LEGAL ETHICS OPINION 1815

CAN A LOCAL GOVERNMENT ATTORNEY REPRESENT A ZONING ADMINISTRATOR IN AN APPEAL AGAINST THE BZA WHILE REPRESENTING THE BZA IN AN UNRELATED APPEAL BEFORE THE CIRCUIT COURT?

You have presented a hypothetical situation involving an attorney representing a locality. In a prior year, a citizen applicant appeared before the Board of Zoning Appeals (BZA) to appeal a decision of the Zoning Administrator pursuant to Virginia Code §15.2-2309. The Zoning Administrator had enforced zoning ordinance requirements regarding the use of land in a business zoned district. The applicant had argued that the land use should be allowed even though directly prohibited by the ordinance. At the appeal, the BZA upheld the Zoning Administrator's decision. The applicant then appealed that BZA decision to the Circuit Court. The local government attorney appeared as attorney of record for the BZA, as defendant in the applicant's petition.

In a second matter, the BZA granted a variance. The Zoning Administrator has decided to appeal the decision to the Circuit Court. The Zoning Administrator wants the local government attorney to represent him in filing that petition. The petition will name the BZA as defendant. This case involves a different piece of land and has no common issues of fact with the first matter.

The attorney attended both BZA hearings and commented on the merits of each case, but it does not appear to the attorney that the BZA considered the comments to be legal advice. His comments are normally limited to whether the variance satisfies the statutory requirements or whether an appeal has merit.

Under the facts you have presented, you have asked the committee to opine as to:

1. Would the local government attorney have an impermissible conflict if he represents the BZA in the first case and the Zoning Administrator against the BZA in the second case?

2. If so, can the local government attorney cure that conflict with consent from both the BZA and the Zoning Administrator?

In beginning the analysis of your questions, the committee initially distinguishes the present fact pattern from that in recent LEO 1785, also involving a local government attorney and a BZA. In LEO 1785, the local government attorney advised the BZA regarding the public notice for a particular zoning variance. Subsequently, that attorney represented the Board of Supervisors in a challenge to the variance and filed a petition on its behalf naming the BZA as a defendant. Accordingly, all discussion in that LEO involved one legal matter – the zoning variance. In contrast, the present hypothetical involves two different and unrelated legal matters (the land use case and the zoning variance case). The analysis in LEO 1785 does not, therefore, resolve the questions raised in the present hypothetical.

LEO 1785 considered whether an attorney could represent a party on one side of litigation having advised the opposing party regarding the same matter. Here, the analysis focuses on whether an attorney can represent a party in litigation where the attorney represents the opposing party in some other matter. The governing provision in the Rules of Professional Conduct is Rule 1.7, which states as follows:

RULE 1.7. Conflict of Interest: General Rule.

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
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> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) 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.[1]

The structure of Rule 1.7 is a two-determination process: first, is there a concurrent conflict and, second, if so, may steps be taken to permit the representation? Thus, the first question is whether the local government attorney's representation of the BZA in the first matter while representing of the Zoning Administrator in the second triggers a concurrent conflict of interest.

Under Rule 1.7(a), there are two sources of concurrent conflicts. If either is present, the attorney has a conflict. Paragraph (a)(2) explains that an attorney has a concurrent conflict where the representation of one client is directly adverse to the other. Comment 3 to the rule discusses direct adversity in the litigation context:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. *Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated*. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. (Emphasis added.)

In the present scenario, the attorney is representing the Zoning Administrator against the BZA, a current client represented in unrelated litigation. The representation of the Zoning Administrator is not merely "generally adverse" to the BZA, the attorney's client. Rather, as the BZA is the opposing party in the Zoning Administrator's litigation, the representation of the administrator is *directly* adverse to the other client of this attorney, the BZA. Under paragraph (a), a "direct adversity" conflict is triggered not only when representing opposing parties in the

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[1] The Committee notes that this LEO references a new articulation of Rule 1.7, which the Virginia Supreme Court recently adopted with an effective date of June 30, 2005.

same case, but also when representing one client against another client, represented in some other matter. The attorney in this scenario has a concurrent conflict of interest in trying to represent these two clients in these two matters.

The determination of whether this attorney has a concurrent conflict of interest can be made under paragraph (a)(1) alone. A concurrent conflict of interest may exist under either paragraph (a)(1) or (a)(2). Nonetheless, the Committee notes that the critical concept in paragraph (a)(2), if applied to present scenario, would be whether the representation of one client would materially limit that of the other. That determination must always be decided on a case-by-case basis, with a context driven analysis rather than a bright line rule. The Committee need not make such a determination in the present instance as a concurrent conflict already exists under the first part of paragraph (a).

