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NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1993-94/2
Lawyer-Official: "General Counsel" to Real Estate Development Partnership Serving as Member of Municipal Governing Body.
November 10, 1993
(Bar News, p.12, 12/15/93)

RULE REFERENCES:

*Rule 1.8(a)
*Rule 1.11A
*Rule 1.11A(a)(1)
*1.11A(a)(2)
*Rule 1.11 A(b)(3)

SUBJECTS:

*Lawyer-Official
*Public Official
*Business Activities

ANNOTATIONS:

An attorney serving, in effect, as general counsel to a real estate development partnership and frequently utilizing legal skills in the representation of the partnership before local land use boards and in contract, real property and other matters, likely is "actively engaged in the practice of law" within the meaning of Rule 1.11A. (Rule 1.11A(a)(1); Rule 1.11A(a)(2)).

The attorney's employer under such circumstances is the client of the attorney for purposes of Rule 1.11A, even though the attorney's responsibilities to the employer are generally business-oriented rather than legal in nature. (Rule 1.11A(b)(3)).

FACTS:

The inquiring attorney is contemplating a run for a local governing body. The attorney expressed concern, though, that the attorney's activities on behalf of the attorney's employer may be greatly curtailed if the attorney is elected to this local governing body, due to the application of Rule 1.11A.

The attorney is a member in good standing of the New Hampshire Bar Association and maintains an "active" status with the Bar Association. For a number of years, the inquiring attorney has been a salaried employee of a New Hampshire partnership engaged in the acquisition, management, development, sale and lease of real property. While the inquiring attorney serves the

partnership primarily in a managerial capacity, the inquiring attorney has indicated that the position provides the inquiring attorney with "many opportunities to utilize (the inquiring attorney's) legal education and experience...in matters related to contract, real property, municipal law, etc...." The inquiring attorney also indicated that it would not be wholly inappropriate to identify the inquiring attorney as "general counsel" to the partnership. Further, the inquiring attorney often has appeared before local land use boards in support of applications, petitions and/or positions advanced for the partnership, including certain developments proposed by commercial tenants of the partnership. The inquiring attorney anticipates the need for future appearances before local land use boards in the same municipality where the inquiring attorney proposes to run for office.

Apart from the inquiring attorney's activities on behalf of the partnership, the inquiring attorney does not generally engage in the practice of law. The inquiring attorney has occasionally acted as legal counsel to relatives and friends on a no fee basis, having filed approximately three appearances in court over the past six years in connection with such activity.

QUESTIONS:

Is an attorney who is employed, in effect, as "general counsel" to a partnership and who represents that partnership frequently before local land use boards and in various contractual and real property matters "actively engaged in the practice of law" for purposes of Rule 1.11A?

If an attorney so employed is thus "actively engaged in practice of law" within the meaning of Rule 1.11A, is the attorney's employer the attorney's "client" under Rule 1.11A(b)(3)?

RESPONSE:

The Ethics Committee has been called upon frequently over the years to address inquires in the areas of governmental and municipal law. The majority of Ethics Committee opinions relative to municipal law matters have involved to varying degrees the permissible private practice activities of lawyer officials under Rule l.llA. In these previous opinions, though, it has been presented as a given that the inquiring attorney was a lawyer actively engaged in the practice of law. See, e.g., NH Op 87-8/7; NH Op 88-9/8 and NH Op 88-89/12. Conversely, the Ethics Committee has been called upon in at least one instance to address the permissible activities of an attorney who was assumed to be non-practicing, this time in the context of employment as a realtor. NH Op 1989-90/12. The present inquiry presents a case of first impression, then, in that the Committee is being asked to address the issue of whether or not the inquiring attorney is "actively engaged in the practice of law," as opposed to assuming that the attorney is or is not so engaged.

