

INTERPRETIVE RULING 2016-3
(May 6, 2016)

Please Note: For clarity, references to and excerpts from provisions of statutes or the Ethics Guidelines have been updated to conform to subsequent changes in numbering and language, where the changes have not affected the substance of the Opinion.

New Hampshire Constitution Part II, Article 7
Ethics Guidelines Section 1, Principles of Public Service
Ethics Guidelines Section 6, Conflict of Interest Procedure

Representative Shawn N. Jasper, Speaker of the House, has requested an Interpretive Ruling on the following questions:

“Is Part II, Article 7 of the New Hampshire Constitution or Ethics Guidelines, Section 1, Principles of Public Service, violated by a legislator who attempts to separate himself or herself from his or her office by identifying himself or herself as a representative of a public interest group while presenting testimony in advocacy of the group’s position on a bill at a hearing before a legislative committee?

Is the legislator required to disclose a conflict of interest in accordance with Ethics Guidelines Section 6?”

The Committee responds as follows:

Relevant Provisions of the NH Constitution and the Ethics Guidelines

[Art.] 7. [Members of Legislature Not to Take Fees or Act as Counsel.] No member of the general court shall take fees, be of counsel, or act as advocate, in any cause before either branch of the legislature; and upon due proof thereof, such member shall forfeit his seat in the legislature.
September 5, 1792

1 Principles of Public Service.

- I. **Public Office As A Public Trust.** Legislators shall treat their office as a public trust, only using the powers and resources of public office to advance public interests, and not to attain personal benefits or pursue any other private interest incompatible with the public good.
- II. **Principle Of Independent Objective Judgment.** Legislators shall employ independent objective judgment in performing their duties, deciding all matters on the merits free from conflicts of interest and both real and apparent improper influences.
- III. **Principle Of Accountability.** Legislators shall ensure that government is conducted openly, equitably and honorably in a manner that permits the citizenry to make informed judgments, have confidence in the integrity of the legislature, and hold government officials accountable.
- IV. **Principle of Conduct.** Legislators shall treat each other, legislative employees, and the public with dignity and respect.

6 Conflict of Interest Procedure.

- I. No legislator having a conflict of interest shall participate in any official activity associated with the matter without complying with the procedure set forth in this section.
- II. A declaration of intent form shall be filed by a legislator whenever a financial interest could reasonably be expected to produce greater benefit to the legislator or the legislator's household member than would accrue to any other member of a business, profession, occupation, or other group listed by the legislator in the financial disclosure form.
- III. A declaration of intent form shall also be filed whenever a legislator or a legislator's household member has a personal interest in the outcome of a matter that is the subject of official activity, distinct from and greater than the interests of the public at large. A "personal interest" exists where a legislator or household member could otherwise be affected by the outcome of such activity, or when a legislator has a responsibility for the welfare of an organization and where that welfare could be affected by the outcome of such activity.
- IV. In such cases, the legislator shall either:
- (a) Declare that the legislator will not participate in any official activity associated with the issue; or
 - (b) Declare that the legislator intends to participate in the official activity and provide a description of the conflict of interest.
- V. The declaration required in subparagraphs IV(a) and (b) of this procedure shall be publicly announced prior to any participation by the legislator in the official activity in accordance with section 7 of these Guidelines. The declaration of intent form shall be filed with the clerk of the member's respective body prior to the time of the official activity and be made available for public inspection during normal business hours.

Committee Analysis

An examination of the historical context in which Part II, Article 7 of the New Hampshire Constitution was adopted in 1792, indicates the article was intended to prohibit members of the General Court who were attorneys from taking fees or acting as counsel or advocate in cases pending in the General Court. By way of background, it is useful to note that when the article was adopted, members of the legislature who were also attorneys frequently represented citizens in petitions submitted to the legislature seeking redress of various grievances. From New Hampshire's provincial period, through early statehood and into the nineteenth century, the state's legislature (or "General Court") spent a great deal of its time considering and acting upon petitions from its citizens. During this period, when there were no standing committees in the legislature or bureaucratic agencies in the executive branch to directly address the needs or grievances of individuals or groups of citizens, many pieces of legislation derived from petitions. It was a common practice for litigants in civil cases to petition the legislature seeking new trials, or appeals or reversals of decisions in the courts. Until the practice was ruled unconstitutional by the New Hampshire Supreme Court in the case of Merrill v. Sherburne in 1818, the state's laws were replete with examples of interference by the legislature in individual court cases. It was the practice of lawyer-members acting as counsel to the parties submitting petitions to the legislature, and the participation of the lawyer-members in the drafting of the bills resulting from the petitions and in the debates and votes on the bills before the legislature, that led to the adoption of the article.

Additionally, the language used in Part II, Article 7 supports the interpretation that the article was meant to apply to court cases brought before the general court. In late 18th Century America, the term "cause" was defined as "a subject of litigation," meaning the same as the term "case," and an advocate was defined as someone who "pleads the cause of another in a court of judicature."

Accordingly, the Committee determined the constitutional article would not prohibit a legislator from identifying as a representative of a public interest group and advocating the group's position on general legislation at a hearing before a legislative committee.

The second part of the Speaker's question relating to a legislator representing a public interest group is not so easily decided. While the Ethics Guidelines provide extensive regulation and reporting of activities that involve a financial benefit or detriment to a legislator or family member, there are circumstances that may raise ethical concerns even when there is no financial effect entailed.

Clearly, if the legislator were being paid to advocate for a public interest group, that would be lobbying and is prohibited under Section 3, Prohibited Activities of the Guidelines. However, legislators are often involved as volunteers in organizations whose mission they support and advocate for before legislative committees. In the absence of specific provisions in the Guidelines for such circumstances we turn to the general principles that provide the framework for ethical conduct.

Ethics Guidelines, Section 1, Principles of Public Service, declares that legislators shall use the powers and resources of public office to advance public interests and not pursue any "private interest incompatible with the public good," and "employ independent objective judgment in performing their duties, deciding all matters on the merits free from conflicts of interest and both real and apparent improper influences."

The Committee determined that legislators may wear two hats: first as an elected official, and also as representative of an advocacy group, as the long as the private interest is not incompatible with the public good. Recognizing that there may be a difference of opinion about "public good" and "improper influences" the Committee relied on Ethics Guidelines, Section 1, Paragraph III, Principle of Accountability, which requires that government be "conducted openly, equitably and honorably" and "permits the citizenry to make informed judgments and hold government officials accountable." To achieve this transparency, **the Committee advises that legislators representing an organization must file a declaration of intent under Section 6, Conflict of Interest Procedure of the Guidelines**, indicating that they will participate in official action on a particular bill. While the form is designed for financial conflicts of interest, the Committee believes disclosure of a legislator's dual role as elected official and unpaid representative of an advocacy group will allow the public and his or her constituents to decide if such participation is compatible with the public good.

Honorable Donna Sytek, Chairman
Senator Sharon M. Carson, Vice Chairman
Representative Janet G. Wall
Senator Martha Fuller Clark
Representative David A. Welch
Honorable John A. Graham
Attorney David H. Bradley

For the Committee,
Donna Sytek
Chairman

[Vote: 6-1]