

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1988-89/3  
**Town Moderator Representation of Clients Before the Same Town Board**  
October 13, 1988

**RULE REFERENCES:**

- \*Rule 1.7
- \*Rule 1.8
- \*Rule 1.11
- \*Rule 1.11A
- \*Rule 1.11A(b)(3)
- \*Rule 1.11A(b)(5)
- \*Rule 8.4(d)

**SUBJECTS:**

- \*Adverse Effect on Professional Judgment
- \*Adverse Representation
- \*Conflict of Interest
- \*Government Representation
- \*Lawyer Official
- \*Public Officials

**CODE REFERENCES:**

- \*DR5
- \*DR5-105 (A & B)
- \*DR9
- \*DR9-101

**STATUTORY REFERENCES:**

*RSA 40:3	*RSA 672:8
*RSA 40:4	*RSA 675:3
*RSA 40:4-B	*RSA 675:4
*RSA 40:8	*RSA 677:2-4
*RSA 669:62	

**ANNOTATION:**

There is no outright prohibition against an attorney who is town moderator also representing clients before the local land use boards of that municipality. However, the attorney should be alert to particular situations which may require that the attorney decline representation of a particular client, call for the appointment of a moderator pro tempore, or both.

Conflict of interest questions must be resolved by resorting to the general conflict of interest rule (Rule 1.7), the listing of prohibited transactions in Rule 1.8, and with respect to potential conflicts in the public sector, the rules governing successive government and private employment and the conduct of lawyer officials (Rule 1.7, Rule 1.8; Rule 1.11; Rule 1.11A).

Generally, a lawyer-moderator may discharge responsibilities to both the town and to clients in matters involving the town's zoning board of adjustment or planning board, without: 1) direct adversity or material limitation; or 2) entering into prohibited transactions (Rule 1.7; Rule 1.8)

Rule 1.11A would not prevent a lawyer-official from functioning both as an attorney for private individuals appearing before local land use boards of a town and serving as a moderator for the town, in most circumstances. (Rule 1.11A.)

Rule 1.11A(b)(3) speaks only of appointed officials and is inapplicable to elected land use board members. (Rule 1.11A; Rule 1.11A(b)(3)).

A lawyer-official must take great care to avoid conflicts of interest. (Rule 1.7; Rule 1.11A(b)(5).)

A lawyer-official must not state or imply an ability to influence government in derogation of Rule 8.4(d). (Rule 8.4(d).)

**QUESTION:**

May an attorney who is a town moderator represent clients before the planning board and zoning board of adjustment of the town in which he or she serves as moderator?

## **BRIEF RESPONSE:**

Nothing in the New Hampshire Rules of Professional Conduct would operate as an outright prohibition against an attorney who is town moderator also representing clients before the local land use boards of that municipality. However, the attorney should be alert to particular situations which may require that the attorney decline representation of a specific client, call for the appointment of a moderator pro tempore, or both.

## **RESPONSE:**

The area of municipal law has been a fertile field for inquiries to this committee regarding possible conflicts of interest. See generally the decisions noted under Rule 1.11A, NH Rules of Professional Conduct. *See also* NH Op 87-88/7 (regarding appearances before local land use boards by an attorney/alternative member of the zoning board of adjustment within the town) and NH Op 87-88/13 (regarding representation of criminal defendants in the same district court where the inquiring attorney serves as a part time municipal prosecutor). With the exception of the latter two opinions, these inquiries were decided under the prior New Hampshire Code of Professional Responsibility. In general, the 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.

In NH Op 82-6/15, for example, the question was whether it would be proper for an attorney to represent a teachers' union and at the same time serve as moderator of a school district in which a local affiliate of the union was the collective bargaining unit for the teachers of that district. The committee assumed that the moderator had an active role in school district affairs and that on some occasions, the moderator would be acting as a representative for the school district while acting on behalf of the teachers in an adversary proceeding against the school district on other occasions. The Committee viewed these dual roles as creating an impermissible appearance of, impropriety. Similarly, the Ethics Committee cited DR 5-105(A), (B) and DR 9-101 in responding in the negative to an inquiry as to whether or not a firm representing a city in most of its legal matters may also represent private clients before boards and agencies of that city. NH Op 1982-3/17.

