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N. H. ETHICS OPINIONS ANNOTATED

FO 1988-89/8

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1988-89/8
Conflict of Interest: Lawyer-Official/
Lawyer-Legislator Appearing Before Certain Agencies/Forums
December 8, 1988

RULE REFERENCES:

- *Rule 1.11A
- *Rule 1.11A(a)(2)
- *Rule 1.11A(a)(3)
- *Rule 1.11A(b)(1)
- *Rule 1.11A(b)(2)
- *Rule 1.11A(b)(3)
- *Rule 1.11A(b)(5)

CODE REFERENCES:

- *Canon 9

SUBJECTS:

- *Conflict of Interest
- *Lawyer Officials
- *Public Officials
- *Government Representation

ANNOTATIONS:

An actively practicing lawyer who is a member of the legislature must comply with Rule 1.11A, and carefully analyze on a case-specific basis the potential for conflict, before appearing before administrative agencies or judicial bodies. (Rule 1.11A)

A lawyer-official with a significant position on a standing committee with significant regulatory authority over a particular agency or judicial body may be precluded from representing clients before that agency or body unless the attorney absents himself or herself from legislative deliberations with respect to that body. (Rules 1.11A(b)(1); 1.11A(b)(2); 1.11A(b)(3); 1.11A(b)(5))

QUESTION:

May an attorney who is a member of the New Hampshire legislature appear before administrative agencies or judicial forums, the salaries of whose members are set by the legislature?

BRIEF ANSWER:

In general, Rules of Professional Conduct do not prohibit appearances by a lawyer member of the legislature before administrative agencies or judicial bodies whose members' salaries are set by the legislature. However, the lawyer should be sensitive to particular situations which may require that the lawyer decline representation of a specific client or disqualify him or herself from participation in certain legislative actions.

DISCUSSION:

Rule 1:11A, Conduct of Lawyer - Official, applies to any actively practicing lawyer who is a member of a governmental body defined to mean;

(a)(2) ... any state or local governmental agency, board, body, council or commission ... (emphasis added)

Accordingly, an actively practicing lawyer who is a member of the legislature must comply with Rule 1:11A.

Rule 1:11A(a)(3) defines interest as follows:

a direct, personal and pecuniary interest individually or on a client's behalf, in a matter which is under consideration by the governmental body of which the lawyer-official is a member.

The Rule (1.11A(b)) goes on to provide that no lawyer-official shall:

(1) 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;

(2) utilize information obtained in such capacity for his or her own personal benefit or that of his or her clients or the clients of the firm with which the lawyer-official is associated;

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(3) appear on behalf of a client before any governmental body of which the lawyer-official is a member or whose members have been appointed by the governmental body of which the lawyer-official is a member;

(4) accept anything of value from any person or organization when the lawyer-official knows or reasonably should know that the offer is for the purpose of influencing the lawyer-official's actions or decisions;

(5) use his or her official position to influence or to attempt to influence any governmental body to act in favor of the lawyer-official or the lawyer-official's clients or clients of the firm with which the lawyer-official is associated.

The New Hampshire Comments provide that public service by members of the Bar is encouraged.

Prior decisions of this Committee have sought to deal with the potential conflict between lawyer's duties to his clients and his or her responsibility as a governmental official. See NH Op 88-89/3: Formal Opinion, Municipal Representation/Service As Moderator (no blanket prohibition on an attorney serving as town moderator and also maintaining local land use practice but specific situations may require withdrawal from representation or appointment of moderator pro tempore); NH Op 83-415 Part-Time District Court Judge: Public Service Limitation (under prior Code of Professional Responsibility, a part-time district court judge could not act as town counsel to a town within the district court's jurisdiction). While no clear precedent has emerged, prior Ethics Committee decisions impose an obligation on the lawyer-official to carefully analyze on a case - specific basis the potential for conflict.

While the present Rules of Professional Conduct contain no direct counterpart to the prohibitions against the "appearance of impropriety" contained in the former Disciplinary Rules, it is worth noting that in a recent disbarment case, the New Hampshire Supreme Court seemed to indicate the continued vitality of that doctrine. See Wehringer's Case, 130 N.H. 707, 547 A.2d 252 (1988). That case involved disbarment proceedings arising under the former Code of Professional Responsibility. The court concluded that the record supported the referee's conclusion that the attorney involved had violated certain specified Disciplinary Rules. In concluding that the penalty of disbarment was appropriate in this case, the Court stated:

The respondent fails to understand what it means to be a member of the legal profession. It is a profession where one "seeks to avoid even the appearance of impropriety" and thus, strives to live by a higher standard of conduct than a layperson (cites omitted). The duty to "avoid even the appearance of impropriety" is not one to be taken lightly because "(a)ttorneys constitute a profession essential to society. Their aid is required not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided

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to their management. The confidences which they receive and the responsibilities which they are obliged to assume demand not only ability of a high order, but the strictest integrity" (cites omitted). 130 N.H. at 719

The Court went on to warn that lawyers could not always successfully assert the defense that the applicable rules could not be read to apply to their conduct because:

"The language of a rule setting guidelines for members of the bar need not meet the precise standards of clarity that might be required of rules of conduct for laymen" (cites omitted). 130 N.H. at 720.

The Court noted that its comments were made in the context of a vastly larger Bar than had historically been the case in New Hampshire and the corresponding need for appropriate protection of lay people who seek legal services.

While it is uncertain whether the Court would apply the "appearance of impropriety" standard to a case arising under the present Rules, the Court's strong admonitory language in the Wehringer case puts all lawyers on notice that their conduct will be judged by a particularly exacting standard.

In the context of lawyer-officials, a blanket prohibition on appearances before administrative or judicial bodies whose members' salaries are set by the legislature would appear inconsistent with the articulated policy of encouraging lawyers' involvement in civic affairs. Representation of clients before such bodies would not seem, in and of itself, to give a lawyer-official such a "direct personal and pecuniary interest" to preclude his or her participation in the appropriation process, particularly where the lawyer-official does not sit on the appropriations committee.

Nonetheless, every lawyer-official must be aware of the specific prohibitions contained in Rule 1:11A and determine on a case-specific basis whether it would be appropriate to continue to represent clients before administrative or judicial bodies where the lawyer's activity as a legislator could be construed to influence the outcome of the proceedings. To illustrate, a lawyer-official with a significant position on the Appropriations Committee or a standing committee with significant regulatory authority over a particular agency or judicial body may be precluded from representing clients before that body unless he or she excuses himself or herself from legislative deliberations with respect to that body. See Rule 1:11A(b) (1) (2) (3) and (5). No lawyer-official, even absent such a powerful position, can take any action inconsistent with Rule 1:11A.

To summarize, while lawyers/legislators are not precluded in every case from appearing before administrative or judicial bodies whose salaries are set and whose activities are regulated by the legislature, each lawyer/legislator must comply with Rule 1:11A and determine on a case-specific basis whether such representation would be appropriate.

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