

LEO 1884 Conflicts arising from a lawyer-legislator's employment with a consulting firm owned by a law firm

HYPOTHETICAL

Lawyer A, a member of the Virginia General Assembly, considers joining a consulting firm. The consulting firm, in which lawyers and non-lawyers lobby and bring matters before the state and federal legislatures, is owned by a law firm composed of Virginia lawyers. Lawyer A's proposed role at the consulting firm would be limited solely to lobbying on the federal level and would not involve lobbying before the state legislature.

Lawyer A asks whether the Rules of Professional Conduct would preclude lawyer and/or non-lawyer employees of the consulting firm from lobbying the General Assembly if Lawyer A joins the consulting firm and remains a member of the General Assembly. If so, would the disqualification extend to members of the law firm as well?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.11(a)¹, 5.3², and 8.4(a) and (d)³. Relevant LEOs include 419, 537, 1278, and 1718.

¹ **Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees**

(a) A lawyer who holds public office shall not:

- (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;
 - (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client;
- or
- (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

² **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associate with a lawyer:

- (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial actions.

³ **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; [or]

- (d) state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official[.]

DISCUSSION

Prior opinions establish that a lawyer may not lobby the General Assembly if another member of the lawyer's firm is a member of the General Assembly. *See* LEOs 419, 537, 1278, and 1718. This is so even if the lawyer-legislator complies with the General Assembly Conflict of Interests Act (Va. Code §§ 30-100 *et seq.*) and recuses himself from participation in the decision.⁴ As addressed in LEO 1718:

The sense of the committee is that public confidence in the legal profession is not inspired, nor is an appearance of impropriety avoided, if a law firm represents clients before a governing body on which one of its lawyers is a member even if he/she abstains from participation and voting. A likely public perception, and an understandable one, is that the lawyer for the client has an advantage or an "inside track" because another lawyer in the law firm is a member of the governing body. Regardless of the lawyer-member's recusal, his/her cultivation of a relationship of trust and respect with the other members and their inter-personal relations are likely to result in a public perception that his/her law firm profits from that relationship in its representation before the governing body. Conversely, if the law firm's representation is unsuccessful, a nagging suspicion for the client is whether the governing body's decision was the result of an unarticulated concern that it not be accused of impropriety in dealing with a member's law firm.

The Committee concludes that there is no reason to distinguish between lawyers associated in a law firm and lawyers associated in a lobbying/consulting firm, as the public confidence concerns depend on the fact that the General Assembly member and the lobbyist are associated in the same firm, not on the nature of that firm's business. *See* Rule 1.11(a) and 8.4(d).

Lawyers are held to a higher standard of conduct than mere compliance with legal requirements, and may not act in a way that "diminishes public confidence in and respect for the integrity of the legal profession, as well as the administration of government." LEO 1718. Accordingly, Rule 8.4(d) prohibits the lawyer/lobbyist from representing a client before the public body on which his lawyer/colleague sits, regardless of whether that colleague participates in the matter.

This hypothetical involves a consulting firm that is owned by a law firm composed of lawyers licensed in Virginia and other jurisdictions. Just like the lawyers in the consulting firm, lawyers in the law firm may not represent clients or otherwise lobby before the General Assembly, again regardless of whether the General Assembly member complies with the Conflict of Interests Act. To conclude otherwise would be to place form over function and essentially allow the firms to use a screen to circumvent the conflict created by the General Assembly member's employment by the consulting firm – members of a public body could be employed by the consulting firm - to allow the law firm to represent clients it would not be able to represent if the consulting/lobbying business were all conducted through the law firm.

⁴ If the lawyer were not a member of the General Assembly, but a member of another public body, the applicable Conflict of Interests Act would be the State and Local Government Conflict of Interests Act (Va. Code §§ 2.2-3100 *et seq.*).

Prior opinions do not address whether *non-lawyer* members of the consulting firm may lobby the General Assembly when the consulting firm also employs a lawyer who is a member of the General Assembly. Non-lawyers are, of course, not directly subject to the Rules of Professional Conduct, though a lawyer who supervises a non-lawyer may in certain circumstances be responsible for ensuring the non-lawyer's conduct complies with the lawyer's ethical obligations. *See* Rule 5.3.

The lawyers in this consulting firm may not have supervisory or managerial authority over all of the non-lawyer employees, since the firm is not a law firm and non-lawyers can engage in the work on their own, without any supervision, and can be partners/owners/executives of the firm. Nonetheless, a lawyer may not circumvent the Rules of Professional Conduct by using others to engage in conduct that he could not personally engage in. *See* Rule 8.4(a). The lawyers in the consulting firm cannot permit the non-lawyer employees of the firm to engage in conduct the lawyers themselves are not permitted to undertake. This prohibition exists regardless of whether the lawyers have any managerial or supervisory authority over the non-lawyer employees. As discussed above, prior opinions on this topic emphasize the need for lawyers on public bodies to avoid even an appearance of impropriety and to avoid diminishing public confidence in the administration of government. Permitting non-lawyer colleagues of a member of a public body to lobby that body would not serve any of those important purposes, and in fact might undermine those purposes by suggesting that the ethical obligations here are merely technical rules that can be easily evaded by permitting non-lawyers to do the work that lawyers within the same firm would be prohibited from doing.

CONCLUSION

When a lawyer in a consulting firm is a member of a public body, including the General Assembly, other members of that firm may not represent clients before that public body, regardless of whether those members of the firm are lawyers or non-lawyer lobbyists. Lawyers in the law firm that own the consulting firm also may not represent clients before the public body. This prohibition does not depend on whether the member of the public body complies with the applicable Conflict of Interests Act; his colleagues are forbidden by Rule 8.4 from appearing before his public body even if he recuses himself as required by statute.

APPROVED BY THE SUPREME COURT OF VIRGINIA
SEPTEMBER 30, 2016