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Zoning and Land Use Planning

*Patricia E. Salkin**

Relationships, the Rules of Professional Conduct and Land Use: Ethical Quagmires for Land Use Attorneys

Introduction

Oftentimes, professionalism and ethics issues come down to relationships. At the core, it is critical to identify the client of the attorney since so much of the Rules of Professional Conduct are premised on the lawyer's relationship to her client¹ as well as to former clients.² Relationships are also

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¹Model Rules of Prof'l Conduct R. 1.1-1.8, 1.10, 1.13-1.18 (2008) (1.1 Competence—"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." 1.2 Scope of Representation and Allocation of Authority Between Lawyer and Client. 1.3 Diligence "A lawyer shall act with reasonable diligence and promptness in representing a client." 1.4 Communication. 1.5 Fees—"(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses . . ." 1.6 Confidentiality of Information—"(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b) . . ." 1.7 Conflict of Interest: Current Clients—"(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest . . ." 1.8 Conflict of Interest: Current Clients: Specific Rules. 1.10 Imputation of Conflicts of Interest: General Rule. 1.13 Organization as Client—"a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." 1.14 Client with Diminished Capacity. 1.15 Safekeeping Property. 1.16 Declining or Terminating Representation. 1.17 Sale of Law Practice. 1.18 Duties to Prospective Clients.).

²Model Rules of Prof'l Conduct R. 1.9, 1.11 (2008) (1.9 Duties to Former Clients "a) 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 materi-

important between the lawyer and his or her law firm,³ and between the many clients of the lawyer and the firm.⁴ In the land use context, the relationship and roles played by various lawyers in the process often raises significant ethical dilemmas. For example, attorneys represent planning boards, zoning boards, and local legislative bodies—all important governmental players in the land use game, yet the form and scope of this representation can raise different ethical and professional dilemmas. Sometimes, attorneys are employed full-time by the government, and often these boards are represented by “outside counsel” or law firms retained to provide legal counsel and services to individual boards. Those employed full-time by the government are most often “in-house” corporation counsel who may individually, or through the municipal attorney office, represent more than one board simultaneously, raising questions regarding who the client is in cases of conflicting internal governmental positions.⁵ In addition, attorneys may represent applicants appearing before these boards, or neighbors who wish to have input into the land use decision making process. Sometimes, issues arise as a result of the lawyer’s relationship to the law firm representing another party in the matter (e.g., the applicant or the government) or because of the attorney’s relationship to a member of one of the decision making bodies (e.g., spouse, partner, child, parent, sibling, or business associate). Attorneys may also be involved in the

ally adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.” 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees.).

³Model Rules of Prof'l Conduct R. 5.1-5.7 (2008) (5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers, 5.2 Responsibilities of a Subordinate Lawyer, 5.3 Responsibilities Regarding Nonlawyer Assistants, 5.4 Professional Independence of a Lawyer, 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law, 5.6 Restrictions on Right to Practice, 5.7 Responsibilities Regarding Law-Related Services.).

⁴Model Rules of Prof'l Conduct R. 1.6-1.8, 1.18 (2008) (1.6 Confidentiality of Information—“(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)” 1.7 Conflict of Interest: Current Clients—“(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest” 1.8 Conflict of Interest: Current Clients: Specific Rules, 1.18 Duties to Prospective Clients.).

⁵For a more detailed discussion about the client of government lawyers, see Rosenthal, *Who is the Client of the Government Lawyer?* ETHICAL CONSIDERATIONS IN THE PUBLIC SECTOR (2d ed.).

land use process because they volunteer to serve on one of the boards in their community. This too can raise ethics and professionalism issues with regard to the volunteer board member-attorney's relationship with others who appear before the board.

Many of the state ethics opinions cited in this article employ the phrase "appearance of impropriety" as the reason for opining that certain actions of lawyers dually serving on land use boards are unethical. Jurisdictions vary on what creates an appearance of impropriety and restrain lawyers therein accordingly. Although the Model Rules of Professional Conduct and the Restatement of the law governing lawyers have found that standard impossible to decipher or define,⁶ this has not stopped states from incorporating this standard into specific rules.⁷ In spite of criticism, the "appearance of impropriety" is peppered throughout land use ethics opinions as jurisdictions try to avoid allegations of impropriety in boards serving local land interests.

Much has been written about ethics in the land use game in terms of reported court decisions and opinions of state attorneys general and statewide ethics bodies,⁸ but the literature is devoid of a focused examination on how bar association committees on ethics and professionalism (lawyers

⁶Rotunda and Dzienkowski, *PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE* 13–15 (2007–2008).

⁷See, e.g., *Kramer v. Scientific Control Corp.*, 534 F.2d 1085, Fed. Sec. L. Rep. (CCH) P 95530, 21 Fed. R. Serv. 2d 1223 (3d Cir. 1976).

⁸See, generally, Salkin, *Ethics in Land Use*, *AMERICAN LAW OF ZONING*, (5th ed.); see also Salkin, *1998 Survey of Ethics in Land Use Planning*, available at http://www.governmentlaw.org/files/FULJ-1998_survey_ethics.pdf; Salkin, *Litigating Ethics Issues in Land Use: 2000 Trends and Decisions*, available at http://www.governmentlaw.org/files/UL-Litigating_ethics_issues.pdf; Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, *ZONING AND PLANNING LAW REPORT*, Apr. 2003; Salkin, *A Woody Allen Movie, Show Me the Money, and Other Ethical Considerations in Land Use Planning*, *ZONING AND PLANNING LAW REPORT*, Mar. 2004; Salkin, *Land Use Ethics Update 2005: Conflicts of Interest, Improper Conduct and Other Ethical Considerations*, *ZONING AND PLANNING LAW REPORT*, Mar. 2005; Salkin, *Back to Kindergarten: Pay Attention, Listen, and Play Fair with Others—Skills That Translate into Ethical Conduct in Planning and Zoning Decision Making—A Summary of Recent Cases and Decisions on Ethics in Land Use Law*, *URBAN LAW*, 2005 at 573; Salkin, *Tips for Ethical Considerations in Land Use Decision-Making: No Gobbly Goop in the 2006 Annual Review of Cases and Opinions*, *ZONING AND PLANNING LAW REPORT*, May 2006; Salkin, *Crime Doesn't Pay and Neither Do Conflicts of Interest in Land Use Decisionmaking*, *THE URBAN LAWYER*, Summer 2008, reprinted in, *AT THE CUTTING EDGE* 2008 (Merriam ed.).

providing ethical guidance to other lawyers) apply the Rules of Professional Conduct to provide advice to the thousands of full-time and part-time attorneys who have a role in the planning and zoning process. This article begins to fill the void by introducing the application of the various Rules of Professional Conduct, as adopted by the specific opining jurisdiction, through a review of the relevant reported opinions of the various committees and sometimes courts, in the land use context. Part I discusses the challenges that arise for lawyers vis-à-vis their clients in the land use context. This is followed by a discussion in Part II of the ethics and professionalism issues that confront lawyers who serve on local boards.

Part I. Challenges Vis-à-vis the Lawyer and the Client in the Land Use Context

A. Lawyers Serving as Counsel Simultaneously to Both Planning and Zoning Boards

As noted in the Introduction, it is common for smaller municipalities to employ one attorney to provide legal counsel to the municipal entity, including various offices, departments, and boards. When lawyers are in a position to serve as counsel to more than one entity within a municipality, ethics problems might arise. For example, in Florida, the Professional Ethics Committee has opined that a “lawyer may act as legal advisor to both the Zoning Commission and the Board of Zoning Appeals,” but cannot become an advocate for either.⁹ The Committee explained that so long as the lawyer’s role is as an adviser there is “no impropriety” unless the lawyer becomes an advocate for one side while serving as the legal advisor for the other.¹⁰ If there is a conflict then both bodies should have separate counsel advising them.¹¹ Although there may be an attempt by one board to secure representation by the attorney in question, it would be inappropriate to continue the attorney-client relationship with one client who is in an adversarial position with another client.

B. Full-time Municipal Attorneys and Conflicts Between Municipal Personnel and an Administrative Land Use Decisionmaking Body

A South Carolina ethics advisory opinion explained that a

⁹FL. Ethics Op. 72-12 (1972).

¹⁰FL. Ethics Op. 72-12 (1972).

¹¹FL. Ethics Op. 72-12 (1972).

municipal attorney can advise the Zoning Board of Adjustment during its review of a zoning matter,¹² however if the “attorney reasonably believes that communication between municipal counsel and members of the decision-making body may violate any provision of law and . . . such communication is likely to result in substantial injury to the client” or if the “communication would prejudice the municipality by invalidating its decision on a municipal matter,” the attorney must take “measures . . . to minimize disruption of the organization and the risk of revealing information . . . to persons outside the organization.”¹³ The question presented posed the scenario of a municipal attorney being consulted by administrative personnel before they render a zoning decision which is subsequently appealed to the Zoning Board of Adjustment.

C. Full-time Municipal Attorney and Intra-Governmental Litigation

The New York State Bar Association’s Committee on Professional Ethics opined that an assistant municipal attorney cannot accept assignments to act as counsel to the zoning board of appeals in an action initiated by the town board against the zoning board of appeals.¹⁴ The Committee noted that the “zoning board of appeals is an agency of the town and the assistant town attorneys are generally obliged” to “rende[r] legal advice to the town zoning board of appeals.”¹⁵ However, when the “relationship between the two boards become antagonistic” a conflict of interest will appear.¹⁶ As a result, “counsel fully independent from the office of the town attorney should be retained to represent the zoning board of appeals.”¹⁷

Similarly, in South Carolina a “city attorney cannot represent the city in an appeal against an agency of the city which the attorney represents.”¹⁸ The South Carolina Bar explains that to allow this would be an “impermissible conflict of interest” as a “lawyer should never represent in litigation

¹²SC Bar Ethics Advisory Comm., S.C. Advisory Op. 95-08.

¹³SC Bar Ethics Advisory Comm., S.C. Advisory Op. 95-08 (quoting Rule 1.13(b)).

¹⁴Comm. on Prof'l Ethics, NYSBA Op. 501 (May 5, 1979).

¹⁵Comm. on Prof'l Ethics, NYSBA Op. 501 (May 5, 1979).

¹⁶Comm. on Prof'l Ethics, NYSBA Op. 501 (May 5, 1979).

¹⁷Comm. on Prof'l Ethics, NYSBA Op. 501 (May 5, 1979).