Pursuant to Rule l.llA, a "lawyer-official" is defined as "a lawyer actively engaged in the practice of law, who is a member of the governmental body." Rule 1.11A(a)(l). "Government body" is defined in such a way as to clearly include a local governing body like a board of selectmen or a city council. Rule 1.11A(a)(2). No definition is provided in this rule or elsewhere in the Rules of Professional Conduct for the phrase "actively engaged in the practice of law." Similarly, while the Ethics Committee's chief and arguably sole function is to interpret the Rules of Professional Conduct and render advice thereon, it is noted as well that no statutory definition of the phrase "actively engaged in the practice of law" was found.

The committee believes that the issue of whether or not a given attorney is "actively engaged in the practice of law" is best decided by considering the totality of the circumstances. However, based on the description of the inquiring attorney's activities given to the Ethics Committee, the Committee is of the opinion that the inquiring attorney likely is "actively engaged in the practice of law."

In one of the numerous "Settle" decisions, the New Hampshire Supreme Court quoted from a Superior Court order enjoining the defendant from engaging in the unauthorized practice of law by

> "... rendering, offering to render, or holding himself out as rendering to any other person ... any service requiring the use of legal knowledge or skill, whether in court or out of court...." State v. Settle, 129 NH 171, 174 (1987).

The inquiring attorney relates that the attorney's employment activities provide the attorney "with many opportunities to utilize (the attorney's) legal education and experience (e.g. in matters related to contract, real property, municipal law, etc.)."

In the inquiring attorney's own view, the attorney's employment involves the use of legal knowledge or skill. The inquiring attorney also suggests that it would not be inappropriate to identify the attorney as "general counsel" to or of the partnership that employs the inquiring attorney. The inquiring attorney also appears before local land use boards in support of applications, petitions and/or positions of the partnership or relating to developments proposed by commercial
tenants of the partnership.

The inquiring attorney is not held out to the public as engaged in the general practice of law and does not generally undertake to represent individuals or entities apart from the partnership. The non-public or non-general nature of the attorney's activities is not dispositive of the issue, though. The activities of the attorney on behalf of the partnership, while engaged in for the sake of only one entity, are sufficiently extensive and "legal" in nature to constitute the active practice of law. It follows as well that the partnership is the "client" of the inquiring attorney for purposes of this Rule 1.11A analysis.

The inquiring attorney also noted that as additional consideration for the attorney's employment, the inquiring attorney has received from the partnership an entitlement to an ownership interest in one of the partnership's real estate ventures. It might be argued, then, that the inquiring attorney intends to appear before local land use boards, at least with respect to this business venture, to protect the inquiring attorney's own business interests which, presumably, are coextensive or at least consistent with the interests of the partnership.

To the extent the inquiring attorney may be suggesting that the inquiring attorney will be appearing pro se, rather than on behalf of the partnership, with respect to this business venture, such activities likely would be regarded as either an impermissible conflict or the practice of law. In Knox Leasing v Turner, 132 NH 68 (1989), the New Hampshire Supreme Court held that a non-attorney member of a partnership or other unincorporated association could not represent that association pro se, unless all the partners appear and represent their individual interests and all such individual interests are consistent. While the inquiring attorney undoubtedly does have individual

interests to protect as well, the thrust of the inquiry seems to be that the inquiring attorney intends to appear primarily on behalf of the inquiring attorney's employer relative to this venture.

The inquiring attorney does not seek guidance as to the consequences of the conclusion that the inquiring attorney is actively engaged in the practice of law and that the inquiring attorney's employer is the inquiring attorney's client. The inquiring attorney clearly is conversant with Rule 1.11A and likely knows the limitations that these conclusions will place upon the attorney if the attorney is elected to the governing body.

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[1] The Ethics Committee, without rendering an opinion thereon, directs the inquiring attorney's attention to the provisions of Rule 1.8(a) relative to business transactions between lawyers and clients involving the acquisition of an ownership, possessory, security or other pecuniary interest adverse to a client.