

LEGAL ETHICS OPINION 1763

RECONSIDERATION OF LEO 1718;
REPRESENTATION OF CLIENT
BEFORE GOVERNING BODY WHEN
OTHER ATTORNEY IN SAME FIRM IS
MEMBER OF GOVERNING BODY.

You have requested a reconsideration of Legal Ethics Opinion 1718 [LE Op. 1718]. That opinion involved the following hypothetical:

Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, is it ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter?

The committee concluded that “it is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter.”

Your request suggests that reconsideration of that conclusion occur for two reasons: 1) the adoption of the Rules for Professional Conduct since the issuance of LEO 1718 [LE Op. 1718] and 2) the possible effect of LEO 1718 [LE Op. 1718] on the availability of attorneys for service on public boards.

LEO 1718 [LE Op. 1718] cites a number of legal authorities as comprising the legal foundation for the conclusion that the proposed conduct triggers an incurable conflict of interest. The opinion analyzes discipline rules, ethics considerations, prior Virginia ethics opinions, an ABA opinion, and numerous ethics opinions from other states.

The pertinent regulatory authority has changed since 1998, the year the committee issued LEO 1718 [LE Op. 1718]. That opinion cites the following authority as pertinent from the former Code of Professional Responsibility: Discipline Rules 8-101 (A) [DR:8-101] and 9-101(C) [DR:9-101], along with Ethical Considerations 8-8 [EC:8-8] and 9-6 [EC:9-6]. The change highlighted by your request is that the phrase “appearance of impropriety” in the title of former Canon 9, of which DR 9-101 [DR:9-101] was a part, was not repeated in the corresponding portion of the new Rules for Professional Conduct, that is, Rule 8.4(d) [Prof. Conduct Rule 8.4]. Also, the text of the two Ethical Considerations cited in LEO 1718 [LE Op. 1718] does not appear in the new rules. However, the text of DRs 8-101(A) [DR:8-101] and 9-101(C) [DR:9-101] remains virtually intact in the new rules. Thus, the new rules maintain the prohibitions regarding

Committee Opinion
January 6, 2002

the use of a public office for improper influence or advantage and regarding the suggestion that a lawyer has influence with a government official or entity.

While express reference to the “appearance of impropriety” standard is no longer in the rules, the conflict of interest portion of the rules remains an appropriate source of analysis for the question raised in LEO 1718 [LE Op. 1718]. As referenced in that opinion, a majority of the state bars that have issued an opinion regarding this issue have found that the proposed conduct is improper. While some of those opinions are based on an analysis of the “appearance of impropriety” standard, opinions from other states are based in whole or in part on a conflict of interest analysis.

This committee finds especially compelling the analysis developed by the Michigan Bar on this issue. In considering this issue, the Michigan Bar relied upon an analysis of Rule 1.11. Mich. Bar Op. RI-22 (1989). Part (b) of that rule addresses an attorney's working on a matter both as a public official and in representing a private client. A conflict of interest arising under Rule 1.11(b) [Prof. Conduct Rule 1.11] can be “cured” if both the private client and the appropriate government agency consent after consultation. That provision also provides that an attorney in that first attorney's firm could work on the matter so long as the lawyer is properly screened and notice is given to the proper agency. In applying that rule to the present issue, the Michigan Bar found that, at first blush, the rule would suggest that the government board member could “cure” the conflict by recusing himself from the matter. Nevertheless, the Michigan Bar concluded that such a “cure” was not available to the attorney/board member as such a withdrawal from duty would “deprive citizens of the representative elected to exercise judgment in such matters.” This committee agrees with the Michigan Bar's conclusion that the attorney/board member's obligation to his constituents would disqualify any attorney in his firm from appearing before the board.

This committee opines that the situation in the present hypothetical triggers an impermissible conflict of interest under the Rules for Professional Conduct. This conflict of a partner representing a client before a partner's board should not be “cured” by the board member's recusal from the matter. Such recusal goes against the directive found in Comment 1 to Rule 1.11 [Prof. Conduct Rule 1.11], which states,

This Rule prevents a lawyer from exploiting public office for the advantage of the lawyer or a private client. 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, this committee opines that for an attorney/board member to recuse himself from a matter before his board in order that his law firm may accept representation of a private client creates an impermissible conflict of interest. Therefore, an attorney may not accept representation of a client in a matter that would require an appearance before a board, or other public body, of which any member of that attorney's firm is a member.

Committee Opinion
January 6, 2002

Your request raises as cause for reconsideration not only the recent rules change in Virginia but also the concern that the conclusion of LEO 1718 [LE Op. 1718] could limit the availability of lawyers for service on public boards. The committee notes that this concern is actually one of public policy rather than of rules interpretation. The committee opines that, regardless of public policy considerations, the Rules of Professional Conduct do not permit the proposed conduct. The committee also notes that this particular potential consequence was considered and addressed in LEO 1718 [LE Op. 1718].

This committee reaffirms the conclusion of Legal Ethics Opinion 1718 [LE Op. 1718].

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

Committee Opinion
January 6, 2002