

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

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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 LEO 1763 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.

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