

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/24
**Municipal Representation: Appearances Before Town Land
Use Board, Actions Against the Town, or Representation of
Criminal Defendants Arrested by the Town's Police Department
by Members of a Firm in Which Another Member of the
Firm Represents the Town in its Collective Bargaining Negotiations**

August 10, 1989

RULE REFERENCES:

- *Rule 1.7
- *Rule 1.7(b)
- *Rule 1.10(a)
- *Rule 1.11A
- *Terminology-Consultation

CODE REFERENCES:

- *Canon 5
- *Canon 9

SUBJECTS:

- *Adverse Representation
- *Attorney-Client Relationship
- *Client Communications
- *Conflict of Interest
- *Consultation
- *Disqualification
- *Dual Representation
- *Government Representation
- *Harsh Reality Test
- *Multiple Representation

ANNOTATIONS:

There is no "per se" prohibition preventing an attorney who represents the town in collective bargaining negotiations from either representing (1) clients in land use board matters; (2) clients in unrelated civil litigation against the town or (3) criminal defendants. The particular facts and circumstances must, however be carefully examined in each case to determine if the attorney could reasonably proceed to represent both clients after proper consultation.

Representation of a client under circumstances directly adverse to another client is prohibited by Rule 1.7 unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and both clients consent after consultation and full disclosure. (Rule 1.7)

Under Rule 1.10(a), each lawyer in an attorney's firm would be prohibited from undertaking representation of private parties in matters involving a municipal client, whenever one attorney in the firm would be prohibited from doing so under Rule 1.7. (Rule 1.7; Rule 1.10(a))

The present Rules of Professional Conduct contain no direct counterpart to the prohibitions against the "appearance of impropriety." (Canon 9)

A lawyer generally may not represent an individual or entity whose interests are adverse to an existing client even when the matters are wholly separate and distinct. This is based on the lawyer's duty of undivided loyalty to the client and the lawyer's duty to zealously represent the client. (Rule 1.7)

A lawyer may not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client. (Rule 1.7(b))

Neither the prohibition against simultaneous representation of clients in matters of Rule 1.7(a) direct adversity nor the prohibition against simultaneous representation of one client involving Rule 1.7(b) material limitation of the lawyer's responsibilities to another client, are always absolute. Representation may occur if the lawyer reasonably believes the representation will not adversely affect either client and both clients consent to the dual representation after full consultation and with knowledge of the consequences. (Rule 1.7(a); Rule 1.7(b).)

I. QUESTIONS:

- A. May the inquiring attorney or other members of that lawyer's firm appear before land use boards of a town which is represented in its collective bargaining negotiations by the inquiring attorney?
- B. May the inquiring attorney or other members of that lawyer's firm represent private parties in civil actions against the town which is represented in its collective bargaining negotiations by the inquiring attorney?
- C. May the inquiring attorney or other members of that lawyer's firm represent criminal defendants arrested by a town's police department when that town is represented in its collective bargaining negotiations by the inquiring attorney?

II. BRIEF ANSWERS:

Representation of a client under circumstances directly adverse to another client is prohibited by Rule 1.7 unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and both clients consent after consultation and full disclosure. Clearly, a town must be considered a client of a lawyer even if the lawyer represents the town in only the limited matter of collective bargaining negotiations. Representation of a different client in a civil action against that town presents the direct adversity generally proscribed by Rule 1.7.

The Ethics Committee believes that representation of a private party in a civil action against a town will involve in many instances a degree of adversity that would lead a disinterested lawyer to conclude that the inquiring attorney should not ask either the municipality or the prospective private client to consent to such a representation. In such instances, representation may not be undertaken. There well may be instances, though, where the inquiring attorney may reasonably believe that representation of a private client in a litigation matter involving the municipality will not adversely affect the attorney's relationship with the municipality. In such instances, the attorney may represent the private client provided both the municipality and the private client consent to such representation after consultation.

Similarly, the Committee is not inclined to view representation of private clients before land use boards of the municipality as involving a "per se" disqualification situation. In fact, such representation likely will be permissible in more instances than representation of private clients in litigation against the municipality. However, as litigation often follows adverse decisions of land use boards, disqualification may be required in certain instances. In instances where disqualification is not required at the outset, the consultation process should involve disclosure of the potential for litigation and the possibility that new counsel may be necessary depending on the given facts and circumstances of such litigation.

The inquiring attorney should be particularly sensitive to the potential for impermissible conflicts of interest in the representation of criminal defendants. While the opposing party in such proceedings is the State of New Hampshire, not the given town, the police chief works closely with the inquiring attorney in the collective bargaining process. The inquiring attorney should not become involved in particular criminal matters if either the municipality or the criminal defendant may question the loyalty or zealousness of the attorney.