¹⁸S.C. Bar Ethics Advisory Comm., S.C. Advisory Op. 89-22 (1989).

multiple clients with differing interests.”¹⁹ The applicable Disciplinary Rules require an attorney to refuse to accept or to continue employment if the interest of another client may impair his independent professional judgment and require that a lawyer avoid even the appearance of professional impropriety.²⁰

D. Law Firms Who Provide Part-Time Legal Counsel to Municipal Land Use Boards

Municipalities typically retain part-time outside counsel to represent specific administrative bodies such as the planning and zoning boards. Ethics issues arise when partners or associates of that attorney wish to appear before the boards representing other clients. The Kentucky Bar Association has explained that a partner and/or associate of the attorney for a planning and zoning commission cannot represent applicants for zoning changes before that commission since such representation would result in the appearance of impropriety.²¹ The opinion explains that an attorney’s ethical duty precludes her “from accepting employment for representation from two parties with conflict interests in the same manner” which would occur if the representation described was allowed.²²

Going a step further, the Kentucky Bar Association opined that a “person who shares office space with the attorney who represents the Planning and Zoning Commission [cannot] represent applicants for zoning changes before the Planning and Zoning Commission.”²³ The Ethics Committee considered that clients and members of the public might be led to believe the lawyers so affiliated have a close personal and professional relationship as to imply special advantage or unusual influence.²⁴ Further, the Committee noted that the applicable rules provide that, “if a lawyer is required to decline employment or to withdraw from employment . . . no partner or associate of his or her firm may accept or continue such

¹⁹S.C. Bar Ethics Advisory Comm., S.C. Advisory Op. 89-22 (1989).

²⁰S.C. Bar Ethics Advisory Comm., S.C. Advisory Op. 89-22 (1989).
See also DR 5-105 and EC 5-15.

²¹K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²²K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²³K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²⁴K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

employment.”²⁵ As a result, this situation presented an impermissible “appearance of impropriety” and is prohibited.²⁶ The opinion explains that although office sharing may be adopted for convenience and there is no formal relationship between the firms, the proximity of one practice to another can create the appearance of impropriety in certain cases and so the same protections afforded to a client within a firm extend to the firm that shares its office. Representation by a lawyer who shares office space is allowed only when each lawyer has “(1) separate private offices, (2) separate secretarial staff, (3) separate filing systems and complete non-access by any other lawyer or secretaries in the office sharing arrangement, (4) separate checking and banking accounts, . . . (5) separate taxation, workers compensation, and insurance, and (6) separate stationary.”²⁷ Furthermore, the opinion continued, that a common phone number may be used only if it is answered in the form of the number and not by stating the names of the lawyer.²⁸ The opinion addressed fee splitting, and noted that such is not permitted other than on an hourly basis where one lawyer “covers” for the other lawyer.²⁹ Lastly, the committee commented that any signs displaying the names of the lawyers in the building must be separated by lines to clearly show that there is no partnership relationship.³⁰

A part-time municipal attorney or her firm in New York cannot represent parties in real estate matters that might involve collateral proceedings with the municipality such as the need to obtain building permits, zoning variances, or other licenses/certificates.³¹ The Ethics Committee opined that “an attorney should not accept employment where his professional judgment and responsibilities to his client may be subject to conflicting influences and loyalties.”³² Therefore, part-time public attorneys must be mindful before accepting such representation whether they will be able to represent

²⁵K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981); *see* K.Y. Bar Ass’n, Ethics Op. KBA E-61, E-167, E-194; Code of Prof’l Responsibility, Canon 9; Disciplinary Rule 5-105(D).

²⁶K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²⁷K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²⁸K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

²⁹K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

³⁰K.Y. Bar Ass’n, Ethics Op. KBA E-244 (May 1981).

³¹Comm. on Prof’l Ethics, NYSBA Op. 450 (1976).

³²Comm. on Prof’l Ethics, NYSBA Op. 450 (1976).

their private clients.³³ The Ethics Committee advises attorneys in these situations to negotiate a limited retainer with the client, “wherein the client agrees that the attorney’s representation will be limited to the private real estate contract and that outside counsel will have to be obtained by the client if representation before the municipality becomes necessary.”³⁴ This is designed to prevent a situation where it might appear that the attorney may influence municipal authorities or obtain special consideration on behalf of a private client.³⁵ The opinion also noted that these considerations apply not just to the part-time municipal attorney, but also to members of her firm.³⁶

E. Prohibition on Representing Clients Where Attorney Serves on the Board

Where a lawyer serves as an alternate member of a municipality’s zoning board of adjustment, the lawyer may not represent a private client in a zoning board matter that the lawyer participated in personally or substantially while a board member unless the board consents. The lawyer may also not represent a person whose interests are adverse to a third party about whom the attorney obtained confidential governmental information during his or her tenure at the board.³⁷ Under the New Hampshire Rules of Professional Conduct, an attorney is required to refrain from representing a private client in a zoning board of adjustment matter in which the attorney has participated personally and substantially as a member of that board.³⁸ The attorney could, however, represent the client if the board consented to the representation.³⁹ The attorney must refrain, however, “from representing a client where the attorney has obtained ‘confidential government information’ while a member of the board, where the information relates to a person whose interests are adverse to the attorney’s client, and who would

³³Comm. on Prof'l Ethics, NYSBA Op. 450 (1976).

³⁴Comm. on Prof'l Ethics, NYSBA Op. 450 (1976).

