

Pursuant to the Administrative Process Act (APA), Chapter 1.1:1, Article 3.1 of Title 9 (Section 9-6.14:14.1) of the Code of Virginia, the executive secretary of the Supreme Court is given authority to regulate hearing officers and the hearing officer system to be used by agencies of the Commonwealth in conducting hearings under the act. Section 9-6.14:14.1(C) provides that a hearing officer shall disqualify himself and withdraw from any case in which he cannot accord a fair and impartial hearing or “when required by the applicable rules governing the practice of law in the Commonwealth.”

To fulfill its obligation under the APA, the executive secretary of the Supreme Court maintains a list of qualified attorneys from which part-time hearing officers are selected.

REFERENCES

Canon 8. A Lawyer Should Assist in Improving the Legal System.

DISCIPLINARY RULES.

DR:8-101. Action as a Public Official

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

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(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 his action as a public official.

Canon 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

DISCIPLINARY RULES

DR:9-101. Avoiding Even the Appearance of Impropriety

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal legislative body, or public official.

ETHICAL INQUIRIES

Committee Opinion

April 1, 1987

ISSUE # 1

If an attorney's name appears on the approved part-time hearing officer list maintained by the executive secretary of the Supreme Court, does this appearance on the list constitute service to all agencies which may draw hearing officers from the list?

ANSWER TO ISSUE #1

No. Even though an attorney's name appears on the approved list, he serves only when he is actually employed as a part-time hearing officer by a given agency and such service is only to that agency.

ISSUE #2

If an attorney serves as a part-time hearing officer for a State Agency Regulation Board (SARB), can the attorney represent clients in matters before the SARB so long as the legal or factual issues (hereafter subject matter) of the client's case are substantially unrelated to those under consideration by the attorney in his capacity as a part-time hearing officer?

ANSWER TO ISSUE #2

Yes. It is not improper for an attorney to represent clients before a SARB where he is also a part-time hearing officer, *provided* that the subject matter of his client's case is substantially unrelated to those under his consideration as a part-time hearing officer for the SARB. (See also LE Op. 632.)

ISSUE #3

Would the committee answer be different in situations where a state agency has multiple regulatory boards?

ANSWER TO ISSUE #3

No. A state agency with multiple regulatory boards should not be distinguished from a state agency with only one regulatory board.

ISSUE #4

Can an attorney represent a client in a law suit or administrative hearing against the agency which he currently serves or has served as a part-time hearing officer?

ANSWER TO ISSUE #4

(A) It would be improper for an attorney to represent a client either in a law suit or administrative hearing against a state agency where attorney is currently serving as a part-time hearing officer.

(B) However, it would not be improper for an attorney to represent a client against a state agency in a law suit or administrative hearing where the attorney has in the past, but does not presently serve as a part-time hearing officer, *provided* the attorney's knowledge of confidential information does not disqualify him.

ISSUE #5

Committee Opinion

April 1, 1987

Can an attorney who serves as part-time hearing officer for a SARB thereafter advise clients regarding matters under the agency's jurisdiction even though the attorney does not make an appearance on behalf of the client before the SARB?

ANSWER TO ISSUE #5

Yes, it is not improper for an attorney to advise clients even though he will not be making an appearance regarding matters within the jurisdiction of the SARB where the attorney is also a part-time hearing officer, *provided* any confidential information the attorney learns in his position as part-time hearing officer or matters under his consideration which are substantially related to those of his client, cannot be used.

ISSUE #6

Does an attorney have a conflict if he decides to become a part-time hearing officer and is currently representing clients who do not have matters currently before a SARB but could have matters before a SARB in the future?

ANSWER TO ISSUE #6

No. It would not be improper for an attorney to become a part-time hearing officer even though he represents clients who do not have matters pending before a SARB even though they could have matters before the SARB in the future.

ISSUE #7

If an attorney is disqualified from representing a client before the SARB where he is also a part-time hearing officer, are the members of his law firm also disqualified?

ANSWER TO ISSUE #7

Yes. If an attorney is disqualified from representing a client because of circumstances involving confidentiality or having a substantially related matter under consideration, then the members of his law firm would also be disqualified. (See also LE Op. 617.)

ISSUE #8

Is it ethical for an attorney in his capacity as a part-time hearing officer to hear a case presented by the Attorney General's office when that same attorney is representing a client before a SARB which is being prosecuted by the Attorney General's office?

ANSWER TO ISSUE #8

Yes. It would not be improper for an attorney to simultaneously hear a case presented by the Attorney General's office and represent a client before a SARB in a substantially unrelated matter being prosecuted by the Attorney General's office.

PRIOR LEGAL ETHICS OPINIONS

LE Op. 632 as stated below is hereby affirmed.

Hearing Officer-Advocate for Client.

Committee Opinion
April 1, 1987

It is improper for an attorney on the list of state agency hearing officers maintained by the executive secretary of the Supreme Court of Virginia to represent a client before a state agency in a proceeding which involves the same subject matter as that which the attorney considers when serving as a hearing officer for said state agency. Committee Opinion, December 3, 1984.

LE Op. 617 as stated below is hereby affirmed.

Appearance of Impropriety-Hearing Officers.

It is improper for an attorney representing a party in a special education due process hearing to appear in said hearing when the presiding hearing officer is a member of the same law firm as the representative attorney.

It is not improper for an attorney representing a party in a special education due process hearing to appear in said hearing when the presiding hearing officer is not a member of the same law firm as the representative attorney although a member of the said attorney's firm presides as a hearing officer in other such cases.

It is improper for an attorney to represent a school division in proceedings in which the hearing officer is a member of said attorney's law firm.

It is not improper for an attorney to represent a school division in proceedings when a member of said attorney's firm who serves as a hearing officer in similar proceedings had no contact with the instant case. Committee Opinion, October 24, 1984.

LE Op. 583 as stated below is hereby superseded by LE Op. 847. This is for clarity and not for substance.

Hearing Officer-Appearance of Impropriety.

It is improper for an attorney who serves as a hearing officer in special education due process proceedings to appear as an advocate in such hearings or appellate proceedings in other jurisdictions. Committee Opinion, May 31, 1984.

LE Op. 549 as stated below is hereby superseded by LE Op. 847. This opinion is correct in very limited and special facts. We supersede for clarity and not for substance.

Appearance of Impropriety — Part-Time Hearing Officer.

It is improper for an attorney who is a part-time Virginia Employment Commission appeals examiner to represent private clients in cases involving the Virginia Employment Commission, even if the private cases are to take place in a geographical location other than where the attorney functions as a hearing officer. Committee Opinion, March 1, 1984.

Committee Opinion
April 1, 1987

Committee Opinion
April 1, 1987

Legal Ethics Committee Notes. – Rule 1.11 governs former government lawyers and judges, and recognizes the efficacy of “ethics screens” to avoid imputed disqualifications in some situations.

Editor’s Note. – See also L E Op. No. 883, 987.