Under Rule 1.10(a), each lawyer in the inquiring attorney's firm would be prohibited from undertaking representation of private parties in matters involving the town whenever the inquiring attorney would be prohibited from doing so under Rule 1.7. Consequently, the inquiring attorney and other members of that attorney's firm will be treated as one and the same for purposes of this opinion.

III. RESPONSE:

In NH Op. 82-3/17, the Ethics Committee answered in the negative the question whether a law firm could represent private clients before city boards and agencies where that firm represents the city in most, but not all, of the city's legal matters. Similarly, in NH Op. 83-4/12, the Ethics Committee opined that it would be unethical for partners or associates of a city attorney to represent criminal defendants in cases prosecuted by the city prosecutor. In rendering these decisions, the Ethics Committee relied on prior Canon 5 and Canon 9 of the

New Hampshire Code of Professional Responsibility. In particular, the Committee viewed the proposed conduct as proscribed by the mandate that attorneys avoid even the appearance of impropriety.

The present inquiry involves the substantially similar issue of whether or not an attorney or a law firm may represent private clients before town boards or in district court prosecutions involving the town prosecutor where the lawyer or law firm in question represents the town in one unrelated matter, its collective bargaining negotiations. In contrast to the situation existing when these previous opinions were issued, though, the present Rules of Professional Conduct contain no direct counterpart to the prohibitions against the "appearance of impropriety."¹

Under the present Rules of Professional Conduct, the general rule regarding conflicts of interest is contained in Rule 1.7. Pursuant to this Rule, a lawyer generally may not represent an individual or entity whose interests are adverse to an existing client even when the matters are wholly separate and distinct. The prohibition against simultaneous representation of adverse interests is based dually on the lawyer's duty of undivided loyalty to the client and the lawyer's duty to zealously represent the client. Consistent with this latter duty, Rule 1.7(b) also prohibits representation of one client if the representation of that client "may be materially limited by the lawyer's responsibilities to another client..."

Both the prohibition against simultaneous representation of clients in matters involving direct adversity contained in Rule 1.7(a) and the prohibition against simultaneous representation of one client involving material limitation of the lawyer's responsibilities to another client contained in Rule 1.7(b) are not always absolute. Despite direct adversity, a lawyer may simultaneously represent clients with opposing interests if the lawyer involved reasonably believes the representation will not adversely affect the relationship with the other client and both clients consent to the dual representation after full consultation and with knowledge of the consequences. Similarly, representation of one client which may be materially limited by a lawyer's responsibilities to another client nonetheless is permissible if the lawyer once again satisfies the test regarding the reasonable belief that representation will not be adversely affected and there is consultation with the client and consent by the client.

The Committee generally takes the position that these rules require a case-specific analysis. In the instant case, the inquiring attorney represents the municipality only in its collective bargaining and labor matters. Neither the inquiring attorney nor any member of the inquiring attorney's firm has any access to personnel files or other confidential information regarding municipal employees. In its other legal matters, the municipality is represented by a separate municipal attorney. That attorney also prosecutes cases at the District Court level involving the municipality's police department. It should be noted, though, that the officers of that department participate quite closely with the inquiring attorney in the collective bargaining process.

In undertaking the required case-specific analysis, the appropriate first step is to determine whether or not a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances.² At first blush, it might appear from the wording of these rules that the analysis is subjective in that the lawyer's beliefs about the potential effects of the conflicting representation is critical. However, the ABA Model Code comments underscore the importance of the words "the lawyer reasonably believes" in these rules. In the Committee's view, this analysis requires an objective test and the attorney should not even ask for the consent of a client to a potentially conflicting representation if a disinterested lawyer would conclude that the client should not agree to such representation.

In the present case, the Committee is not prepared to urge a "per se" disqualification rule based on this objective test. Depending on the nature of the litigation against the municipality, the particular circumstances of the zoning or planning case or the nature and facts of particular criminal matters in which the law firm's representation is sought, it is entirely possible that a disinterested lawyer would conclude that both clients may consent to the representation without adverse effect. However, the Committee observes that at least one jurisdiction adopted under the prior code such a "per se" disqualification rule with respect to dual representation by a municipal attorney even when the attorney does not advise either the municipality or the private client with respect to conflicting matters.³ In the Committee's view, it is likely that the inquiring attorney will be required to decline representation of private clients based on this objective test in many instances, particularly in litigation matters.

In a recent seminar on ethics, George Kuhlman of the ABA Center for Professional Responsibility advocated the "harsh reality" test in determining whether a lawyer properly could request the consent of a client or clients to adverse or materially limited representations pursuant to Rule 1.7. Under this test, a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney's requesting the client's consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent. In cases involving litigation against the municipality, the inquiring attorney's loyalty to the municipality is likely to be scrutinized by the public and town officials alike in most instances. If this "harsh reality" test may not be readily satisfied by the inquiring attorney, the inquiring attorney and other members of the inquiring attorney's firm should decline representation of the private client.