³⁵Comm. on Prof'l Ethics, NYSBA Op. 450 (1976).

³⁶Comm. on Prof'l Ethics, NYSBA Op. 450 (1976).

³⁷N.H. Rules of Prof'l Conduct R. 1.11, 1.11(a), 1.11(b), 1.11A, 1.11A(b) (3).

³⁸N.H. Bar Ass'n Ethics Advisory Op. # 1987-88/7 (1988) (quoting N.H. Rules of Prof'l Conduct R. 1.11(a)).

³⁹N.H. Bar Ass'n, Ethics Comm. Advisory Op. # 1987-88/7 (1988).

be materially disadvantaged by the attorney's use of the information."⁴⁰

F. Former Government Lawyers

Ethics rules typically prohibit attorneys, absent consent, from representing new clients where such representation conflicts with former clients.⁴¹ One New York court held that a law firm that had represented a village planning board for more than 30 years, could not represent a client before that board even though the firm ceased representing the board six years before representing the new client before that board.⁴² The court reasoned that the firm had represented the board "when certain provisions were added to the Code . . . affecting the [client's] site plan approval" and considered the fact the firm had "drafted and helped to enact" the provisions during "its previous representation" of the board.⁴³ The court found that the representation of the current client was a conflict of interest as the firm's "former and current representations were both substantially related, as well as adverse."⁴⁴ In addition, the court concluded that since it was "reasonable to infer that [the firm] gained some confidential information during its former representation . . . of value to its present client" the lower court was justified in disqualifying the firm's representation of its client "on the basis of the mere appearance of impropriety."⁴⁵

A Connecticut court, however, reached a different conclusion, finding that a lawyer who served as town counsel for a town 26 years before his representation of a client before the town, with both representations regarding the "same property and same issue involved in [the] case" did not result in a conflict of interest that would prevent the attorney's repre-

⁴⁰N.H. Bar Ass'n Ethics Advisory Op. # 1987-88/7 (1988) (quoting N.H. Rules of Prof'l Conduct R. 1.11(b)).

⁴¹Model Rules of Prof'l Conduct R. 1.9, (2008).

⁴²Walden Federal Sav. and Loan Ass'n v. Village of Walden, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).

⁴³Walden Federal Sav. and Loan Ass'n v. Village of Walden, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).

⁴⁴Walden Federal Sav. and Loan Ass'n v. Village of Walden, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).

⁴⁵Walden Federal Sav. and Loan Ass'n v. Village of Walden, 212 A.D.2d 718, 622 N.Y.S.2d 796 (2d Dep't 1995).

sentation of the client before the town.⁴⁶ The court considered the fact that the attorney had authored an opinion letter for the town regarding the property 26 years before the current case and that the town had not consented to the representation of the client by the attorney,⁴⁷ but it compared the competing interests to disqualifying an attorney which were: (1) the town's "interest in protecting confidential information"; (2) the client's "interest in freely selecting counsel of their choice, and (3) the public's interest in the scrupulous administration of justice."⁴⁸

The court noted that in Connecticut, "the mere appearance of impropriety" alone will not disqualify an attorney from representing a client unless there is a violation of the Rules of Professional Conduct.⁴⁹ The court considered Rule 1.9 of the Rules of Professional Conduct which states that "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 consents after consultation."⁵⁰ The Commentary to the Rule explains that "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when representing another client" as long as the later representation is not "used by the lawyer to the disadvantage of the [former] client."⁵¹ The court held there was no conflict because when the attorney wrote the opinion for the town, the "the town was not in an adversarial position with respect to the . . . property," 15 years had passed since the attorney "severed his relationship" with the town, and the "public's interest in the scrupulous administration of justice

⁴⁶Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *1, *3 (Conn. Super. Ct. 2001).

⁴⁷Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *1, *3 (Conn. Super. Ct. 2001).

⁴⁸Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *2 (Conn. Super. Ct. 2001).

⁴⁹Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *2 (Conn. Super. Ct. 2001).

⁵⁰Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *3 (Conn. Super. Ct. 2001) (quoting Rules of Prof'l Conduct R. 1.9).

⁵¹Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *3 (Conn. Super. Ct. 2001) (quoting Commentary on Rules of Prof'l Conduct R. 1.9).

[would] not be compromised” by the attorney’s representation of the current client.⁵² Therefore the court concluded that the competing interests weighed in favor of allowing the client to freely choose his attorney and the attorney’s prior relationship with the town did “not provide a sufficient relationship to the facts surrounding [the] present matter to warrant his disqualification pursuant to Rule 1.9.”⁵³

The West Virginia Supreme Court of Appeals held that “a former lawyer for a county’s board of zoning appeals cannot represent a private developer before the board in connection with a conditional use permit application that the lawyer worked on while serving as the board’s lawyer.”⁵⁴ The court based its holding on the West Virginia Rules of Professional Conduct Rule 1.1 which requires a lawyer to “not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the . . . government agency consents after consultation.”⁵⁵ Since the attorney had “participated personally and substantially in connection” with his current client’s permit applications while the board of zoning appeals’ attorney “as a public officer or employee” and the board never consented to the representation, the attorney was disqualified from representing the current client before the board on that issue.⁵⁶

G. Former Private Lawyers

The D.C. Bar has held that a lawyer who leaves private practice for full time government service will owe a special duty to former private sector clients who may have future land development business before the governmental entity.⁵⁷ The D.C. Bar opined that, “lawyers who leave private practice to enter government service must be vigilant to protect the interests of former clients while representing

⁵²Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *3 (Conn. Super. Ct. 2001).

