NEW HAMPSHIRE BAR ASSOCIATION

Municipal Representation and Potential Conflicts of Interest

Ethics Committee Opinion #2019-20/02

Abstract:

An Attorney who represents a municipal Planning Board and provides advice to the Planning Board on interpreting the Zoning Ordinance in a particular matter, should use extreme caution and carefully evaluate the possibility that a conflict of interest may exist in providing advice to the Zoning Board of Adjustment on the same matter on appeal to the Zoning Board of Adjustment.

Annotation:

Attorney A represents a municipal Planning Board with respect to a subdivision application that requires the Board to interpret the Zoning Ordinance. The Attorney provides the Planning Board with advice regarding the interpretation of the Zoning Ordinance. The Planning Board makes a final decision, and an appeal is taken to the Zoning Board of Adjustment ("ZBA") pursuant to RSA 676:5, III regarding the interpretation of the Zoning Ordinance. Attorney A provides advice to the ZBA regarding the interpretation of the Zoning Ordinance. Does Attorney A's representation of the Planning Board and the ZBA constitute a conflict of interest under these circumstances?

The lesson to be learned from the above fact pattern is this: if you are unsure whether a particular situation presents a conflict of interest, the prudent course of action is to decline the representation. In short, if you have to ask it is probably a bad idea.

Although you may think you know the answer, an adjudicative body such as the Professional Conduct Committee or the Supreme Court may take a different view. Despite debating the above fact pattern over a period of months, based on some of the competing opinions described below, the Ethics Committee has been unable to arrive at a clear consensus as to whether Attorney A's representation of the Planning Board and the ZBA constitutes a conflict of interest. So, the short answer is: having represented the Planning Board and being unsure if representing the ZBA in the same or a related action would constitute a conflict of interest, Attorney A should not, out of a surfeit of caution, represent the ZBA.

Applicable Rules:

Rule 1.7 (a) Except as provided in paragraphs (b) and (c), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing....

Rule 1.9(a) provides in relevant part as follows:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Conflict of Interest Analysis:

In considering the above fact pattern, Committee members essentially fell into two camps. Both camps started with some preliminary assumptions. Assumptions are required because the question presented includes few facts. Conflict analysis is fact intensive and it is difficult to draw categorical lines in any but the most obvious cases. It is presumed that no member of the Planning Board and ZBA has a disqualifying financial stake in the outcome of the application. Such conflicts are a matter of municipal law and town policy and would be outside the scope of this opinion. It is also presumed the attorney has no direct financial stake in the application. Finally, in the absence of contrary evidence, it is presumed that the respective boards and the municipal attorney attempt in good faith to make decisions or render advice consistent with applicable law, the zoning ordinance, the master plan (if any), and relevant considerations of public interest. At the same time, the fact pattern presented is unclear as to whether the attorney is representing the municipality or the board. The scant authorities related to this topic suggest that the client is the municipality, but that is not made clear. If the attorney is representing the planning board and not the municipality,

the difficulties of client identification complicate the entire analysis, particularly because in this fact pattern the different entities of the municipality have, or appear to have, differing interests.

With those assumptions in mind, the first camp's analysis follows:

The examining Committee members in the first camp perceive no direct adversity between the Planning Board and the ZBA on the limited facts presented. Rule 1.7(a)(1). Neither board has a financial interest in the outcome of the application. The applicable statutes give the ZBA final authority (as between the ZBA and the Planning Board) over interpretation of the zoning ordinance. The possibility of disagreement between the boards is inherent in the process, and no criticism should necessarily be implied in the event differing interpretations arise. The question then becomes whether there exists a significant risk the lawyer's ability to represent one or more clients will be materially limited by the lawyer's responsibilities to another client, former client, or the lawyer's personal interests. Rule 1.7(a)(2).

The lawyer's responsibility to the Planning Board is to advocate for the Board's interpretation of the zoning ordinance; accordingly, those Committee members believe no conflict necessarily arises merely because the attorney maintains before the ZBA the advice he or she rendered to the Planning Board. Under ordinary circumstances, there seems no sound reason to presume the attorney would knowingly perpetuate incorrect advice. Those Committee members believe there is significant danger in presuming an attorney has a conflict, let alone a disqualifying conflict, merely because they maintain consistent positions before each Board.

Attorneys frequently deal with complex intangible considerations in any representation and the advice rendered is subject to opposing interpretation. The touchstone of the conflict analysis, however, is that there must be a *significant* risk of a *material* limitation on the lawyer's responsibilities to another client or third person or by a personal interest of the lawyer. Although there may be specific factual circumstances under which these considerations might create a conflict under Rule 1.7(a)(2), such a conflict should not be presumed under ordinary circumstances.

On balance, the Committee members in the first camp found no direct or material adversity between the interests of the ZBA and the Planning Board with respect to interpretation of the zoning ordinance. Each board shares a common interest in consistent and lawful interpretation of the ordinance and no financial interest of either board is implicated by the outcome. Under the circumstances presented, no personal interest of the attorney sufficient to raise a conflict is presented. Accordingly, Committee members in the first camp conclude there is no conflict of interest.

