

**LEGAL ETHICS OPINION 1769**

**CONFLICT—WHETHER AN ATTORNEY CAN REPRESENT THE DAUGHTER IN GAINING GUARDIANSHIP OF INCOMPETENT MOTHER WHO IS CURRENTLY A CLIENT IN ANOTHER MATTER.**

You have presented a hypothetical situation in which a legal aid office has been asked by the daughter of an elderly, incompetent woman to represent the daughter in seeking guardianship of her mother. The mother is also currently a client of the legal aid office in an unrelated matter.

Under the facts you have presented, you have asked the committee to opine as to whether the acceptance of the daughter as a client for this guardianship petition would trigger an impermissible conflict of interest for the legal aid office.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs concurrent conflicts of interest, and Rule 1.14, which addresses representing a client with a disability. Rule 1.7 squarely addresses the conflict triggered by an attorney representing adverse parties in the same matter:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely effect the relationship with the other client; and
  - (2) each client consents after consultation.

The committee notes that under Rule 1.10(a), any conflict arising under Rule 1.7 for one attorney would be imputed to every other attorney in the office.

Applying Rule 1.7(a) to the attorney in the present hypothetical presents insurmountable problems. This committee does not see how that attorney could fulfill either of the two requirements listed under paragraph (a), above. As for the first requirement, that the representations not be adversely affected, it seems unlikely that the representation of the mother in a legal matter would not be adversely affected by a finding of her incompetence. Even were that hurdle cleared, the second requirement can not be met. This committee sees no way for an attorney on the one hand to argue that a client is incompetent and, on the other hand, to argue that the same client can provide valid consent.

Should the attorney in this hypothetical actually consider his client to be incompetent, that attorney can look to Rule 1.14 for guidance. That rule specifically addresses the difficulties in representing a client under a disability. The rule does suggest that the lawyer should, “as far as reasonably possible, maintain a normal client-lawyer relationship.” However, should the lawyer reasonably believe that “the client cannot adequately act in the client’s own interest,” then the lawyer “may seek the appointment of a guardian or take other protective action.” Rule 1.14(a) and (b). Thus, should the attorney in this hypothetical reasonably believe that the mother cannot adequately act in her own interest, he could seek the appointment of a guardian.

This committee’s two conclusions in this matter—that there would be an impermissible conflict of interest for the attorney to represent the daughter in seeking a guardian and that, under certain circumstances, the attorney may permissibly seek appointment of a guardian under Rule 1.14—are not contradic-

tory. This committee believes that in addressing this same dilemma regarding Rule 1.7 and Rule 1.14, the ABA correctly made a critical distinction. *See*, ABA 98-405 (1997).<sup>1</sup> In its opinion on this same question, the ABA distinguished between an attorney representing a third party petitioner and filing the petition himself:

Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his client, in permitting the lawyer to take action that by its very nature must be regarded as “adverse” to the client. However Rule 1.14 does not otherwise derogate from the lawyer’s responsibilities to this client, and certainly does not abrogate the lawyer-client relationship. In particular, it does not authorize a lawyer to represent a third party in seeking to have a court appoint a guardian for his client. Such a representation would necessarily have to be regarded as “adverse” to the client and prohibited by Rule 1.7(a) . . .

This committee concurs with the ABA’s analysis of the interplay between Rule 1.7 and Rule 1.14 in the present context. Neither the attorney in this hypothetical, nor anyone in his office, may properly represent the daughter in petitioning for a guardian for her mother, also a client of this attorney’s office. Such an action is by its very nature an adverse action with respect to the mother. However, the attorney may permissibly consider any information provided by the daughter regarding the mother in determining this attorney’s duties toward the mother with regard to Rule 1.14. That rule would be the proper source for guidance for this attorney should he believe the mother’s competence is questionable.

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

Committee Opinion  
February 10, 2003

<sup>1</sup> The ABA, in this opinion, is interpreting Model Rules 1.7 and 1.14, which are substantially similar to Virginia’s corresponding rules.

