of the client involved in litigation with the city in which that lawyer-official sits as a city councilor likely would be limited by the lawyer's responsibilities to a "third person," the city, 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 NH Rules of Professional Conduct, "Terminology" at pp. 2-3 (defining "consultation").

Other members of the lawyer-official's firm would be subject to the same limitations as the lawyer-official in representing clients in litigation with the city pursuant to Rule 1.10(a). Consequently, while the committee is unable to conclude that Rule 1.7 or other applicable Rules of Professional Conduct would constitute an outright bar to the conduct to which the second inquiry is directed, the Committee cautions the inquiring attorney that in many specific instances, it is likely that the members of the lawyer-official's firm will be unable to satisfy the "reasonable belief that representation will not be adversely affected" test found in Rule 1.7 and that representation of clients in litigation matters involving the city likely will need to be declined in many, if not most, instances. In light of this conclusion, it is further suggested that members of the lawyer-official's firm give careful consideration in each case involving appearances before local land use boards in the given city,

though such appearances are not clearly prohibited, to the issue of whether or not the client's interests will best be served if that member of the firm must withdraw from the case should litigation of the land use board's decision be necessary.

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 wishing to further this goal by serving on their city council may do so without fear that members of their firm will be barred from appearing in every instance before all boards and subdivisions of that municipality. However, attorneys contemplating such service should also bear in mind that such appearances before land use boards by members of their firms may well be precluded in some instances and litigation against the city by members of the lawyer-official's firm is likely to be precluded in most instances. Further, the attorney contemplating such service should be aware that he or she will frequently be forced to step down and decline to participate in city council matters involving the appointment of governmental body members or other matters directly or indirectly concerning the clients of the lawyer-official's firm. The Ethics Committee offers no opinion as to whether or not the lawyer-official may adequately serve his or her constituents under such circumstances.

¹ But see *Wehringer's Case*, 130 NH 707, 547A.2d 252 (1988), in which the New Hampshire Supreme Court, in disbarring an attorney for violations of various disciplinary rules involving his intermeddling in a divorce case and his assistance in illegal conduct, castigated the attorney for failing to live up to the "duty to 'avoid even the appearance of impropriety.'" While this may suggest that attorneys should continue to be guided by this "duty," another explanation is that this case was decided under the prior Code of Professional Responsibility.