On the other hand, Committee members in the second camp raised some hard questions—questions that should represent red flags to prudent attorneys. Those members took the view that, as to Rule 1.7(a)(1), the ZBA is an appellate body to the Planning Board in the fact pattern. Lawyer A's representation of the ZBA in its appellate review of a decision in which Lawyer A counseled the Planning Board, whose decision is

being alleged to be incorrect (thus calling into question the viability of Lawyer A's earlier advice) could be considered representation of a client that is directly adverse to representation of a prior (and probably ongoing) current client. In looking for further support, turning to Google, an impeccable source of certitude only slightly behind Wikipedia, and Googling "can someone who participated in the initial decision be a hearings officer," the focus seems to be on due process. In the Alaska APA manual, the section on due process states that the hearing officer should not be advised by agency staff, including an attorney for the agency staff, who has acted as an advocate in the matter before the hearing officer. Similarly, the Social Security website states: "The first step in the appeals process is called a reconsideration determination. You will receive a new decision by someone who had no part in the first decision. We will send you a letter explaining how we made the decision." In the words of one second camp Committee member, "If I was an applicant, I would feel my right to a second independent decisionmaker had been undercut by the powerful lawyer's role in this process, especially on a largely legal question."

Second camp Committee members also raised concerns that the representation might run afoul of Rule 1.7(b)(1). Those members asked how Lawyer A could reasonably believe he or she would be able to provide competent and diligent representation to each client when Lawyer A would naturally be affected by his or her natural preconception that his or her original advice given to the Planning Board was correct. There is an adage that a person who represents himself or herself has a fool for an attorney. Second camp Committee members felt that it appears Lawyer A is taking it upon himself or herself to render an impartial and considered opinion as to whether his or her original advice was flawed or sound. In that situation, Lawyer A seems to be effectively representing himself or herself by defending his or her decision because it would be troublesome at best to now reverse position and opine that Lawyer A's original position was incorrect. Lawyer A gave advice leading to the Planning Board's decision that is being appealed. Now Lawyer A is volunteering to give an opinion as to whether his or her own original advice should have been followed. The second camp Committee members feel that in this situation, as a matter of human nature Lawyer A simply cannot be impartial; therefore, he or she cannot provide competent and diligent representation to each client.

Based on that premise, the second camp Committee members were of the opinion that a lawyer who is asked to render supposedly impartial legal advice as to an earlier opinion rendered by that same attorney faces an inherent, non-waivable conflict because it is doubtful the attorney can overcome his or her natural bias to affirm the research, analysis, and conclusion the attorney already reached after, one assumes, thoughtful consideration. Assuming that is true, Lawyer A is unable to adequately represent his or her client because it is likely he or she cannot render impartial advice.

The second camp Committee members also looked to Rule 1.9(a) in their analysis. That rule holds, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." Second camp Committee members believe that the above fact pattern presents the same or a

substantially related matter as to the ZBA appeal. Although one can argue that both agencies have the public's interests at heart, that argument overlooks the fact that the second agency is being asked to declare the first agency's decision incorrect. It can easily be argued that if one agency is being asked to declare another agency's decision to have been incorrect and overturn it, the interests of the two agencies are adverse.

Finally, second camp Committee members were of the opinion that the analysis in favor of claiming no conflict exists is flawed when it asserts that because the attorney is acting as an advisor, but not as a decision-maker, the attorney "appears to have no personal interest in the advice they offered the planning board regarding the zoning ordinance." Those members feel that in the above fact pattern, the attorney's personal interest in the advice he or she is offering stems from the fees he or she is charging for Lawyer A's advice. To be blunt, the very question posed by the scenario at hand is a result of Lawyer A's desire to continue representing both agencies so (1) he or she can collect fees from both, and (2) he or she can avoid the risk of a second attorney being brought in who may disagree with Lawyer A's initial advice to the Planning Board, impugning Lawyer A's legal competence and possibly even endangering Lawyer A's continued representation of those clients.

Conclusion

Be wary of potential conflicts of interest. They are not all black and white, as exemplified by the above fact pattern. Regardless of whether a potential conflict may be eventually adjudicated in your favor if you are brought to task, prudence dictates you are better off avoiding the potential conflict. If you are unsure if prospective representation presents a conflict, ask yourself if you want to put yourself at risk of having to later defend yourself (or hire a lawyer to defend you) in front of the Attorney Discipline Office or from a lawsuit brought against you by your own client. It bears repeating: "If you have to ask, it is probably a bad idea."

NH Rules of Professional Conduct:

Rule 1.7

Rule 1.9(a)

Other Authorities: *Nergaard v. Town of Westport Island,* 2009 ME 56; *Johansen v. City of Bath*, 2010 Me. Super. LEXIS 150 (Dec. 14, 2010); *Paruszewski v. Township of Elsinboro*, 711 A.2d 273 (N.J. 1998); *Joovelegian v. West Greenwich Zoning Bd. of Review*, 2007 R.I. Super. LEXIS 84 (June 18, 2007); *A. Aiudi & Sons, LLC v. Plainville Planning and Zoning Comm'n*, 2000 Conn. Super. LEXIS 1173 (May 10, 2000).

Subjects:

Attorney-Client Relationship

Candor to the Tribunal

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- **By the NHBA Ethics Committee**
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