As the attorney in the present scenario does have a concurrent conflict under Rule 1.7(a), he may only proceed with these two representations if he fulfills the requirements of paragraph (b) of the rule. Paragraph (b) specifies that an attorney may proceed with a concurrent conflict of interest only if he obtains client consent after consultation *and* he meets four specified requirements. Note that the Preamble to the Rules of Professional Conduct defines "consultation" as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The first of the four requirements in paragraph (b) is that the lawyer must reasonably believe that he can competently and diligently represent each affected client.[2] The comments to the rule provide guidance for making this determination. Specifically, Comments 10 and 13 are pertinent in this context of litigation. Comment 10, in pertinent part, establishes a "disinterested attorney" standard:

> A client may consent to representation notwithstanding a conflict. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. A lawyer's obligations regarding conflicts of interest are not present solely at the onset of the attorney-client relationship; rather, such obligations are ongoing such that a change in circumstances may require a lawyer to obtain new consent from a client after additional, adequate disclosure regarding that change in circumstances.

Thus, the question becomes would a disinterested attorney reasonably believe that this local government attorney can provide competent and diligent representation to the BZA in the first case simultaneous with competent and diligent representation to the Zoning Administrator in the second case. As discussed in Comment 13:

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept

[2] The Committee notes that competent, diligent representation is, of course, required for all clients under Rules 1.1 and 1.3, respectively.

> employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

The final resolution of those issues in the present, and in any, instance, will of course rely on analysis of both the facts of the cases and the law involved in the matters at issue. The Committee notes that the above-referenced comments suggest that two especially critical factors are whether a disinterested attorney would approve of the dual representation and what sort of litigation is involved. The Committee further notes that in your request, you discuss the additional factors that the cases share no issues of fact and that one case's outcome will have no bearing on the other. Those are the sort of issues that the attorney should review in making the conflicts determinations. Other possible factors worth considering may include, but certainly are not limited to, the amount of public attention and acrimony generated by the matters, the risk of inadvertent disclosure of confidential information, and the risk that the attorney's loyalty will be divided or diluted.[3]

The second requirement from Rule 1.7(b) is that the representation is not prohibited by law. The interpretation of the legality of the actions of the local government attorney is outside the purview of this Committee. However, nothing presented in the materials accompanying this request suggests that illegality is a concern.[4]

The third requirement in paragraph (b) is that the representation not involve the lawyer asserting a claim by one client against another *represented in the same proceeding*. In the present instance, any assertions made on behalf of the Zoning Administrator against the BZA in that case will be made in a proceeding where the lawyer represents no other client. He only represents the BZA in some other matter. Thus, while this scenario of representing one client in a matter against a client represented in some other, unrelated matter does constitute a concurrent conflict under Rule 1.7(a), it does not run afoul of the distinguishable requirement set out in paragraph (b)(3).

The fourth requirement in paragraph (b) is that the consent provided by the client must be memorialized in writing. Comment 10, in pertinent part, explains this requirement:

> Paragraph (b) requires that client consent be memorialized in writing. Preferably, the attorney should present the memorialization to the client for signature or acknowledgement; however, any writing will satisfy this requirement, including, but not limited to, an attorney's notes or memorandum, and such writing need not be signed by, reviewed with, or delivered to the client.

The Committee agrees that obtaining a client's signature to acknowledge the consent is advisable in most instances; however, the requirement of (b)(4) would be met if the attorney merely makes a note to file regarding what transpired.

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[3] *See* ABA Formal Op. 05-435 (2004) (extended discussion of factors for concurrent conflicts determinations).

[4] Specifically, discussion in the materials accompanying this request included highlights that a local charter provision requires the local government attorney to be the "chief legal advisor" to all boards, commissions, and agencies of the local government. A local government's charter is generally granted by The General Assembly. *See* Va. Code ' ' 15.2-200 et. seq. (Local Government Charters). Nevertheless, the Rules of Professional Conduct establish the ethical responsibilities of any attorney serving in that position.

In sum, whether or not this attorney may represent these two clients in these two matters is not a bright-line determination. The Committee concludes that the attorney may proceed with the two representations under the following circumstances. As discussed previously, assuming no question of legality is present and as he would not be asserting a claim on behalf on one client in the matter he represents the other client, he may represent both clients in their respective matters so long as he consults with each client regarding the implications of consent, the clients each provide that consent, the attorney memorializes that in writing, and he reasonably believes that his representation in each instance will be both competent and diligent.

The Committee must make one qualification on those conclusions. The analysis of this opinion thus far has been based on the assumption provided with the request that the attorney did not represent the BZA in the second matter, in which it granted the zoning variance. The attorney did, however, "comment" on the merits of the variance application at the BZA hearing. If the BZA reasonably considered these "comments" to constitute legal advice provided by the attorney to the BZA, then an attorney-client relationship may have been created[5], and the conclusions of LEO 1785 would then apply. The committee cautions that the attorney was responsible to clarify his role as a representative of a party to the hearing, and to expressly communicate to the BZA that he was not appearing before them as their legal advisor, if necessary to dispel any confusion.

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.

Committee Opinion
January 10, 2006

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[5] *See* the Unauthorized Practice Rules, "Practice of Law in Virginia", stating in pertinent part:

> Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.