ADVISORY ETHICS OPINION 83-05

SYNOPSIS:

A lawyer who was a selectman may not accept private employment to attack the va1idity of an ordinance adopted while the lawyer was a selectman, but can accept private employment on a case involving the correct interpretation of the ordinance.

OPINION:

This opinion deals with a lawyer who was formerly a selectman for a town. During his tenure, the town adopted a new town plan and zoning ordinance. The lawyer is now considering whether he can represent private clients with respect to the plan and zoning ordinance. He asks whether there are any "ethical considerations or restraints on my representation of private clients in such matters."

The request is open-ended so it may not be possible to discuss all ethical considerations the lawyer may have in mind. We have limited ourselves to the basic conflict problems caused by current representation on ordinances passed while the lawyer was a selectman.

The request is governed in part by Code of Professional Responsibility DR 9-101(B) which provides:

> (B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

This section comes into play only if a selectman is a "public employee" as that term is used in the rule and if the passage of an ordinance is "substantial responsibility." Neither this committee nor the ABA Ethics Committee has rendered an opinion on this exact subject. However, the ABA committee in Informal Opinion 1182 (1971) found that a legislator is a public employee within the meaning of the rule and we followed that opinion in our Opinion No. 76-12 (1976). Since the purpose of the rule is to prevent the appearance of impropriety[1], we can find no difference between a legislator and a selectman when the selectman is acting on an ordinance.

Both Informal Opinion 1182 and Formal Opinion 342 (1975) indicate that enacting law is having substantial responsibility for the subject matter of the law. According to the Formal Opinion, the lawyer has such responsibility when he is "personally and substantially involved in the investigative or deliberative processes." Here, the lawyer was involved in those processes with respect to the plan and ordinance.

The most difficult part of this area is to define what is "employment in a matter" in which the lawyer had substantial responsibility as a selectman. On this point, Formal Opinion 342 states:

> The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

In Informal Opinion 1182 the ABA committee found that a legislator could not ethically accept employment to challenge the constitutionality of a law he had voted for while a legislator. We think this principle applies to any action to challenge the validity of a law on which the lawyer voted while he was a public official.

Without some factual guidance, we are unable to define a line between the extremes covered in these opinions. On the one hand, it would be impermissible for the lawyer to accept employment to attack an ordinance enacted when the lawyer was a selectman. On the other hand, he would not be disqualified from a case that turned on the correct interpretation of the ordinance. The opinions give the lawyer some guidance on what he should consider in other situations.

[1] See EC 9-3.