

## NEW HAMPSHIRE BAR ASSOCIATION

### ATTORNEY ACTING AS TOWN MANAGER AND TOWN COUNSEL

#### Ethics Committee Opinion #2005-06/4

#### ABSTRACT

This opinion addresses whether an attorney may act as both Town manager and Town counsel. The Committee reviewed the situations where the legal advice related to issues implicating actions the attorney took as Town Manager and those where such actions was not implicated. The Committee concluded, that simultaneously holding the position of Town Manager and Town Counsel would make it extremely difficult to comply with Rule 1.7, raises further concerns under Rule 2.1, and may run afoul of either RSA 37:9 and 669:8 and the common law doctrine of incompatibility of offices.

#### ANNOTATIONS

Pursuant to Rule 1.7, the Town Manager/Counsel could not involve himself in issues clearly implicating his personal interests, such as preparation and approval of his own employment contract.

The concerns raised by this inquiry are not limited to those situations in which the attorney's pecuniary or other interests are directly involved. The Committee is reluctant to conclude that there is a *per se* unwaivable conflict of interest in acting as Town Manager and Town Counsel for the same town. However, under the harsh reality test, it is difficult to conceive of a situation in which a conflict would not arise.

The Committee raised concerns about Rule 2.1's requirement that "a lawyer shall exercise independent professional judgment ...." See N.H. PROF'L CONDUCT R. 2.1, ABA Model Code cmt. ("A client is entitled to straightforward advice expressing the lawyer's honest assessment.").

In general, a person who simultaneously holds two positions can avoid a possible conflict of interest by recusing himself or herself in an appropriate situation. See, e.g., Town of Littleton v. Taylor, 138 N.H. 419, 423-24 (1994). In this case, however, the question remains whether Town Counsel would be able adequately to identify all situations in which a possible conflict of interest is presented.

While not an issue arising pursuant to the Rules of Professional Conduct, this situation raises questions concerning the application of RSA 37:9 and 669:8 and the common law doctrine of incompatibility of offices. See N.H. REV. STAT. ANN. § 37:9 (2004)

#### OPINION

##### Questions Presented

- I. Whether an individual may properly serve simultaneously as both Town Manager and Town Counsel for the same town.

- II. Whether that individual may properly avoid conflicts of interest by recusing himself as Town Counsel when he is presented with a question implicating an action he is authorized to take as Town Manager.
- III. Whether, when authority as Town Manager is not implicated, it is necessary for that individual to recuse himself in other situations.

### **Short Answers**

- I. It would be highly problematic for a person to occupy both positions because of conflict of interest issues under N.H. Rule of Professional Conduct 1.7(b) that are likely insurmountable. Further, such a dual role raises concerns under N.H. Rule of Professional Conduct 2.1 and related common law. Finally, the dual role may further implicate RSA 37:9 and 669:8 or the common law doctrine of incompatibility of offices.
- II. A person may not act as Town Counsel when the legal issue at hand involves action based upon that same person's authority as Town Manager. There are substantial concerns about whether the dual role under these circumstances would adversely affect one's ability to identify all situations in which recusal would be required.
- III. There are substantial concerns about whether the dual role under these circumstances would adversely affect one's ability to identify all situations in which recusal would be required.

### **Analysis**

This inquiry raises significant ethical concerns under the N.H. Rules of Professional Conduct. Rule 1.7(b) provides, in relevant part, "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation and with knowledge of the consequences." Certainly, the Town Manager/Counsel could not involve himself in issues clearly implicating his personal interests, such as preparation and approval of his own employment contract. However, the concerns raised by this inquiry are not limited to those situations in which the attorney's pecuniary or other interests are directly involved.

The very purpose of Rule 1.7 is to prevent attorneys, even those with "good faith or high intentions", from finding themselves ensnared in circumstances in which the proper course of action required by one of their roles conflicts with the proper course of action required by the other. See *Fiandaca v. Cunningham*, 827 F.2d 825, 829 (1st Cir. 1987) (finding that Rule 1.7 was implicated in a case in which "the combination of clients and circumstances placed [plaintiffs' counsel] in the untenable position of being simultaneously obligated to represent vigorously the interests of two conflicting clients."). Given the political nature of the Town Manager position, there may be a material limitation under Rule 1.7(b) if the advice given is not based solely on the legal issues presented, but is influenced (consciously or subconsciously) by, for example, an interest in improving relations to enhance standing as Town Manager.

The committee is reluctant to conclude that there is a *per se* unwaivable conflict of interest in acting as Town Manager and Town Counsel for the same town. However, it is difficult to conceive of a situation in which a conflict would not arise. When considering whether to take the dual positions of Town Manager and Town Counsel, the attorney could

evaluate the “harsh reality test” suggested by the NH Bar Association Ethics Committee, which states:

“(i)f 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. 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...” N.H.P. 1988-89/24.

Another significant concern is raised by Rule 2.1’s requirement that “a lawyer shall exercise independent professional judgment ....” See N.H. PROF’L CONDUCT R. 2.1, ABA Model Code cmt. (“A client is entitled to straightforward advice expressing the lawyer’s honest assessment.”). A lawyer attempting to balance the two roles may become hopelessly entangled in competing interests and unable to exercise independent judgment. For example, the Town Counsel may be in the position of having to evaluate his own decisions made as Town Manager, or the converse. Further, it is inevitable that a Town Manager will make executive decisions that could lead to litigation. As Town Manager, he will need to determine whether or not he may properly represent the Town as attorney in a particular situation, or whether the situation calls for independent representation. Such situations raise concerns about the potential of role confusion, the inherent conflict arising out of judging one’s own decisions, and the possibility of one’s independent judgment being unwittingly compromised.

In general, a person who simultaneously holds two positions can avoid a possible conflict of interest by recusing himself or herself in an appropriate situation. See, e.g., Town of Littleton v. Taylor, 138 N.H. 419, 423-24 (1994). In this case, however, the question remains whether Town Counsel would be able adequately to identify all situations in which a possible conflict of interest is presented. The potential conflicts between selectman and librarian, as discussed in Taylor, appear much more limited than those between Town Counsel and Town Manager and, in any event, do not implicate the ethical restraints imposed by Rules 1.7 and 2.1, cited above.

While not an issue arising pursuant to the Rules of Professional Conduct, this situation raises questions concerning the application of RSA 37:9 and 669:8 and the common law doctrine of incompatibility of offices. See N.H. REV. STAT. ANN. § 37:9 (2004) (“The town manager ... may be elected or appointed to any municipal office in such town ... that would be subject to his or her supervision if occupied by another incumbent; but he or she shall hold no other elected or appointed public office of the town ....”); N.H. REV. STAT. ANN. § 669:8 (2004) (same); Town of Littleton v. Taylor, 138 N.H. 419, 423 (1994) (citation omitted) (explaining that the common law doctrine of incompatibility of offices “bars an individual from holding two offices when one office is subordinate to the other, as the governmental checks and balances are eliminated because an individual is reviewing his or her own work.”).

### **Conclusion**

In summary, simultaneously holding the position of Town Manager and Town Counsel would make it extremely difficult to comply with Rule 1.7, and raises further concerns under Rule 2.1, and may implicate either RSA 37:9 and 669:8 and the common law doctrine of incompatibility of offices.

**Rule References:**

NH RPC 1.7

NH RPC 2.1

**Subjects:**

Conflicts of Interest

Harsh Reality Test

Independent Professional Judgment

- **By the NHBA Ethics Committee**

*This opinion was submitted for publication to the NHBA Board of Governors.*