**LEGAL ETHICS OPINION 1773**

**WHETHER AN ATTORNEY WHO IS IN THE GENERAL ASSEMBLY CAN REPRESENT PRIVATE PARTIES BEFORE LOCAL GOVERNING BOARDS**

You have presented a hypothetical involving the private law practice of the firm of a member of the General Assembly. Specifically, members of the firm represent private clients who regularly appear before local boards of supervisors, town councils, and boards of zoning appeals in connection with legislative matters including re-zoning applications, special exception applications, zoning variances, and zoning determination appeals. Also, members of the firm work with the staff of a locality to process ministerial applications, such as site and subdivision plans.

Generally, you raise questions of whether these activities are in ethical conflict with the election of a firm member to the General Assembly. Specifically, you ask whether the attorney, who is a member of the General Assembly, or any member of his firm, may represent clients before any of these local bodies.

Your hypothetical raises the underlying issue of whether membership in the General Assembly combined with representation of private clients in local government matters triggers an impermissible conflict of interest under the Rules of Professional

Conduct. Conflicts faced by firms with legislator members was addressed recently in LEO 1763, which was, in effect, a reconsideration of LEO 1718, which had been decided under the former Code of Professional Responsibility. In LEO 1763, the presenting scenario was that of members of a local government board member's law firm representing clients *before that same board*. In LEO 1763, this committee reiterated its conclusions from 1718, namely, that an impermissible conflict of interest would be triggered by the partner's representation before the board and that the conflict could not be "cured" by recusal of the attorney/board member from the particular matter. Thus, you ask whether that same conclusion must be drawn for the scenarios you present involving various local government entities, where no attorney in the firm sits on such local government bodies.

A careful review of LEO 1763 reveals that the focus of the committee's analysis was whether the conflict of interest created by an attorney appearing before his own board should be imputed so as to prevent his partners from appearing before his board, and, if so, whether the resulting conflict could be "cured" by the attorney/board member's recusal from the particular matter. The committee concluded first that the conflict must be imputed to all members of the firm and further that recusal would not cure the problem as recusal would violate the attorney/board member's obligations to his constituents. Rule 1.11, Comment 1 says, in pertinent part, "A lawyer who is a public officer should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public." Thus, the opinion concludes that as recusal is not an effective conflicts cure, no partner of a board member may represent clients before the board.

What the analysis of LEO 1763 does *not* focus on is the nature of the basic underlying conflict of interest. In that opinion, the basic conflict (that is then imputed) was that a board member may not represent clients before his own board. That such representation would trigger an impermissible conflict is, in effect, so obvious as to be a given throughout the opinion's discussion of the conflict's imputation and cure. It is of guidance for your present request to step back and address the source of that underlying conflict in LEO 1763. Rule 1.7 prohibits representing a client where that representation may be materially limited by the lawyer's own interests, unless he reasonably believes that the representation will not be adversely affected (and the client consents). In addition, Rule 1.11(a) prohibits an attorney who is a public official to use that position to the advantage of his client. Relatedly, Rule 8.4 (d) prohibits an attorney from stating or implying the ability to improperly influence a government entity or official. Those rules, taken together, render it impermissible for a lawyer to ever represent a client before a board upon which the attorney sits; such a representation would be problematic in that the attorney's role as a board member creates both general duties to the public and a unique position of influence for his client. Thus, the committee opines that such representation is *per se* impermissible and, as outlined in LEO 1763, is imputed to all other members of the firm.

Do those same rules also create an impermissible conflict in your outlined scenarios? The committee concludes that they do not. No member of the firm serves on any of the local bodies of the localities in question. Thus, when a firm member seeks action on behalf of one of those bodies for a client, he is not seeking action from the very body to which a firm member belongs. So long as the attorneys do nothing in violation of the influence provisions of Rules 1.11 and 8.4, outlined above, this committee does not deem them prohibited from entering into

the activities involving various local bodies identified in your request. As outlined in those rules, the legislator has an affirmative duty to refrain from using his position to influence any tribunal for the benefit of this clients, and to refrain from implying that such influence is available. This committee declines to extend the analysis recently set out in LEO1763 to any of the activities outlined in your request.

