

## OPINION 2003-06

**Synopsis:** An Attorney who is a member of a firm and is also an appointed member of a quasi-judicial body that promulgates rules and hears administrative appeals, must comply with the spirit of Rule 1.7 of the Vermont Rules of Professional Conduct (the "Rules") with respect to "positional conflicts of interest". In cases where the Board's decision will have an impact on past or present firm clients or the firm itself, the Attorney must consider the following questions: (1) Will the outcome of the decision affect a limited number of non-parties to the proceeding? (2) Will a past or present client or clients of the firm be among those to be affected? (3) Is the potential impact upon the firm's client or clients an "outside consideration" that may affect the Attorney's judgment? Where the potential impact of the decision will affect an entire trade, industry or business in which the client or clients are engaged, the conflict is sufficiently remote and would not constitute a positional conflict of interest. Subject to limited exceptions an Attorney is not precluded from participating in the rule-making process of the Board simply by reason of the fact that the product of the rule-making process may affect one or more clients of the firm

**Facts:** The Attorney requesting this opinion is a member of a quasi-judicial body (the "Board") that hears appeals from administrative proceedings and promulgates rules. The Attorney is also a member of a law firm. In order to avoid conflicts of interest in appeals where current or past clients of the Attorney's firm are parties, the Attorney has arranged for the Board to provide the Attorney with the names of the parties involved in each matter that comes before the Board. The Attorney checks the conflicts checking system operated by the Attorney's firm to determine whether any past or present firm client, adversary or witness is a party to each particular matter. The Attorney routinely recuses himself in matters where a past or present client is a party to the proceeding. Any other conflicts of interest with past or present adversaries or witnesses are disclosed to the participants in the appeal and discussed by the parties before proceeding. Rather than conflicts based on the involvement of past or present clients, adversaries or witnesses, the Attorney is requesting our opinion as to potential conflicts of interest involving **issues or positions** that will affect the interest of a past or future non-party client or clients either adversely or beneficially.

**Questions:** The Attorney poses several questions for consideration by the Committee:

1. Is the Attorney/Board Member disqualified from participating in a proceeding when the Attorney and the Attorney's firm do not have a current attorney-client relationship with parties to the proceeding, but the

Attorney or the Attorney's firm have clients who are part of an industry that may be impacted generally by the Board's decision?

2. Would the answer to the preceding question be different if the decision would affect a specific client of the law firm but the Attorney's firm does not practice in the area of the law that is the focus of the proceeding before the Board and thus would not represent the client with respect to the issues presented in the proceeding?
3. Since the Board has rule-making authority, would the Attorney's ability to participate in rule-making be limited by the possible impact the rules would have on clients in the future?

**Discussion:**

The issues raised by this request are a variation of the typical issues involving conflicting interests based on actual participants in a particular proceeding. Generally questions posed to the Committee involve the issue of whether an attorney or a firm may undertake the representation of or continue the representation of a client because of a current or past relationship with another client, adversary or witness. In this request the potential conflict involves the impact that the Board's decisions or rules will have on non-party past, present or future clients of the firm. There is no express rule that governs positional or issue-related conflicts of interest. Conflicts based on issues or positions advocated by attorneys on behalf of clients are sometimes referred to as "positional conflicts." Although Rule 1.7 and Rule 1.10 generally speak to conflicts of interest arising from the relationship with present and prospective clients, it is our opinion that the provisions of Rule 1.7 and Rule 1.10 may be applied to positional conflicts also.

With exceptions not relevant to this discussion, Rule 1.7 (b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the Attorney's own interest.

Rule 1.10 pertains to imputed disqualification and provides that the disqualification of any attorney within the firm extends to all lawyers associated with the firm.

The requesting Attorney, as member of the Board, would not be representing a client or advocating any particular position, since the Board's role is one of the decision-maker and not of an advocate. It is the Board's role to review the factual circumstances and apply the existing law to those facts. In other

circumstances the Board makes substantive and procedural rules under the statutory process for promulgating administrative rules. In all such matters the Attorney is one voice among many, and not the sole decision-maker.

In light of the fact that the requesting Attorney has decided not to participate in any matter in which a firm client is a party and carefully screens his or her involvement in matters involving past or present firm adversaries or witnesses, our decision will be limited to matters where a firm client or clients will be indirectly affected by the Board's action. The Committee has reviewed a situation involving whether an attorney who served in the Legislature and practiced in a firm created conflicts of interest for the firm in pursuing a legislative lobbying practice. *See. Professional Responsibility Committee Opinion No. 2002-03*. In another opinion, the Committee concluded that a firm could not continue to represent a client in a zoning matter where one of the members of the municipal zoning board was also a member of the firm. *Professional Responsibility Committee Opinion No. 1997-14*.

Most discussions of positional conflicts generally involve litigation and the ABA's Commentary to Rule 1.7. is limited to that context. In substance the commentary suggests that an attorney (and by extension members of the attorney's firm) may not continue to represent two parties if the representation of one client will require the attorney or the firm to advocate opposite positions on an issue when the representation occurs in an appellate court. Unfortunately, such traditional analyses of positional conflicts do not directly apply to the inquiries before us.

As to the first inquiry posed by the requesting Attorney, The Vermont Rules of Professional Conduct do not require recusal in every case where the Attorney's firm generally represents non-party clients in a practice area or business field that is the subject of the pending matter. In such cases, the Attorney must first consider whether the Board rules require recusal. If not, the Attorney must consider whether the spirit of Rule 1.7 of the Rules, as discussed above would require recusal. It is our opinion that recusal is required if the impact on non-party clients of the firm or the firm itself rises to the level of an outside consideration which will materially influence the Attorney in favor of or against a non-client party to the proceeding. In our view, the Attorney should consider the following questions: (1) Will the outcome of the decision affect a limited number of non-parties to the proceeding? (2) Will a past or present client or clients of the firm be among those to be affected? (3) Is the potential impact upon the firm's client or clients an "outside consideration" that may affect the Attorney's judgment? The Attorney, as in the case of any Board member, is entitled to have strong views one way or another on a particular issue. Recusal is required, however, in cases where an Attorney's view is improperly affected by outside influences or considerations.

The more general a particular decision is and the less specific the impact on a particular non-party client or clients, the less likely it becomes that the impact will constitute an improper outside consideration influencing the Attorney's decision.

The second inquiry is subject to the same analysis as discussed above. In our view, it is irrelevant whether the Attorney's firm practices in the area of the law under consideration. It is the potential impact upon a client or clients or the firm and whether that impact could be perceived to be an outside influence that could prejudice the Attorney in favor of one party or another.

Inquiry number three addresses whether the Attorney is precluded from participating in the rule-making process of the Board simply by reason of the fact that the product of the rule-making process may affect one or more clients of the firm. Generally, rules are not developed or promulgated to affect a particular person, but are intended to be applicable to all persons affected by the regulatory process. Except in the circumstance where a particular rule will have a substantial impact on the firm's clients or its practice, we do not believe that the Attorney should be prohibited from adding his or voice to those considering promulgation, revision or repeal of the rule.

In reaching this decision, the Committee is mindful of the fact that attorneys in general provide many hours of service to their local and state communities by serving on quasi-judicial board at all levels of government. The rules of positional conflicts should not be used to prohibit those attorneys from practicing in firms with other attorneys and providing service to their clients. On the other hand, attorneys and their partners and associates must exercise caution when choosing which clients to represent so that the choice of clients does not render the attorney's service on the public boards illusory because the attorney must regularly recuse himself or herself from Board proceedings.