

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1992-93/2
Conflict of Interest: Lawyer Member of City
Council Opposing City Employees in Court
November 18, 1992
(*Bar News*, p. 7, 2/10/93)

RULE REFERENCES:

- *Rule 1.7
- *Rule 1.7(b)
- *Rule 1.8
- *Rule 1.10
- *Rule 1.11A
- *Rule 1.11A(b)(1)
- *Rule 1.11A(b)(5)
- *Rule 8.4(d)

SUBJECTS:

- *Criminal Representation
- *Conflict of Interest
- *Law Firms
- *Lawyer-Official
- *Public Official

ANNOTATION:

The Rules of Professional Conduct do not prohibit a lawyer who is a city councilor, or members of the lawyer-official's firm, from representing criminal defendants in the courts where the lawyer-official does not have any oversight authority for the prosecutor and police witnesses. (Rule 1.7 (b), Rule 1.11A).

A lawyer may not state or imply an ability to influence improperly city employees. (Rule 1.11A(b)(5), Rule 8.4(d)).

A lawyer-official who has the power to vote on compensation of certain municipal positions, such as prosecutor, should consider recusal where that lawyer-official or members of that lawyer's firm routinely oppose the prosecutor in court.

FACTS:

A lawyer is a member of a city council. The city council does not engage in the direct oversight of the city's police department. That oversight is carried out by the chief of police and the city manager. The council does appropriate the police department budget and approves a compensation plan which establishes grade level rates of pay for police officers and for the prosecutor.

QUESTION:

Does an impermissible conflict of interest arise when a lawyer is a member of the city council and that lawyers or colleagues in the lawyer-official's firm oppose members of the city police department and city prosecutor in the courts in criminal defense matters?

RESPONSE:

Threshold issues pertaining to this inquiry were addressed in NH Op 1988-89/12. That opinion pertains to questions of whether an impermissible conflict of interest arises when a member of a law firm is serving on a city council and another member of the same firm appears before a city land use board or when another member of the same firm represents a client in an action against the city. The Committee decided that the lawyer/official would have an impermissible conflict of interest. However, the Committee decided that the conflict does not extend to other members of the lawyer-official's firm provided that the lawyer-official has not acquired "inside information" by virtue of holding public office, that the lawyer-official publicly disqualifies himself or herself from participation in any related vote or discussion and that the lawyer-official otherwise acts in a manner consistent with Rule 1.11A so as to avoid undue influence. The Committee found no outright prohibition against other members of the lawyer-official's firm from maintaining actions against the city but it raised the specter of potential conflicts under Rule 1.7.

The present inquiry is distinguishable because the lawyer official or colleague would not be appearing before a governmental body. Instead, he or she would be opposing city employees whose compensation is voted upon, indirectly for the most part, by the lawyer-official. Rule 1.7 generally and 1.7 (b) specifically do not prohibit the lawyer-official or a colleague from opposing city employees in criminal defense matters. It is difficult to conceive how representation of a client would be materially limited by the lawyer-official's municipal duties pertaining to approving compensation. Rule 1.8 (Prohibited Transactions) does not apply.

The provisions of Rule 1.11A(b) (1) and (5) do not amount to a prohibition against the lawyer-official or colleagues from appearing in court in opposition to city employees in criminal defense matters. The questions pertaining to the lawyer-official's colleagues can be simply disposed of by noting that these colleagues are not appearing before a governmental body. Neither would their representation of a client be materially limited by the lawyer-official's responsibilities in approving or disapproving budgetary items. See Rule 1.7(b).

Finally, while Rule 1.11A does not bar the lawyer-official from representing clients in opposition to prosecutorial/police employees in the court system, it is obvious that the lawyer official cannot "participate in any hearing, debate, discussion or vote, or in any manner otherwise attempt to influence the outcome of a matter in which he or she has an interest." See Rule 1.11A (b)(1). The Committee views this prohibition in a manner not to preclude the lawyer-official from voting on the police budget or police officer/prosecutor compensation plans. However, the Rule does prohibit that lawyer-official from using public office to influence the outcome of a case. See Rule 1.11A (b) (5). It should be equally obvious that neither the lawyer-official nor that official's colleagues can "state or imply an ability to influence "improperly" city employees or prosecutions in the district or superior courts. See Rule 8.4(d).

SUMMARY:

The Rules of Professional Conduct do not prohibit the lawyer-official or the lawyer-official's colleagues from appearing in district and superior courts when they will be opposed by a city prosecutor or when they will have to cross examine city employees. Neither the lawyer-official nor the lawyer-official's colleagues can utilize the lawyer-official's position to influence the outcome of a case. However, some concern might be raised about the potential for a chilling effect upon the city prosecutor/police officer in prosecuting matters the lawyer-official/colleagues have an interest in. For example, will the police prosecutor be less zealous in opposition to the lawyer-official/colleagues out of concern that the prosecutor's/officer's rate of pay might be affected? As NH Op 1988-89/12 provides, the "appearance of impropriety" is not part of the Rules of Professional Conduct [but see Wehringer's Case, 130 NH 707 (1988)]. However, serious consideration must be given by the lawyer-official to recusing himself, pursuant to Rule 1.11A (b)(1) from any vote pertaining to compensation for specific positions, such as the city prosecutor.