



Committee on Professional Ethics

OPINION #89-4

Topic:	Zoning Board Conflicts
Digest:	Law firm members may be restricted from serving as a zoning board member in certain instances.
CODE:	Canon 9; DR 5-105(D); 8-101(A); EC 8-8; 9-2; 9-6

QUESTION

WHERE A MEMBER OF A LAW FIRM IS APPOINTED TO SERVE AS A MEMBER OF A TOWN ZONING BOARD OF APPEALS:

- (A) MAY ANOTHER MEMBER OF THE SAME LAW FIRM REPRESENT A CLIENT BEFORE THE ZONING BOARD OF APPEALS?
- (B) AS A BOARD MEMBER, MUST AN ATTORNEY ABSTAIN IF AN APPLICANT IS REPRESENTED BY AN ATTORNEY WITH WHOM THE MEMBER'S FIRM HAS A PENDING MATTER IN LITIGATION?
- (C) MAY THE BOARD MEMBER PARTICIPATE IN DETERMINATIONS AFFECTING CLIENTS OF HIS LAW FIRM, EITHER PAST OR PRESENT?
- (D) MAY THE ATTORNEY WHO IS A MEMBER OF THE ZONING BOARD OF APPEALS APPEAR BEFORE OTHER MUNICIPAL BOARDS?
- (E) MAY ANOTHER MEMBER OF THE BOARD MEMBER'S FIRM APPEAR BEFORE OTHER MUNICIPAL BOARDS?

OPINION

In Opinion 292 (1973), the New York State Bar Association Committee on Professional Ethics 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. In Opinion 484 (1978) which clarified Opinion 292, the New York State Bar Association Committee on Professional Ethics held that a lawyer-member of a Zoning Board of Appeals ethically bears no less a burden than its counsel in representing private clients before other agencies of the Town. A lawyer-member may not place himself in a position where it is unreasonable 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)(1a) 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). However, continuing in its Opinion 484, the Committee

stated: “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.”

“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 (Emphasis supplied), where it is clear that such agencies are not functionally related to the Zoning Board of Appeals.”

Canon 9 requires that a lawyer avoid even the appearance of professional impropriety. EC 9-2 cites, in part: “On occasion, ethical conduct of a lawyer may appear to laymen to be unethical.” Since the issues presented in Questions (B) and (C) could clearly give rise to the perception of impropriety on the part of the attorney-board member, it is clear that he should not participate in any decisions in which his integrity or motivation may be questioned, or in which the specter of improper influence may be raised.

CONCLUSION

For the reasons hereafter stated, questions (A), (B) and (C) are answered in the negative, and questions (D) and (E) are answered in the affirmative.