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

Committee Opinion  
February 10, 2003

**LEGAL ETHICS OPINION 1774  
FIRM WRITING PATENTS FOR ONE CLIENT AND ALSO WRITING  
PATENTS FOR COMPETITOR OF THE FIRST CLIENT**

You have presented a hypothetical situation in which an associate attorney ("Associate") in a law firm is assigned a case in which he is asked to write a validity opinion for Client A regarding a patent that Client A is attempting to invalidate. While reviewing this assignment, Associate discovers that the patent in question is held by B, another current client of the firm ("Client B"). Associate brings the issue to his Supervising Partner, suggesting to Supervising Partner that there is a conflict and that in order to proceed with this project, they need to obtain consent from both clients. Supervising Partner disagrees, reasoning that Client A would be adversely affected if Associate did not proceed with the analysis, since Supervising Partner had put in a substantial amount of time on the project before Associate discovered Client B's involvement, and the patents that the firm wrote for Client B were in a different technology than that of the patent Client A is challenging.

Under the facts you have presented, you have asked the committee to opine as to what steps are necessary for the attorneys involved in this situation to take in order to be able to write the validity opinion which Client A requested, assuming the opinion involves Technology X and the firm represents Client B regarding patents in Technology Y.

The appropriate and controlling disciplinary rules relative to your inquiry are Rule 1.7, which governs conflicts of interest between existing clients, Rule 1.10, the imputed disqualification rule, and Rule 5.1, which addresses the responsibilities of a partner or supervising attorney to his/her firm and those other attorneys over whom he/she has supervisory authority.

Rule 1.7 provides:

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another existing client, unless:
  - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.

Applying this provision to the facts you presented, the Committee finds that there is a conflict which, absent consent from both clients, precludes Associate and Supervising Partner from providing further representation and proceeding to prepare the validity opinion for Client A, in light of the discovery that Client B holds the patent in question. Even though another attorney in the firm represents Client B on patents involving

different technology than that involved in the patent in question, nevertheless, assisting Client A to invalidate a patent which Client B holds places the attorneys involved in a position directly adverse to an existing client. Invalidating a patent which Client B holds could be detrimental to Client B and could adversely affect the relationship between Client B and the firm. Rule 1.7 (a) directs that representation of Client A can only continue if the attorneys reasonably believe that the representation will not adversely affect the representation of Client B and both clients consent after consultation. Comment 3 to Rule 1.7 is instructive:

[3] 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.

It is the Committee's opinion, therefore, that consent must be obtained from both clients after full disclosure in order to continue representation and work for Client A.

Under Rule 1.10, none of the attorneys in a firm "shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" by Rule 1.7. Disqualification under Rule 1.10 may be waived as provided by Rule 1.7. Thus, one must consider the fact situation presented from the point of view of the attorney handling Client B's patents. Could he, if alone, represent Client A and prepare a validity statement challenging another patent of Client B? If not, then neither Associate nor Supervising Partner can do so without the consent required by Rule 1.7. It is the opinion of the Committee, based on the facts herein, that the attorney representing Client B would not be able to represent Client A in these matters and therefore everyone else in the firm is disqualified unless consent is obtained from both clients.

Finally, the Committee is concerned about the application of Rule 5.1(c) to this set of facts. Rule 5.1(c) states:

- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
- (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

- (2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

This Rule makes partners and supervisory attorneys in a firm equally responsible for ethical violations which attorneys under their supervision commit.<sup>1</sup> Based on the facts presented, Supervising Partner would find himself in violation of Rule 5.1(c)(1). Associate presented the conflict issue to Supervising Partner who, according to the facts, did not disagree that there was a conflict, but rather determined that the clients simply would not be contacted to obtain consent because Client A would be detrimentally affected by the attorneys terminating representation at this point since Supervising Partner had already expended a substantial amount of time on the project and the matter has been with the firm for some time prior to it being assigned to Associate. As for Client B, Supervising Attorney takes the position that because the firm represents Client B with regard to patents in a technology other than that involved in the patent Client A is challenging, there is no need to inform Client B of the representation of Client A and/or obtain Client B's consent to that representation. Supervising Partner has therefore ordered and ratified the inappropriate conduct in contravention of Rule 5.1(c)(1). The conflict exists without question and the only way that representation of either client can continue is to disclose the representation and conflict to both clients and obtain their consent. Supervising Partner, based on the facts presented, breached his responsibility of ethical supervision, as outlined by Rule 5.1, in his response to Associate's concerns regarding this conflict of interest.

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

Committee Opinion  
February 13, 2003

<sup>1</sup> Rule 5.2 of the ABA Model Rules as that provision contains language relieving an associate of ethical responsibility in certain instances where a supervising attorney has directed the conduct in question.