⁵³Nicholas v. Wilton Zoning Bd. of Appeals, 30 Conn. L. Rptr. 386, 2001 WL 1200339, *3 (Conn. Super. Ct. 2001).

⁵⁴State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes, 221 W. Va. 432, 655 S.E.2d 178, 179 (2007).

⁵⁵State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes, 221 W. Va. 432, 655 S.E.2d 178, 184 (2007).

⁵⁶State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes, 221 W. Va. 432, 655 S.E.2d 178, 184 (2007).

⁵⁷D.C. Bar Ethics Op. 308 (2001); see D.C. Rules of Prof'l Conduct R. 1.6, 1.7, 1.8, 1.9, 1.10.

their new clients with diligence and zeal.”⁵⁸ The opinion held that “a government lawyer owes continuing obligations to . . . former clients to protect client confidences and secrets both from disclosure to others and from use by the lawyer to the disadvantage of the former clients.”⁵⁹ In addition, “a government lawyer may not undertake work that is the same as or substantially related to work done for a former client without the consent of the former client.”⁶⁰ The opinion also held that work of a government lawyer with prior private clients will not automatically disqualify other attorneys in the same government agency, but “screening measures should be considered in appropriate cases.”⁶¹

In Florida, it is unethical for an attorney who unsuccessfully represented clients opposing rezoning of a tract to subsequently represent the owner of an adjacent tract who seeks similar rezoning, when that action is again opposed by some of the former clients of the attorney.⁶² The Florida Bar ethics opinion noted that although “there [was] no conflict between the present representation and the former representation” as the “present representation [did] not involve any confidential information which might have been received in representing the objectors in the first matter,”⁶³ the representation would be “offensive to the best interests of the profession” as the former clients of the lawyer would appear to see their lawyer “advocating one side of similar issues” which he had “formerly advocated the opposite side” when he was their lawyer.⁶⁴

The New York Bar Association Committee on Professional Ethics has held that an attorney for a town zoning board of appeals cannot represent a private client in a request for zone change before the Town Board.⁶⁵ The opinion notes that “the powers of the Appeals Board and the Town Board are in many instances concurrent, overlapping, and intertwined, it would be improper for the attorney for the Appeals Board to represent a client before the Town Board in a zoning

⁵⁸D.C. Bar Ethics Op. 308 (2001).

⁵⁹D.C. Bar Ethics Op. 308 (2001).

⁶⁰D.C. Bar Ethics Op. 308 (2001).

⁶¹D.C. Bar Ethics Op. 308 (2001).

⁶²FL State Bar Ass’n, F.L. Ethics Op. 68-12 (May 7, 1968).

⁶³FL State Bar Ass’n, F.L. Ethics Op. 68-12 (May 7, 1968).

⁶⁴FL State Bar Ass’n, F.L. Ethics Op. 68-12 (May 7, 1968).

⁶⁵Comm. on Prof'l Ethics, NYSBA Op. 292 (Apr. 27, 1973).

matter.”⁶⁶ The opinion noted that “while the representation of a private client by an attorney for one public agency before another public agency in the same town may not be prohibited by law” and even “may not be a conflict of interest, there is always danger that unfair influence or impropriety may be involved or inferred from such representation.”⁶⁷ The opinion also noted that “it is the duty of an attorney in public employ to remain above suspicion even at personal financial sacrifice.”⁶⁸

H. Former Clients

A law firm will not necessarily be disqualified where it previously represented a subsidiary company on a land use matter.⁶⁹ The Ohio Court of Appeals held that where the firm represented the subsidiary, a conflict of interest would not occur when the two companies are independent from one another and the relationship between the two companies was at arm’s length.⁷⁰ The court held that as the subsidiary company in the lawsuit was independent, and that the claim of the parent company that the opposing attorney had “learn[ed] a great deal about [the parent company’s] business and property” to support a disqualification from representing the opposing party was without merit.⁷¹

The Kansas Supreme Court recently held that it is an ethical violation where the county counsel represented the county in a proceeding before the board and then drafted the board’s findings.⁷² The court noted that the county attorney represented the defendant on virtually all the matters concerning the plaintiff, which spanned 10 years, and that in his first role as the defendant’s legal advisor, he advised on all actions concerning the plaintiff, including drafting rejection letters, finding an appraiser, instructing on how to proceed, advising commissioners to agree on a damages

⁶⁶Comm. on Prof'l Ethics, NYSBA Op. 292 (Apr. 27, 1973).

⁶⁷Comm. on Prof'l Ethics, NYSBA Op. 292 (Apr. 27, 1973).

⁶⁸Comm. on Prof'l Ethics, NYSBA Op. 292 (Apr. 27, 1973).

⁶⁹Skycasters L.L.C. v. J.W. Didado Elec. Inc., 2008-Ohio-4849, 2008 WL 4335496, *5 (Ohio Ct. App. 9th Dist. Summit County 2008).

⁷⁰Skycasters L.L.C. v. J.W. Didado Elec. Inc., 2008-Ohio-4849, 2008 WL 4335496, *5 (Ohio Ct. App. 9th Dist. Summit County 2008).

