

LE Op. 1038 is the reconsideration of LE Op. 944.

A private attorney represented a client before a professional regulatory board (hereinafter the board). Assistant Attorney General No. 1 presented evidence against the restoration of Private Attorney's client's license. The private attorney presented evidence on behalf of the client. The board went into executive session to deliberate. Assistant Attorney General No. 1, Private Attorney and his client were excused. During deliberations, the board was advised by Assistant Attorney General No. 2. Assistant Attorney General No. 2 sat with the board during the presentation of evidence and read the decision of the board into the record. Private Attorney's client has raised the issue of fairness and Private Attorney has raised the issue of conflict of interest because two attorneys from the Office of the Attorney General were advocating and advising the board on the same case.

Based upon the described factual situation the first question is whether a conflict of interest exists when Assistant Attorney General No. 1 serves as an advisor to the board during an administrative hearing.

The Committee finds that the authority of the Attorney General's office rests in Article V, § 25 of the Constitution of Virginia, which states that the Attorney General of Virginia "shall perform such duties...as may be prescribed by law." Those duties are set forth in § 2.1-121 of the Code of Virginia, which prescribes that the Attorney General render and perform "all legal service in civil matters for the Commonwealth, the Governor and every state department, institution, division, commission, board, bureau, agency, entity, official, court or judge including the conduct of all civil litigation in which any of them are interested. ..." /1

The Committee adopts the following factual representation as the procedure employed by the Office of the Attorney General when serving professional boards in administrative hearings.

Upon receipt of a complaint or other information which might constitute a basis for action against a licensee pursuant to § 54-187 of the Code of Virginia, the staff of the board investigates the matter and, as appropriate, presents its report to a committee of the board. That committee, in accordance with the Administrative Process Act [Sections 9.6-14:1 and 9.6-14:11] and § 54-189.1 of the Code of Virginia may, after notice, conduct an informal conference with the licensee in an effort to determine whether the matter can be resolved by consent. Only one assistant attorney general attends the informal conference as an advisor of the committee.

If the informal conference does not result in a resolution of the matter by consent, or, should the committee so recommend, the matter proceeds to a formal hearing under §

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9.6-14:12 of the Administrative Process Act. At this hearing, an assistant attorney general acts as a presenter of the board's case, either to a hearing officer or to the board or to both sitting together. At that hearing, or later when the board considers the hearing officer's findings, another assistant attorney general acts as counsel to the board during its deliberations.

In addition, the Committee adopts the following representations by the Office of the Attorney General:

1. That the Attorney General only presents the professional board's staff or conference committee's case during the formal hearing.
2. That the Attorney General does not decide which cases to pursue.
3. That the Attorney General does not have the authority to resolve or to settle any licensing matters.
4. That the two assistant attorney generals do not communicate or collaborate with each other about a given case.
5. That no one assistant attorney general serve both roles (advocate and advisor) before the board.
6. That the two assistant attorney generals are supervised by different lawyers in the office.

The Committee opines that the representation by the Office of the Attorney General of the various state boards as described herein does not violate the Code of Professional Responsibility.

The Committee finds that DR:5-105(C) and (E) are not applicable to the factual situation under consideration and no conflict of interest exists because the assistant attorney general is not representing multiple clients. Both assistant attorney generals are representing the same client -- the board.

Accordingly, the Committee finds that LE Op. 944 is hereby overruled to the extent it is inconsistent with this opinion.

The second inquiry is based on the private attorney's client's concern regarding the issue of fairness. The Committee is not unmindful that the arrangement between the Attorney General and the board may appear improper to the lay person. The Washington Supreme Court in *The Matter of Johnson*, 99 Washington 2d 466 at 464, 663 P.2d 457 (1983) determined that " proceedings before a quasi-judicial tribunal are valid only if a reasonable, prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing."

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The Committee, however, believes that fairness must be preserved and displayed and makes the following observations.

The board decides which cases to pursue, conducts the investigation and determines if reasonable cause exists. It appears to the Committee that there is little, if any, need for the assistant attorney general to be present for the informal hearing because he has not had any involvement in the decision to initiate the case or participate in the investigation of the case. The board is given wide discretion to receive evidence and consequently would not require the presence of the assistant attorney general at the informal hearing. The board in conducting its informal hearing provides the party under review an opportunity to hear and respond to the board's case. The board then issues its ruling which is not binding unless the party agrees to accept it. If the party rejects the ruling, a formal hearing is scheduled.

In order to diminish the lay person's perception of unfairness, the Committee strongly suggests that the assistant attorney general advising the board not be present at the informal hearing. This would reinforce the idea that the assistant attorney general performing the advocacy role would not have the opportunity to receive prior knowledge of the facts from the assistant attorney general advising the board. This does not preclude the board from requesting advice on procedural matters from the advising assistant attorney general. The Committee believes that if the responsibility of the assistant attorney general advising the board is to consult only on procedural matters, then the need for his presence is not indispensable during the informal hearing.

If the party rejects the informal hearing, the board will schedule a formal hearing. The same assistant attorney general who was present and advised the board at the informal hearing advises the board at the formal hearing; and another assistant attorney general advocates the board's position during the hearing. Once the assistant attorney general has advised the board on procedural issues, it appears to the Committee that there is little reason for his presence during the deliberation process. The assistant attorney general advising the board should therefore be excused while the board deliberates unless the board has a question requiring the advice of the assistant attorney general and only then would his presence be required for a response to that question and he should then again be excused while the board deliberates. Once the board has reached its decision, the chairman of the board, we believe, should render the opinion of the board to the party as it is read into the record.

The Committee also strongly suggests that the following precautions be taken by the Attorney General in order to diminish the appearance of unfairness:

1. That the two assistant attorney generals who advocate and advise the boards should not collaborate or communicate with each other about a given case; and
2. The assistant attorney generals be supervised in their respective advocacy and advisory functions by different lawyers in the Attorney General's office.

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The Committee believes that if these guidelines are followed, fairness will be preserved in this less than ideal situation. The Committee cautions that even though nothing within this factual scenario violates the Code of Professional Responsibility, the arrangement of providing to the professional boards two assistant attorney generals comes very close to giving an appearance of unfairness and therefore the Committee advises the Attorney General to use extreme caution and avoid any possibility of collusion.

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FOOTNOTES

/1 The following excerpt from the Preamble of the ABA's Model Rules of Professional Conduct also is enlightening:

"... [L]awyers under the supervision of [a state's attorney general] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority."