



Committee on Professional Ethics

Opinion #484 - 5/19/78 (22-78) Topic: Zoning Board of Appeals;
lawyer-member of municipal board; conflict of
interest.
Clarifies #292

Digest: Lawyer-member of town's
Zoning Board of Appeals,
as well as his partners
and associates, may
practice before other
agencies of the town
under certain circum-
stances.

Code: EC 8-8, 9-6;
DR 5-105(D), 8-101(A) (1)
and (2).

QUESTION

May a lawyer-member of a town's Zoning Board of Appeals, or any of his partners and associates, practice before other agencies of the town?

OPINION

In N.Y. State 292 (1973), we held that the lawyer for a municipal Zoning Board of Appeals should not represent a private client in connection with a zoning matter before the Town Board. We observed:

"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 may not [present an actual] conflict of interest, there is always the danger that unfair influence or impropriety may be ... inferred from such representation."

From this observation the casual reader might well have concluded that "the representation of a private client by an attorney for one public agency before another public agency in the same town" was per se improper. This was not, however, the intention of our Committee. Rather, we were very much concerned with the relatedness of the proposed representation to the functions of the two town boards and, most significantly, with the interrelatedness of the boards to each other. Thus, we explained:

"Because 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 matter."

Turning to the question posed, we note that a lawyer-member of a Zoning Board of Appeals ethically bears no lesser burden than its counsel in representing private clients before other agencies of the town. The lawyer-member may not place himself in a position where it is reasonable to assume that he is using his public office to gain a "special advantage" or otherwise "influence" the deliberations of a public body. DR 8-101(A) (1) and (2), EC 9-6. Hence, the lawyer-member is 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. And, to the extent that disqualification would apply to the lawyer-member, his partners and associates would be similarly disqualified. DR 5-105(D).

Nevertheless, we can find no basis upon which to apply a per se rule of disqualification to lawyer-members of municipal boards which would serve to preclude them from representing private clients before other agencies in matters unrelated to their public office. Indeed, there is much that would seem to compel a different rule. The Code, for example, reminds us that it is "highly desirable" for lawyers to hold public office. EC 8-8. In this light, to disqualify lawyer-members of municipal boards from handling all matters involving agencies of the municipality in which they serve, without reference to the nature of their public office or private employment, would seem unduly restrictive and almost certain to discourage that which the Code expressly seeks to promote.

We note that ethics committees in other states have rejected a mechanical rule of per se disqualification and have come to focus their consideration of the ethical problem on the relatedness of the proposed representation to the nature of the lawyer's public function. See, e.g., Ariz. Op. 73-28 (1973) and N.J. Op. 267 (1973), respectively indexed at 7588 and 8868, O. Maru, Digest of Bar Association Ethics Opinions (1975); cf., N.Y. County 506 (1963) with N.J. Op. 64 (1964), indexed at 1550, Maru's Digest (1970).

Consistent with the foregoing principles and authorities, we believe that a lawyer-member of a town's Zoning Board of Appeals, as well as his partners and associates, should be at liberty to represent private clients before other agencies of the town in matters unrelated to zoning where it is clear that such agencies are not functionally related to the Zoning Board of Appeals.

For the reasons stated, and subject to the qualifications hereinabove set forth, the question posed is answered in the affirmative.
