

LEGAL ETHICS OPINION 1699

FORMER CITY ATTORNEY WHO  
PARTICIPATED IN DRAFTING ZONING  
ORDINANCES ANTICIPATES FILING A  
LAWSUIT CHALLENGING CURRENT  
ZONING ORDINANCES.

You have presented a hypothetical situation in which a former Assistant City Attorney drafted zoning ordinances as part of her duties. All of the zoning ordinances which contained any language drafted by the former Assistant City Attorney were repealed some time after she left the City Attorney's office for private practice. A new zoning ordinance was adopted containing in some sections the same or modified language from the now repealed ordinance.

The former Assistant City Attorney has now filed a lawsuit on behalf of a client challenging the current zoning ordinance based upon language that was part of the repealed ordinance drafted by her while employed in the City Attorney's office.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the former Assistant City Attorney filing a suit challenging a zoning ordinance when the zoning ordinances drafted by the former Assistant City Attorney were repealed several years ago.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:9-101(B) which prohibits a lawyer's private employment in a matter in which she had substantial responsibility while she was a public employee unless the public entity by which she was employed consents after full disclosure; and DR:5-105(D) which prohibits representation of a client adverse to a former client if the legal matters are substantially related unless the former client consents after disclosure.

For purposes of DR:9-101(B), the committee has previously opined that a government attorney's participation in an agency rulemaking process and the drafting of rules or regulations constituted a "matter" in which the attorney had a substantial responsibility as a public employee. LE Op. 1299 (September 13, 1990).

In LE Op. 1299, supra, the committee concluded that the former government attorney was not disqualified under DR:9-101(B) because, under the facts presented, the former government attorney's involvement with an earlier version of the regulation ended before the new regulation was adopted and utilized a third draft for which the attorney had no substantial responsibility. Thus, it was not improper for the former attorney to represent private parties challenging the new regulation as arbitrary or capricious, provided that the language of that rule was proposed and adopted subsequent to any proposed draft for which the former government attorney had substantial responsibility.

/1 The Dillon Rule of strict construction provides that municipal corporations have only those powers expressly granted, those that are necessarily or fairly implied from granted powers, and those that are indispensable and essential. *City of Chesapeake v. Gardner Enterprises*, 253 Va. 243 (1997). When an ordinance exceeds the scope of this authority, the ordinance is invalid. *Id.*

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The committee believes that the circumstances presented in your hypothetical are dissimilar to those presented in LE Op. 1299. The suit filed by the former Assistant City Attorney challenges, on "Dillon Rule" grounds, /1 aspects of the subject zoning ordinance which survived the repealed ordinance, and in which the former Assistant City Attorney had substantial involvement in drafting. Based upon the supplemental materials included with your request, the former Assistant City Attorney prepared the ordinance, an informational cover sheet stating that the City Council had the authority to adopt the ordinance, and a memorandum explaining the import of the language drafted into the ordinance. Also included was a citation to the legal authority for the ordinance.

The committee is also of the opinion that in drafting the original zoning ordinance, the former Assistant City Attorney vouched for its legal sufficiency. The former Assistant City Attorney cannot now, for the benefit of a client in private practice, challenge her own legal advice by way of a declaratory judgment seeking to have the successor ordinance declared invalid under Dillon's Rule. This is precisely the type of situation DR:9-101(B) seeks to prevent. See also LE Op. 1683 (September 23, 1996) (City Attorney who represented Personnel Board in adoption or promulgation of personnel policy, cannot thereafter represent City Administration attacking such policy or asserting that Board acted without authority). The scenario you present places the former Assistant City Attorney in the position of attacking her own work product and legal advice. Since the City objects to this conflict, both DR:5-105(D) and DR:9-101(B) require the former Assistant City Attorney to seek leave to withdraw as counsel for plaintiff in the pending declaratory judgment action.

You further inquire as to whether the former Assistant City Attorney would be in violation of DR:9-101(B) if the subject ordinance was not repealed, but only amended and reordained. The Committee opines that such circumstances would not change its conclusions. It would be improper under DR:9-101(B) to represent a private party challenging the amended and reordained ordinance since the amended and reordained ordinance is substantially related to the work product prepared by the attorney while employed as a staff attorney in the City Attorney's office.

Finally, you ask if DR:9-101(B) would be violated if the ordinance being challenged exists in its original form as drafted by the attorney while employed as a staff attorney in the City Attorney's Office. The committee believes that LE Op. 1299 is dispositive of your inquiry and that it would not be proper, under these circumstances, to represent a private client challenging an ordinance drafted by the attorney in her capacity as an Assistant City Attorney.

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