⁷¹Skycasters L.L.C. v. J.W. Didado Elec. Inc., 2008-Ohio-4849, 2008 WL 4335496, *4-5 (Ohio Ct. App. 9th Dist. Summit County 2008).

⁷²Davenport Pastures, LP v. Morris County Bd. of County Com'rs, 2010 WL 3516163 (Kan. 2010).

figure, and drafting the written decision.⁷³ In his role as the defendant's sole advocate, he represented the defendant on all proceedings against the plaintiff, and during the damages hearing, the counselor argued against the plaintiff's evidence, cross examined the plaintiff's witnesses, and called witnesses.⁷⁴ Looking at the entirety of the circumstances, the court determined the plaintiff showed probable risk of actual bias that was not constitutionally tolerable. The probability of bias, the court noted, was most exemplified in the process leading to the awarding of damages where the counselor recommended the appraiser, who became the expert witness, the counselor advised the commissioners to agree upon a damage amount when they all initially had different figures (they agreed upon the sum determined by the counselor's expert witness), and finally the counselor had been present during the some of the damages meetings and he wrote the final decision.⁷⁵ Taken together, the court concluded that these facts were sufficient to find a probable risk of bias that was not tolerable.

I. Former Special Counsel

The New York State Bar Association's Ethics Committee concluded that an outside attorney retained as special counsel to a town may represent private parties before the town's planning board or zoning board of appeals.⁷⁶ The Committee noted that "the interests of the private clients whom special counsel seeks to represent before the planning board and zoning board of appeals are [not] necessarily so conflicting, diverse, or inconsistent with the interests of the town he or she serves as special counsel as to affect" the "judgment or loyalty" of the special counsel "to either client."⁷⁷ Furthermore, the Committee opined that "the fact a disappointed applicant to a planning board or a zoning board of appeals ultimately may commence litigation against the town, does not disqualify special counsel from appearing the first

⁷³Davenport Pastures, LP v. Morris County Bd. of County Com'rs, 2010 WL 3516163 (Kan. 2010).

⁷⁴Davenport Pastures, LP v. Morris County Bd. of County Com'rs, 2010 WL 3516163 (Kan. 2010).

⁷⁵Davenport Pastures, LP v. Morris County Bd. of County Com'rs, 2010 WL 3516163 (Kan. 2010).

⁷⁶Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁷⁷Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

instance before the town agency.”⁷⁸ The opinion recommends that special counsel advise prospective clients “that extra expense and delay may flow from his inability to handle any future litigation” if for example his representation of the client is challenged by opposing parties including the town.⁷⁹ The opinion concluded that there is no per se rule of disqualification, and that affirmative evidence that an attorney is being secured “to influence [a town agency] or to obtain special consideration” is needed to disqualify an attorney from representation.⁸⁰ The Committee discussed that the fact special counsels typically have “limited duties and responsibilities and d[o] not have the town-wide responsibilities and influence of the town attorney or permanent member of his or her staff.”⁸¹ The outcome may be different where the nature or volume of legal work handled by a special counsel amounts to the functional equivalent of a regular, ongoing member of the town attorney’s staff, or where the special counsel is perceived as having significant influence with the planning or zoning board.⁸²

In another twist, an attorney who represents a municipality in collective bargaining negotiations can represent clients in land use board matters.⁸³ The New Hampshire Bar Association opined that there was no per se prohibition preventing an attorney who represents the town in collective bargaining from “either representing (1) clients in land use board matters; (2) clients in unrelated civil litigation against the town, or (3) criminal defendants.”⁸⁴ If the client and the municipality consent then the attorney should be free to represent the client, but the Ethics Committee noted, “that representation of private party in a civil action against a town will involve in many instances a degree of adversity that would lead a disinterested lawyer to conclude that the inquiring attorney should not ask either the municipality or the prospective client to consent to such a representation.”⁸⁵ In addition “while disqualification is not required at the outset,

⁷⁸Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁷⁹Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁸⁰Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁸¹Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁸²Comm. on Prof'l Ethics, NYSBA Op. 630 (1992).

⁸³N.H. Bar Ass'n Ethics Comm., Formal Op. 1988-89/24 (1989).

⁸⁴N.H. Bar Ass'n Ethics Comm., Formal Op. 1988-89/24 (1989).

⁸⁵N.H. Bar Ass'n Ethics Comm., Formal Op. 1988-89/24 (1989).

the consultation process should involve disclosure of the potential for litigation and the possibility that new counsel may be necessary depending on the given facts and circumstances of such litigation.”⁸⁶ If an attorney is prohibited from representation because of possible conflict of interest issues, the same prohibition will also apply to any members of his or her firm who wish to represent private parties in the same circumstance.⁸⁷

Part II. Lawyers Serving on Planning and Zoning Boards and on Local Legislative Bodies

Where lawyers serve as members of local legislative bodies and as members of planning or zoning boards, there is potential for tension between the lawyer’s professional obligations to an individual client who requires representation before those bodies and the lawyer’s broad official duties as a public servant.

A. Obligations of a Lawyer-Legislator

When an attorney serves as a legislator, ethics violations may occur based on the attorney’s actions in his capacity as a legislator. A legislator’s responsibilities to the citizens within his jurisdiction have the potential to conflict with his narrower but no less important duties to a client.

