

**VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS SEEKING
PUBLIC COMMENT ON LEGAL ETHICS OPINION 1841**

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1841, *Can a Member of the Town's Governing Body Represent Clients Charged with Violations of the Town's Code?*

This hypothetical involves a lawyer who is a member of a local town's governing body. The locality recently adopted a Virginia statute as local law and incorporated it into the locality's Traffic Code. This lawyer has now been retained by a defendant charged under the locality's Traffic Code, who is challenging the constitutionality of the provision. The question presented is whether there is a per se prohibition against the lawyer representing a client challenging a town ordinance.

Based on the application of Rule 1.11(b), the Committee opines that this lawyer participated "personally and substantially" in the adoption of the town ordinance. Therefore, the lawyer would have to gain the consent of both the private client, and the government agency regarding the potential conflict in order to represent the client in challenging the town ordinance. If the lawyer survives the potential exclusion of Rule 1.11(b), the lawyer must then analyze the effect of Rule 1.7. The Committee opines that the lawyer may continue the representation with complete disclosure to the client, and client consent as long as the lawyer reasonably believes that he can provide competent and diligent representation that is not materially limited by his responsibilities to a third person or a personal interest.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 AM and 4:30 PM., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at <http://www.vsb.org>.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Karen A. Gould, the Executive Director of the Virginia State Bar, not later than **February 29, 2008**.

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(DRAFT — November 29, 2007)

**LEGAL ETHICS OPINION 1841
CAN A MEMBER OF THE TOWN'S GOVERNING BODY
REPRESENT CLIENTS CHARGED WITH VIOLATIONS OF THE
TOWN'S CODE?**

This hypothetical involves a lawyer who is a member of a local town's governing body. The locality recently adopted a Virginia statute as local law and incorporated it into the locality's Traffic Code, which they

routinely do when new statutes are adopted annually by the General Assembly. Normally, these statute revisions are adopted by the town's governing body *in toto* and not individually screened or adopted piecemeal. The lawyer, as a member of the body, voted in favor of the adoption.

The lawyer has now been retained by a defendant charged under this same provision of the locality's Traffic Code who is challenging the constitutionality of this provision. Is it improper for the lawyer to continue this representation when it involves a direct attack on the locality's Traffic Code?

The analysis starts with the application of Rule 1.11 (b)¹ which prohibits a lawyer from representing a private client in a matter in which he has participated "personally and substantially" as a public official unless both the client and the agency consent. The concern here is misuse of the public office for the benefit of the private client. Given the facts in this hypothetical, the Committee is of the opinion that this lawyer participated "personally and substantially" in the adoption of this town ordinance.

In the current hypothetical the Committee finds that there is no *per se* prohibition under Rule 1.11(b) against the lawyer representing a client challenging a town ordinance. As per the rule, the lawyer would have to get the consent of both the private client and the government agency, after full disclosure and consultation regarding the potential conflict. Whether or not the lawyer is successful in acquiring such consent from the government agency depends upon many factors outside the purview of this Committee.

Once the lawyer survives the potential exclusion of Rule 1.11(b), the lawyer must analyze the effect of Rule 1.7. Specifically, under Rule 1.7(a)(2), a conflict of interest exists whenever, "there is significant risk that the representation of one or more clients will be materially limited by ... a third person or by a personal interest of the lawyer." Rule 1.7(a) creates neither a blanket prohibition nor a blanket approval for this type

FOOTNOTES

¹ Rule 1.11(b) states as follows:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

² Rule 1.7(b) states as follows:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) the consent from the client is memorialized in writing.

of scenario. A case-by-case determination is necessary. Rule 1.7(b)² provides the circumstances under which a lawyer may continue the representation of a client despite conflicts that arise under Rule 1.7(a).

In this hypothetical, the lawyer needs to consider the affect of his public service on such representations and determine whether his role on the town's governing body creates a "significant risk that the representation ... will be materially limited by the lawyer's responsibilities to a third person or by a personal interest of the lawyer." Even if the lawyer has responsibilities to a third party or personal interests that may materially limit his responsibilities to the client; the lawyer may continue the representation with complete disclosure to the client and client consent if

the lawyer reasonably believes that he can provide competent and diligent representation. Rule 1.7(b).

One way the representation of the criminal client might be materially limited is if the lawyer, as a member of the public body, went on record as supporting the very town ordinance he seeks to challenge. The inconsistent positions could undermine the lawyer's credibility and weaken his effectiveness as an advocate. Under those circumstances, the lawyer may not be able to meet the requirement of Rule 1.7(b) and continue the representation.

This opinion is advisory only, and not binding on any court or tribunal.
