

Committee Opinion
June 24, 1997

LEGAL ETHICS OPINION 1698

ATTORNEY HANDLING ZONING CASE
AFTER HAVING SERVED ON COUNTY
PLANNING COMMISSION AND AS
CAMPAIGN TREASURER FOR A
COUNTY SUPERVISOR.

You have presented a hypothetical situation in which an attorney served on a County Planning Commission, which made recommendations on zoning cases and amendments to the County's Comprehensive Plan and took final action on certain development plans. The attorney also served as campaign treasurer for a member of the County's Board of Supervisors. Also, the attorney's spouse volunteered as campaign manager for the same Supervisor, and the County Registrar reported the spouse's volunteer service as an \$8,000 contribution.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the attorney representing applicants in matters before the Planning Commission or Board of Supervisors, if the matters do not relate to issues the attorney voted on while a member of the Planning Commission. You also inquire as to whether the campaign activities of the attorney or his wife preclude the attorney from ethically handling zoning cases.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:9-101(B) which states that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee unless the public entity by which he was employed consents after full disclosure; DR:9-101(C) which states that a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official; and DR:5-101(A) which states that a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests, except with the consent of his client after full and adequate disclosure under the circumstances.

Your first inquiry is whether it is ethically permissible for Lawyer to represent clients before the Planning Commission or the Board of Supervisors where Lawyer formerly served as one of the five members on the Planning Commission. The fact of Lawyer's former relationship on the Planning Commission, without more, does not bar his representation of clients before it or the Board of Supervisors. In LE Op. 373, the committee concluded that a former county attorney could ethically represent a client to secure a franchise from the county, provided the former county attorney did not have any "substantial responsibility" in the franchise matter while serving as the county attorney. Thus, DR:9-101(B) permits such representation in matters in which Lawyer did not have substantial responsibility while a member of the Planning Commission; and, in addition, permits such representation where the matters overlap if the Planning Commission consents after full disclosure.

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However, DR:9-101(C) mandates that Lawyer's former membership on the Planning Commission may not be used as a vehicle to "state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. In LE Op. 1123, the committee opined that there was no per se violation of DR:9-101(C) for a lawyer to represent clients before a Board of Zoning Appeals of which his wife was a member where she disqualified herself on the record and did not discuss his cases with the other members of the Board or with her husband.

Your second inquiry is whether it is ethically permissible for Lawyer to represent clients before the Planning Commission or the Board of Supervisors where Lawyer formerly served as campaign treasurer for one of the supervisors and Lawyer's wife volunteered her services as the same Supervisor's campaign manager, which was declared as an in-kind political contribution in the amount of \$8,000.

In LE Op. 279, the committee opined that it is improper for a lawyer to make a gift to a public official "for the past or future performance of any public act or duty." In LE Op. 1360, the committee opined that it is not improper for a lawyer to create or contribute to a political action committee for an election campaign provided the lawyer made "no suggestion or implication to a client of an intent to improperly influence the legislator." The committee concluded in LE Op. 1421 that it is not per se improper for a lawyer to make a contribution to a campaign committee for the re-election of a circuit court clerk where there were no "circumstances which might give the appearance that the gift or loan is made to influence official action."

A determination of the issue entails a balancing of interests between the rights of lawyers as citizens to participate in the political process and the duties of lawyers as professionals to foster public confidence in the profession and the integrity of the legal process, whether judicial, legislative, or administrative. EC:9-2 aptly observes:

Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. . . . While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. . . .

In the facts you present, the committee believes that it is ethically permissible for Lawyer to represent clients before the Planning Commission or the Board of Supervisors even though he served as campaign treasurer and his wife, as campaign manager, for one of the supervisors, provided that he does not state or imply that, by reason of the campaign services of himself or his wife, he is able to improperly influence the Planning Commission or the Board of Supervisors. DR:9-101(C). The committee observes that whether the campaign services were done for the purpose of suggesting or implying to Lawyer's clients his intention to employ improper influence on the supervisor or other

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public officials entails a subjective determination beyond the purview of the committee. See, LE Op. 1421. The potential for the appearance of impropriety is significant and should be scrupulously guarded against. LE Op. 1123, EC:9-4. Specific factual circumstances may render political contributions, by a lawyer to court or other public officials before whom they practice, improper as they create an appearance that they have been made for the purpose of influencing official action. LE Op. 1421.

The Committee cautions that allegiance of Lawyer to the Supervisor in whose election campaign Lawyer and his wife held positions of authority could implicate DR:5-101(A). Appropriate disclosures would need to be made to and consent obtained from a client whose interests conflicted with the personal interests of Lawyer as campaign treasurer seeking election of the Supervisor, or as the husband of the Supervisor's campaign manager. See, LE Op. 1123.

The committee's opinions are limited to the application of the Virginia Code of Professional Responsibility to the facts presented. Application of the Virginia State and Local Government Conflict of Interests Act (Va. Code §§ 2.1-639.1, et seq.) is a matter of law beyond the purview of the committee.

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