The New Hampshire Bar Association’s Committee on Ethics has held that a lawyer who serves as a city council member cannot appear before other boards in the city where the city council has appointed the board members.⁸⁸ The opinion notes that “a lawyer-official would be precluded from representing a client in litigation involving the city in which that lawyer-official sits as city council member, due to the lawyer-official’s responsibilities to a ‘third person,’ the city, or by the lawyer-official’s own political interests.”⁸⁹ The opinion excepts attorneys who represent clients in litigation when the “lawyer-official reasonably believes that the representation would not be adversely affected and the client consented after consultation and with knowledge of the consequences” of the representation.⁹⁰

The New Hampshire Bar Association also regulates the

⁸⁶N.H. Bar Ass’n Ethics Comm., Formal Op. 1988-89/24 (1989).

⁸⁷N.H. Bar Ass’n Ethics Comm., Formal Op. 1988-89/24 (1989).

⁸⁸N.H. Ethics Op. 1988-89/12 (1989).

⁸⁹N.H. Ethics Op. 1988-89/12 (1989).

⁹⁰N.H. Ethics Op. 1988-89/12 (1989).

participation of members of a lawyer-official's firm who could appear before a governmental body, opining that when a lawyer-official is precluded from appearing before a governmental body of the city, the members of the lawyer's firm are also precluded.⁹¹ However, members of the firm may appear before the city council or before governmental bodies composed of members appointed by the city council only if the "lawyer official publicly disqualifies himself or herself and refrains from participating in any related city council matters."⁹² Where the lawyer-official recuses himself or herself "from participation in the appointment process for all boards before whom members of the lawyer official's firm may appear," then the members of the firm can appear.⁹³ The opinion cautions, when members of a lawyer-official's firm appear before the city, their appearances "should be scrutinized on a case-by-case basis by the attorneys involved to insure that no prohibited conflict exists and that the circumstances do not imply an ability on the part of either the lawyer-official or the members of the lawyer-official's firm to improperly influence the outcome of a matter."⁹⁴ In representing clients in litigation involving a governing entity the same standards apply to the lawyer-official and the members of the lawyer-official's firm.⁹⁵

In New York, an attorney county-legislator is prohibited from acting as a counsel for the board of appeals of a town within the same county due to inherent conflicts and an appearance of impropriety since decisions of the town board of appeals may be reviewed by regional or county boards whose members are selected by the county legislature.⁹⁶ In addition "determinations of the town board of appeals must comply with the master plan of the [regional or county] planning board."⁹⁷ Lawyers who are also public officers are advised not to engage in activities where personal or professional interests are or may be in conflict with official duties.⁹⁸

A lawyer-legislator is permitted to vote on a council mat-

⁹¹N.H. Ethics Op. 1988-89/12 (1989).

⁹²N.H. Ethics Op. 1988-89/12 (1989).

⁹³N.H. Ethics Op. 1988-89/12 (1989).

⁹⁴N.H. Ethics Op. 1988-89/12 (1989).

⁹⁵N.H. Ethics Op. 1988-89/12 (1989).

⁹⁶Comm. on Prof'l Ethics, NYSBA Op. 326 (1974).

⁹⁷Comm. on Prof'l Ethics, NYSBA Op. 326 (1974).

⁹⁸Comm. on Prof'l Ethics, NYSBA Op. 326 (1974).

ter that may be adverse to interests of a client of his law firm.⁹⁹ Where a shareholder in a large law firm, who also served as a legislator on a city council, voted in favor of an ordinance that adversely affected a firm client, the Texas Supreme Court held “that legislative immunity shields lawyer-legislators from civil liability for activities within their legislative capacities.”¹⁰⁰

In Virginia, where a member of the law firm was also a member of the state legislature, the lawyer-legislator is precluded from representing clients in legislative matters such as re-zoning as the “legislator has an affirmative duty to refrain from using his position to influence any tribunal for the benefit of [his] clients and to refrain from implying that such influence is available.”¹⁰¹ If the issue concerns a local matter in which a member of the firm was a legislator on the town board, all members of the firm would be prevented from representing the client before the board to prevent the opportunity of improper influence or the implication that it is available.¹⁰²

B. Obligations of a Lawyer-Board Member

Lawyers in New Hampshire who serve as alternate members of a zoning board may not appear before that same board, but may represent clients before other town boards.¹⁰³ Even where an alternate member-lawyer resigns from the zoning board, the attorney should “refrain from representing a private client in a zoning board of adjustment matter in which the attorney has ‘participated personally and substantially’ as a member of that board, unless the board ‘consents after consultation.’”¹⁰⁴ The attorney “must refrain from representing a client where the attorney has obtained ‘confidential government information’ while a member of the board, where the information relates to a person whose interests are adverse to the attorney’s client and who would

⁹⁹Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 154 (Tex. 2004).

¹⁰⁰Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 154 (Tex. 2004).

¹⁰¹Va. Comm. on Legal Ethics Op. 1773 (2003).

¹⁰²Va. Comm. on Legal Ethics Op. 1773 (2003).

¹⁰³N.H. Ethics Op. 1987-88/7 (1988).