The former Disciplinary Rules regarding the "appearance of impropriety" have no direct counterpart in the present Rules of Professional Conduct. Instead, conflict of interest questions must now be resolved by resorting to the general conflict of interest rule (Rule 1.7), the listing of prohibited transactions contained in Rule 1.8, and with respect to potential conflicts in the public sector, the rules governing successive government and private employment and the conduct of lawyer-officials (Rules 1.11 and 1.11A, respectively). Before undertaking such an analysis in this instance, though, a brief examination of the role of a moderator is in order.

A moderator is an elected official within the town. The moderator's duties are prescribed by RSA 40:4. A moderator's chief function is to preside over town meetings. In discharging this duty, the moderator is empowered to decide questions of order, determine rules of procedure (subject to alteration by the voters) and preserve order. RSA 40:4 and RSA 40:8. In deciding questions of order and prescribing rules of procedure, the moderator has broad powers, but the moderator's function is ministerial with respect to the counting of votes. *Pierce v. Langdon*, 110 NH 170 (1970).

Unlike the selectmen, the moderator does not possess executive or administrative authority or discretion in the administration of the prudential affairs of the town. A moderator generally is not in an "insider" position with respect to matters coming before the voters. While the moderator clearly functions in a quasi-judicial capacity in discharging certain responsibilities of that office, such as issuing procedural rulings and declaring results of votes, the moderator's rulings are subject to alteration or correction by the town. RSA 40:4 and RSA 40:4-B. It should lastly be noted that provision for the appointment of a moderator pro tempore to serve when the moderator is absent or unable to perform his or her duties is contained in RSA 40:3 and RSA 669:62.

While the moderator presides over the legislative branch of local government, planning boards and zoning boards of adjustment act in a judicial or quasi-judicial capacity, much like jurors in a civil matter. The operation of these local land use boards is generally distinct from the government of the town through town meetings. It

must be recognized, however, that representation of clients in land use matters occasionally necessitates involvement in town meeting matters. Proposed zoning amendments may adversely affect a client's planned project. Such amendments must be enacted at town meetings pursuant to RSA 675:3 or RSA 675:4. Further, a person aggrieved by a zoning-related order or decision of the local legislative body (the town meeting pursuant to RSA 672:8) must seek a rehearing before the local legislative body as a prerequisite to an appeal to the superior court. See RSA 677:2-4.

With these facts as the basis for the Committee's review of the relevant rules, the Committee is of the opinion that none of the rules regarding conflicts of interest would operate as an outright bar to serving as a moderator and appearing on behalf of clients before the local land use boards of that town. As a general proposition, a lawyer/moderator may discharge his or her responsibilities to both the town and to clients in matters involving the zoning board of adjustment or planning board of that town without direct adversity or material limitation as would be proscribed by Rule 1.7 and without entering into any of the transactions prohibited by Rule 1.8. Even if it is assumed that a moderator is a "lawyer-official" as that term is employed in Rule 1.11A, that rule would not prevent an attorney from functioning both as a moderator for the town and as an attorney for private individuals appearing before local land use boards of that town in most circumstances. While Rule 1.11A(b)(3) might appear upon first reading to bar appearances by an attorney/moderator before local land use boards if the members of those boards are elected rather than appointed, as the town meeting over which the moderator presides would then be responsible for installing those board members, the Committee notes that this section of Rule 1.11A speaks only of appointed officials and is inapplicable to elected land use board members. If this rule were interpreted otherwise, any attorney who participated in a town election and therefore made him or herself part of the governing body arguably would be precluded from appearing before boards elected at town meeting.

While as a general proposition an attorney may represent clients before the planning board or zoning board of adjustment of a town in which he or she also serves as moderator, great care must be taken by that attorney to avoid conflicts of interest in particular situations such as those alluded to above. An attorney who also functions as the town moderator should decline to accept any case in which the validity of a zoning ordinance or amendment is or may be at issue, for example. Should the inquiring attorney become involved in a situation which later overlaps with his or her role as moderator, the Committee recommends that the attorney withdraw from such representation and consider recusing himself or herself from performing the duties of moderator regarding the matter in question in favor of the appointment of the moderator pro tempore so that violations of Rule 1.11A(b)(5) or Rule 1.7 do not occur. Naturally, too, the attorney/moderator must not state or imply an ability to influence local government in derogation of Rule 8.4(d).

## **SUMMARY:**

In the New Hampshire Comments to 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 as town moderator may do so, as a general rule, without foregoing their local land use practice. Attorneys seeking to do this, however, are cautioned that the potential for conflicts of interest in certain situations exists and they are advised to decline private employment in those instances where an overlap between representation of a client and municipal responsibilities reasonably may be anticipated.