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New Hampshire Municipal Association

December 9, 1994

New Hampshire Bar Ethics Committee N.H. Bar Association 112 Pleasant Street Concord, New Hampshire 03301

Dear Colleagues:

I am a member of the Bar and am employed full-time by the New Hampshire Municipal Association, a non-profit voluntary association all of whose members are municipalities. My work does not involve representation of NHMA per se, but rather the provision of certain services to its member municipalities. I want to emphasize that I am making this inquiry on my own behalf as an attorney, and not that of NHMA or any member municipality.

NHMA is supported by dues paid by local governing bodies pursuant to statute, RSA 31:8-a. One of the prime services we provide to our members, for those dues, is a legal inquiry service, described in the attached pamphlet which has been periodically distributed to our member municipalities. (Many other statewide municipal leagues throughout the U.S. provide similar services.) Although we deal constantly with potential ethics issues (citizens or newspapers attempting to get us to render legal opinions on local issues, for example), my inquiry to you concerns three discrete areas:

1. Exercise of Independent Professional Judgment.

Although I assume that the case of *In Re N.H. Disabilities Rights Center, Inc.*, 130 N.H. 328 (1988) settles any problem raised by RSA 311:11, and that the prohibition on corporate practice of law cannot constitutionally apply to a voluntary non-profit association employing attorneys to provide legal services to its members, nonetheless my first inquiry is whether Rule 2.1 requires, in the context of my position as employee of NHMA, any affirmative agreement between me and NHMA which recognizes my duty to exercise my independent professional judgment on behalf of the municipalities making legal inquiries, and/or assures that I will not be influenced by NHMA or its lay Executive Committee (its governing body) in the exercise of that judgment.

2. Creation and Scope of Attorney/Client Relationship.

I have long assumed that, when I give legal advice to any town or city official, my client is the municipal entity itself, and not NHMA or any particular official (Rule 1.13). This entity representation raises problems no different than those encountered by regular municipal attorneys, and as you can see from the attached pamphlet, we decline to answer inquiries from officials who ask about their private affairs, or try to second-guess actions within the legal responsibility of some other official.

I have an additional problem, though, which the regular municipal attorney does not encounter, viz., determining when the attorney/client relationship is created, and how its scope is set. Now given the financial straits of municipalities, and the fact that our services are included in their dues without extra fee, most towns and cities are only too happy to give all officials unrestricted access to our services (and indeed most feel that this greatly improves the quality of local government in N.H.) Occasionally, however, majority members of a governing body may be at odds with a minority member, or with, say, some "rogue" member of the planning board, and will ask that we respond only to inquiries from a smaller list of people. We have assiduously complied with such requests. On rare occasions, though, we may give an opinion to, say, a ZBA member, and later a selectman or town attorney calls and raises questions about who authorized us to give advice to that official.

My question therefore is: What does it take to create the limited attorney/client relationship described in the attached pamphlet between me and the municipality (Rule 1.2), so that I can be assured of answering the inquiry without violating Rules 4.2 or 4.3? More specifically:

- (a) Is a telephone call from a local official, requesting advice on a matter clearly within the scope of his/her statutory authority as an official, sufficient in and of itself to create an attorney/client relationship between me and the municipality as an entity for the limited purpose of that inquiry?
- (b) If not, is the fact that the municipal governing body pays dues to NHMA, knowing that it entitles the officials of that municipality to the scope of legal services described in the pamplet, sufficient to create an attorney/client relationship for the limited purposes described in the pamphlet, in the absence of contrary instructions from the municipal governing body?
- (c) Do I have an affirmative ethical duty to inform the local governing body of every NHMA member that it has the authority to further limit the scope of the attorney/client relationship between it and the NHMA attorneys?

3. RELATIONSHIP TO INSURANCE POOLS.

For several years NHMA has had two municipal insurance pools associated with and controlled by it: the Property-Liability Insurance Trust and the Health Insurance Trust. These are separate legal entities. I do not give advice to either trust, and neither my salary nor any other interest of mine is dependent on the earnings or management of either trust. Nevertheless we do share the same building, as well as certain support personnel, and there is quite likely a public perception among our members that we are all one thing, especially since I have at times spoken as a guest lecturer at the PLIT's risk management workshops for local officials. I have on occasion gotten calls from officials inquiring about insurance coverage, and have had to explain that the PLIT is a separate entity and has its own claims manager and attorneys. It is, however, quite common for me to get legal inquiries about potential liability issues (e.g. questions about RSA 231:90-92), which could have implications for the liability insurance pool if that advice is acted upon. And while my practice has been to answer these inquiries without reference to whether the particular town is a member of the trust (or indeed has any insurance at all), there is at least the possibility that the answer might mistakenly be perceived by some novice official as a representation about coverage. My questions are:

- (a) Do I have any affirmative duty to inform municpal officials that when I am providing legal advice to them, I am doing so as their attorney, and not attorney for the insurance trust? Do I have any affirmative duty to inform them that advice I give on liability issues does not entail any representation about insurance coverage? If so, what would such a duty entail? Would an explanation in a revised version of the attached pamphlet be sufficient?
- (b) (Similar to question #1 above:) Are there any affirmative steps which I need to take to ensure that my exercise of independent professional judgment is not affected by the existence of the trusts, in particular the Property-Liability Insurance Trust? If so, what would such steps entail?

Thank you for the opportunity to clarify these issues.

H. Bernard Waugh, Jr.

Legal Counsel

Sincerely,