

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1992-93/7  
Fairness to Opposing Party and Counsel Before  
The Worker's Compensation Appeals Board  
February 19, 1993

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RULE REFERENCES:

- \*Rule 1.6(a)
- \*Rule 1.7
- \*Rule 3.4
- \*Rule 3.5(b)

STATUTORY REFERENCES:

- \*RSA 281-A:42-a

SUBJECTS:

- \*Attorney-Client Relationship
- \*Consent
- \*Fairness to Opposing Party and Counsel

ANNOTATION:

An attorney representing an insurance company may appear before a Worker's Compensation Appeals Board where the Board's "pro-insurance" member is an employee of another client of the attorney. (Rule 1.7)

An attorney representing an insurance company need not notify the opposing party that the Board's "pro-insurance" members is an employee of another client of the attorney. (Rule 3.4(c))

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QUESTION:

Do the New Hampshire Rules of Professional Conduct prohibit an attorney from appearing, on behalf of an insurance company, before a Worker's Compensation Appeals Board which contains, as a participating member, an employee of the insurance company with whom the attorney has an attorney-client relationship?

BRIEF RESPONSE:

New Hampshire Rules of Professional Conduct do not prohibit an attorney, on behalf of an insurance company, from appearing before a Worker's Compensation Appeals Board which contains, as a participating member, an employee of the insurance company with whom the attorney has an attorney - client relationship.

RESPONSE:

This inquiry raises the question of whether the Rules of Professional Conduct impose any prohibition upon an attorney who represents an insurance company from practicing before the Appeals Board when that Board has, as a participating member, an employee of a client of that attorney.<sup>1</sup> In establishing a Worker's Compensation Appeals Board, RSA 281-A:42-a requires that members of the board shall have experience in the area of worker's compensation. Members are drawn from a pool of insurance adjusters and a group considered to be "pro-labor". The insurance adjusters are employed, apparently on a full-time basis, adjusting worker's compensation claims. In this role, they work with some of the major insurance defense firms as they prepare defenses to claims in which they are involved. Questions have been raised

about the perceived unfairness when an attorney-client relationship exists between a Board member and an attorney for one of the parties to the litigation.

The question presented is whether there is any ethical prohibition for the attorney representing an insurance carrier client before such a panel. This opinion does not address due process and fairness issues as they relate to the participating member of the Appeals Board.

The Rules of Professional Conduct contain no prohibitions against an attorney representing an insurance carrier client before the Worker's Compensation Appeals Board when a member of the Appeals Board is employed by a client of the attorney. There is no issue of conflict of interest as the activities on behalf of the party to the appeal are not adverse to the client whose employee sits on the Appeals Board. Rule 1.7. Nor is there any issue of a breach of confidentiality pursuant to Rule 1.6.

The question arises whether the lawyer has an obligation to make the parties and other tribunal members aware of the existence of the relationship between the attorney and the adjuster/tribunal member. Rule 3.4(c) entitled Fairness to Opposing Party and Counsel, is the only rule conceivably on point. There is no specific provision which seems to apply. Rule 3.4(c) requires that an attorney not knowingly disobey an obligation under the rules of the tribunal. If there were a specific rule of the Worker's Compensation Appeals Board requiring disclosure of such a relationship, then, perhaps, there would be an ethical obligation implicated under Rule 3.4(c). However, without such a tribunal rule, there appears to be no ethical obligation on the part of the attorney to raise the issue.

Counsel representing clients under the circumstances addressed in this opinion should be aware of Rule 3.5(b) which prohibits ex parte communication with an Appeals Board member. See also Appeal of Atlantic Connection, 135 NH 510, 515 (1992).

SUMMARY:

In the factual circumstances provided to the Ethics Committee, there is no prohibition for the attorney to represent an insurance carrier client before the Appeals Tribunal which contains as a member the employee of another client.

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<sup>1</sup> The Committee specifically does not address the ethical issues which could arise if the attorney in this matter represented an injured claimant, rather than an insurance carrier; nor does this opinion address the ethical issues surrounding an attorney who sits on the Appeals Board.