

Committee Opinion
June 27, 2008
Committee Revised
March 17, 2011

LEGAL ETHICS OPINION 1841

CAN A LAWYER WHO IS A MEMBER
OF THE TOWN'S GOVERNING BODY
REPRESENT A CLIENT CHALLENGING
THE CONSTITUTIONALITY OF AN
ORDINANCE THE LAWYER VOTED TO
ADOPT?

This hypothetical involves a lawyer who is a member of a local town's governing body. The locality recently adopted a Virginia statute as local law and incorporated it into the locality's Traffic Code, which they routinely do when new statutes are adopted annually by the General Assembly. Normally, these statute revisions are adopted by the town's governing body *in toto* and not individually screened or adopted piecemeal. The lawyer, as a member of the body, voted in favor of the adoption.

The lawyer has now been retained by a defendant charged under this same provision of the locality's Traffic Code who is challenging the constitutionality of this provision. Is it unethical for the lawyer to continue this representation when it involves a direct attack on the locality's Traffic Code?

In this hypothetical the member of town council determined that his client's defense should be based on the constitutionality of the locality's Traffic Code. It is this defense, and not the decision to represent the client, that is problematic. If the lawyer cannot provide competent and diligent representation without challenging the ordinance's constitutionality, it is unethical for him to agree to represent the client, or have the client agree to forgo the challenge.¹ *See also* LEO 1699 in which the Committee opined that it would be unethical for a former Assistant City Attorney to represent a private client challenging an ordinance drafted by the attorney in her capacity as an Assistant City Attorney in part because she would be put in the position of attacking her own work product and legal advice.²

There are three aspects to this conflicts analysis based upon application of the Rules of Professional Conduct: 1) the interest of the client; 2) the interest of the governing body; and 3) the personal interest of the lawyer. These conflicts are addressed through application of Rule 1.11(b) and Rule 1.7(a)(2). If the lawyer cannot resolve these conflicts then he should decline the representation.

¹ Cmt. [7], Rule 1.2 (agreement limiting scope of representation must comply with lawyer's other duties under the Rules of Professional Conduct, i.e., competence and diligence); Rule 1.7 (a)(2)(material limitation). *See also* Cmt. [19], Rule 1.7 (when a disinterested lawyer would conclude that the client should not consent to a conflicted representation it is improper for the lawyer to seek the client's consent).

² Nothing in this opinion overrules LEO 683 (attorney who holds office as city councilman may represent client charged with violation of an ordinance where doing so complies with other rules).

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In addition, consideration should be given to the State and Local Government Conflict of Interests Act³ that provides standards of conduct for officers and employees of the Commonwealth.

The Committee's analysis starts with the application of Rule 1.11 (b),⁴ which prohibits a lawyer from representing a private client in a matter in which he has participated "personally and substantially" as a public official unless both the client and the agency consent. The concern here is misuse of the public office for the benefit of the private client. Given the facts in this hypothetical, the Committee is of the opinion that this lawyer participated "personally and substantially" in the adoption of this town ordinance.

Secondly, in the current hypothetical the Committee finds that there is no *per se* prohibition under Rule 1.11(b) against the lawyer representing a client challenging a town ordinance. Under the rule, where a current conflict exists, the lawyer is required to obtain the consent of both the private client and the government agency, after full disclosure and consultation regarding the potential conflict. Whether or not the lawyer is successful in acquiring such consent from the government agency depends upon many factors outside the purview of this Committee.

Finally, the Committee is of the opinion that the lawyer needs to consider his own personal interests, as required by Rule 1.7(a)(2). Specifically, under Rule 1.7(a)(2), a conflict of interest exists whenever, "there is significant risk that the representation of one or more clients will be materially limited by ... a third person or by a personal interest of the lawyer." Rule 1.7(a) creates neither a blanket prohibition nor a blanket approval for this type of scenario. A case-by-case determination is necessary. Rule 1.7(b)⁵ provides

³ See § 2.2-3100 et seq.

⁴ Rule 1.11(b) states as follows:

Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the private client and the appropriate government agency consent after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

⁵ Rule 1.7(b) states as follows:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

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the circumstances under which a lawyer may continue the representation of a client despite conflicts that arise under Rule 1.7(a).

In this hypothetical, the lawyer needs to consider the effect of his public service on such representations and determine whether his role on the town's governing body creates a "significant risk that the representation ... will be materially limited by the lawyer's responsibilities to a third person or by a personal interest of the lawyer." Even if the lawyer has responsibilities to a third party or personal interests that may materially limit his responsibilities to the client, the lawyer may continue the representation with complete disclosure to the client and with client consent if the lawyer reasonably believes that he can provide competent and diligent representation. Rule 1.7(b).

One way the representation of the criminal client might be materially limited is if the lawyer, as a member of the public body, went on record as supporting the very town ordinance he seeks to challenge. This inconsistent position could undermine the lawyer's credibility and weaken his effectiveness as an advocate. Under those circumstances, the lawyer may not be able to meet the requirement of Rule 1.7(b) and continue the representation.

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(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) the consent from the client is memorialized in writing.