¹⁰⁴N.H. Ethics Op. 1987-88/7 (1988).

be materially disadvantaged by the attorney's use of the information."¹⁰⁵

In New York, while a "lawyer-member [and the members of his firm are] ethically precluded from undertaking to represent private clients in matters related to zoning before the Zoning Board of Appeals or other agencies of the town having jurisdiction over such matters" for fear of improper influence, the members of a firm as well as the lawyer-member could represent "private clients before other agencies in matters unrelated to [the lawyer-member's] public office."¹⁰⁶ This rule is intended to encourage and not discourage attorneys from holding public office.¹⁰⁷

C. Familial Relationships

Lawyers can wind up in conflicts situations where a family member is involved in land use administration or decision making. In Virginia, when spouses practice law in the same firm and one is a member of the county board of zoning appeals, the other spouse can represent clients before the board if the member-spouse recuses himself or herself.¹⁰⁸ The Committee on Legal Ethics has held that while this situation does not present a per se ethics violation, "the potential for impropriety [or even an appearance of impropriety] is significant and should be scrupulously guarded against."¹⁰⁹ The Committee advised that clients should be informed of the relationship and should be able to consent to proceed with knowledge of the relationship as state ethics rules, "prohibit a lawyer from accepting employment if his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests except with his client's consent after full and adequate disclosure."¹¹⁰

When the father of the vice chair of the zoning board is "of counsel" to the law firm that had represented the applicant a number of years ago, the board member must be disqualified.¹¹¹ The New Jersey Appellate Division held that a father in his "of counsel relationship with a law firm has a

¹⁰⁵N.H. Ethics Op. 1987-88/7 (Jan. 12, 1988).

¹⁰⁶Comm. on Prof'l Ethics, NYSBA Op. 484 (May 19, 1978).

¹⁰⁷Comm. on Prof'l Ethics, NYSBA Op. 484 (May 19, 1978).

¹⁰⁸Va. Comm. on Legal Ethics Op. 1123 (1988).

¹⁰⁹Va. Comm. on Legal Ethics Op. 1123 (1988).

¹¹⁰Va. Comm. on Legal Ethics Op. 1123 (1988).

¹¹¹Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1102 (App. Div. 2006).

sufficient stake in the financial viability of the firm as to impute to . . . [the board member] any disqualification of the firm arising from client representation by partners or associates in the firm.”¹¹² The court based its holding on the New Jersey Ethics Law which holds that “no local government office or employee shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.”¹¹³ The court held it did not matter that the daughter was independent of her family, noting that “her independent status does not sever her family ties and thereby eliminate the conflict.”¹¹⁴ The court concluded that the potential for conflict existed and the vice chair was on actual notice of the conflict.¹¹⁵ As a result, the court held she should have been disqualified from participating, and the court voided the proceedings.¹¹⁶

This decision was distinguished in another New Jersey case.¹¹⁷ Where a bank sought a variance to construct a mixed use development, the chair of the zoning board recused himself from the hearing since he had represented one of the developer’s part-owners in the purchase of a house.¹¹⁸ The Board granted the variance and a town resident filed legal action alleging that the variance was invalid because the acting chair had a disqualifying conflict of interest since the acting chair’s father, a retired judge, held a position at same the law firm where the zoning board chair was a partner.¹¹⁹ The Appellate Division pointed out that the law firm had

¹¹²Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1103 (App. Div. 2006).

¹¹³Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1101 (App. Div. 2006).

¹¹⁴Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1103 (App. Div. 2006).

¹¹⁵Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1103 (App. Div. 2006).

¹¹⁶Haggerty v. Red Bank Borough Zoning Bd. of Adjustment, 385 N.J. Super. 501, 897 A.2d 1094, 1103 (App. Div. 2006).

¹¹⁷Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹¹⁸Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹¹⁹Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

never represented the developer, more than two years has passed since any member of the law firm represented the part-owner of the developer or of any of its subdivisions, and that the acting chair's father only had an indirect connection to the representation of the developer's part-owner.¹²⁰ The court found that the chair's decision to recuse himself from the matter was a choice he made individually, and that there was no requirement that the acting chair do the same.¹²¹ Further, the court explained that whether the familial relationship amounted to a disqualifying interest did not depend on the degree of relationship, rather, it depended on the type of relationship her father had with the applicant and the amount of interest that her father had in her actions.¹²² Under the circumstances, the court concluded that the father's of counsel relationship with the law firm in this case could not reasonably be viewed as improperly influencing the member's judgment relating to the variance application.¹²³

The California Attorney General opined that a city council may enter into a development agreement with a land developer where one of the council members is married to an attorney whose law firm represents the developer concerning matters unrelated to the proposed development.¹²⁴ The Attorney General noted that in order for the agreement to be valid, the council member must disclose the interest to the council, the interest must be noted in the council's official records, and the member cannot participate in negotiating or voting upon the agreement.¹²⁵

Conclusion

Lawyers who work full-time or part-time for municipal planning and zoning boards or local legislative bodies, as well as lawyers who are elected or appointed to serve on these boards, may confront significant ethical dilemmas when their professional and public service duties overlap.

¹²⁰Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹²¹Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹²²Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹²³Meyer v. MW Red Bank, LLC, 401 N.J. Super. 482, 951 A.2d 1060 (App. Div. 2008).

¹²⁴78 Op. Att'y Gen. 230 (1995).

¹²⁵78 Op. Att'y Gen. 230 (1995).

The analysis as to whether certain conduct and behavior will violate applicable rules of professional conduct is subject to a case by case inquiry, and may also involve consideration of relevant state and local ethics laws and regulations. Therefore, attorneys who interact with, and who volunteer to serve in, the public sector, must be mindful of the public trust which may impact a conflicts analysis.