Representation of parties before local land use boards of the municipality will not always involve direct adversity, at least at the outset. In such cases, Rule 1.7(b) ordinarily will control. Once again, that Rule bars representation of a client if representation of that client may be materially limited by the attorney's responsibilities to another client or a third party or by the lawyer's own interests. If the inquiring attorney or the member of his or her firm contemplating such representation is able to conclude reasonably that representation of the client before the land use boards may be undertaken zealously despite the lawyer's other obligations to the municipality or to third parties, as may well be the case in many instances, the lawyer may proceed to consult with the client and proceed with representation if the client consents.

As part of the consultation process, though, the inquiring attorney or a member of the inquiring attorney's firm proposing to represent the private client should be careful to explain that such matters frequently result in litigation following an adverse decision. If the land use board renders an adverse decision in a particular case, the inquiring attorney or the inquiring attorney's firm should reassess the situation and consider consulting further with the respective clients.

In undertaking the "reasonable belief" test and the consultation process with respect to zoning or planning matters, the inquiring attorney should also be sensitive to limitations or complications that may result from perceived conflicts of interest. It could be argued, for example, that the land use board before whom the inquiring attorney wishes to appear is placed in a difficult position knowing that the selectmen who retained the attorney to represent them in the collective bargaining negotiations or with whom the attorney generally works in such negotiations have reposed sufficient trust in that attorney's abilities to engage him or her as their counsel. The land use board may be subtly influenced by the relationship between the inquiring attorney and the town. Opposing parties in the land use matter may seek to utilize the relationship between the inquiring attorney and the town to question the impartiality of the tribunal. While the inquiring attorney is not a lawyer-official as defined in Rule 1.11 A, the specter of alleged improper influence may be raised by an opponent to the detriment of the client.

While the Committee is also disinclined to opine that a per se disqualification should obtain with respect to representation of criminal defendants in the given municipality by members of the inquiring attorney's firm, the inquiring attorney should approach this issue with the same caution as other matters involving litigation and direct adversity with the municipality, although for slightly different reasons.

In one sense, the inquiring attorney is in an adversarial relationship with respect to the police department by virtue of his participation on behalf of management in the collective bargaining negotiations and undertaking to enter into another adversarial relationship in a different forum should not present a conflict. As noted in NH Op 87-8/13, the prosecutor represents the State.

On the other hand, the police chief for the town is considered part of management and is actively involved in the collective bargaining negotiations alongside the inquiring attorney. The inquiring attorney or other members of the inquiring attorney's firm may well have their loyalties questioned by either the town or the criminal defendant based on these circumstances. If an ineffective assistance of counsel claim appears likely or possible, the attorney should either decline the representation or, at a minimum, fully disclose this possibility and the ramifications of such a claim to the Town and the prospective defense client. Further, zealous representation of the defendant may involve allegations of police misconduct or civil rights violations

necessarily involving the town. A case likely to involve such issues might well present an impermissible conflict situation under the objective test required under Rule 1.7.

Depending on a number of factors, including the nature of the crime with which the defendant is charged and the alleged behavior of the arresting officers, the attorney may be able to conclude that both the defendant in the criminal proceeding and the town should agree to representation under the circumstances, as no division of loyalty or impairment of representation is likely to result. It is probable, though, that in many instances, the attorney will be unable to reach this conclusion reasonably. In such instances, the attorney may not undertake representation of the criminal defendant and should not seek through the consultation process to obtain the consent of the defendant.

¹ But see *Wehringer's Case*, 130 NH 707 (1988). As noted in NH Op. 88-9/12 and NH Op. 88-9/18, both involving the conduct of lawyer-officials, this case suggests that the admonition to avoid even the appearance of impropriety is still sound advice.

² ABA Model Code Comments to Rule 1.7. While the ABA's Comments were not adopted as part of the New Hampshire Rules, they are frequently enlightening.

³ *In the matter of A. and B.*, 44 N.J. 331, 209 A.2d 101 (1965) and *In the matter of Edward J. Dolan*, 76 N.J. 1, 384 A.2d 1076 (1978). In the latter case, the court observed that "(a) municipal attorney's public obligations are such that he must take particular pains to avoid the shadow of suspicion which inevitably is cast when he begins to entangle himself in a representative capacity in the legal affairs of a developer operating within the municipality. If the municipal attorney is not a full-fledged member of the "municipal family," he is at least in such a close and confidential relationship with it as to warrant his not representing those who may benefit (from the actions of the municipality's land use boards)". *Dolan, id.*, 384 A.2d at 1079.