

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/22
Conflict of Interest: Public Service
May 11, 1989

RULE REFERENCES:

- *Rule 1.11A
- *Rule 7.1
- *Rule 7.1(b)
- *Rule 7.5
- *Rule 7.5(a)
- *Rule 7.5(c)

SUBJECTS:

- *Adverse Effect On Professional Judgment
- *Advertising and Solicitation
- *False Advertisement
- *Law Firms
- *Lawyer Official
- *Letterhead
- *Public Officials

CODE REFERENCES:

- *Canon 2
- *Canon 9
- *DR2-102(B)
- *DR2-105(D)
- *EC2-10
- *EC2-12

ANNOTATIONS:

The name of a lawyer who has been appointed to a high state public office may not appear in the name, letterhead or other professional notices of the lawyer's former firm. (Rule 7.1; Rule 7.5.)

A communication contained in a lawyer's letterhead, firm name, or other professional designation must not be misleading to the public. (Rule 7.1; Rule 7.1(b); Rule 7.5(a); Rule 7.5(c).)

A communication by a lawyer or law firm is misleading, which is likely to create an unjustified expectation about results the lawyer can achieve. (Rule 7.1(b); Rule 7.5(c).)

Rule 1.11A is clearly intended to prohibit a lawyer who is also a public official from using the position for personal benefit or for that of the clients of the lawyer's former law firm. (Rule 1.11A.)

I. QUESTION:

Does Rule 7.5 of the Rules of Professional Conduct prevent the name of a lawyer who has been appointed to a high state public office from appearing on the letterhead of the lawyer's former firm with the designation "on leave of absence"?

II. BRIEF ANSWER:

Rules 7.1 and 7.5 of the Rules of Professional Conduct would prohibit the inclusion of the name of a lawyer who has been appointed to a high state public office, from appearing in the name, letterhead, or other professional notices of the lawyer's former firm.

III. RESPONSE:

This inquiry is primarily governed by Rules 7.1(b) and 7.5(a) and (c) of the Rules of Professional Conduct. Rule 7.1 provides that "a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." New Hampshire Rules of Professional Conduct, Rule 7.1, (1986). The ABA Model Code Comments clearly indicate that Rule 7.1 governs "...all communications about a lawyer's services..." and that a lawyer's letterhead constitutes "communication" as that term is contemplated by the Rule. *See* ABA/BNA Lawyers Manual On Professional Conduct, Model Code Comments 81:3004, (1987).

The thrust of Rule 7.1 is that the communication contained in a lawyer's letterhead must not be misleading to the public. Rule 7.5(a) codifies that concept by stating that "a lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1." Rule 7.5(c) goes on to provide:

"the name of a lawyer holding a public office shall not be used in the name of the law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly in practicing with the firm." New Hampshire Rules of Professional Conduct, Rule 7.5(c), (1986).

The question then becomes: does a firm's letterhead which contains the name of a former partner who has been appointed to a high state public office in which the former partner will be practicing as an attorney, and which designates that person as "on leave of absence" violate any of the provisions of Rules 7.1 or 7.5? The answer to the question is "yes" in light of the clear language of Rule 7.5(c) and the admonition of Rule 7.1(b).

Ethical Consideration 2-12 of Canon 2 of the ABA Model Code of Professional Responsibility specified that a lawyer who occupies a judicial, legislative, or other public executive or administrative position and who does not have the right to concurrently practice law with his or her former firm should have his or her name removed from the firm name and should not be identified as a past or present member of the firm. Although New Hampshire has not yet addressed this specific question, many other states have and their decisions are instructive. A 1980 opinion of the Professional Ethics Commission of the Board of Overseers of the Bar of the State of Maine held that continuing to use the name of an attorney who has left the attorney's law firm to become a public official in communications by the firm with its clients could be misleading in that it "...could lead an ordinary prudent person to believe that the departed attorney stills wields influence and the firm therefore is in a more advantageous position as a result." Professional Ethics Commission of the Board of Overseers of the Bar, Opinion 13 (10/15/80), (Case Digest). The rationale of this decision is consistent with both the admonition contained in Rule 7.1(b) which classifies as misleading any communication by a lawyer or law firm which "[i]s likely to create an unjustified expectation about results the lawyer can achieve..." and the prohibition found at Rule 7.5(c). New Hampshire Rules of Professional Conduct, Rule 7.1(b), (1986).

A 1984 opinion of the Committee on Ethics of The Maryland State Bar Association, Inc. found:

"A lawyer who is an assistant state's attorney may not allow his name to be retained on the letterhead of his former law firm. Such practice may mislead the public.... The lawyer must avoid the appearance of impropriety." Opinion 84-74; DR2-102(B); EC2-10; Canon 9 (undated), (Case Digest).¹

The Disciplinary Commission of the Alabama State Bar found that a partner of a law firm who takes a position with a state agency "...may not continue to be included in the name or letterhead of his former firm or in other such legal listings while he is not practicing with the firm." Opinion 88-37 (5/11/88); DR2-105(D), (Case Digest).

In an analogous case, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court found:

"A lawyer who becomes a judge may not permit his name to be used on his former law firm's letterhead, professional notices, or name, unless the judge is actively and regularly practicing law as a member of the firm." Opinion 87-48 (12/18/87); DR2-102(B), (Case Digest).

Rule 1.11A is clearly intended to prohibit a lawyer who is also a public official from using the position for his or her own personal benefit or for that of the clients of the former law firm. In the face of that Rule it would be anomalous to fail to prohibit such a lawyer's former law firm from capitalizing on the lawyer's public position by potentially attracting clients who are misled into thinking that the law firm still has a connection to the public official which might be exploited to their benefit.

IV. SUMMARY:

The inclusion of the name of a lawyer who has left a firm to assume a high state public office in the letterhead of the lawyer's former law firm has the potential for misleading the public into believing that the former law firm may have an advantage in its dealings with the state that will work to the benefit of their clients. That perception clearly results in the appearance of impropriety as to the potential relationship between the law firm and the public official. Therefore, the inclusion of the lawyer-official's name in the former firm's letterhead would violate the provisions of Rules 7.1(b) and 7.5(c).

¹ Note that this decision was based on provisions of the prior Code of Professional Responsibility. Although the present Rules of Professional Conduct contain no direct counterpart to the prohibitions against "appearance of impropriety" addressed by Canon 9, the New Hampshire Supreme Court, in a recent disbarment case which was also brought under provisions of the old Code, appeared to support the continued validity of the doctrine. *See Re: Wehringer's Case*, 130 N.H. 707, (1988). In their opinion in that case the New Hampshire Supreme Court stated:

"The respondent fails to understand what it means to be a member of the legal profession. It is a profession where one 'seeks to avoid even the appearance of impropriety' and thus, strives to live by a higher standard of conduct than a layperson (cites omitted). The duty to 'avoid even the appearance of impropriety' is not one to be taken lightly because, [a]ttorneys constitute a profession essential to society.'" 130 N.H. at 719.

While there is no certainty that the Court will apply this standard to a case brought under the new Rules of Professional Conduct, the Court's opinion should be read to be instructive when looking into the future as opposed to merely a comment on the past.