**VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1829**

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1829, *Lawyers Serving on Public Bodies—Compendium Opinion.*

This proposed opinion is a compendium opinion that addresses situations in which lawyers *serve* on a public body, as opposed to situations in which a lawyer *represents* a public body. The Committee has chosen to review prior opinions on this subject as well as to address new questions. At the beginning of the opinion, the Committee establishes the basic framework for analyzing the questions presented. As this is a compendium opinion addressing numerous specific questions, the reader may wish to go to that section of the opinion that addresses a particular issue of interest.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **June 8, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1829
LAWYERS SERVING ON PUBLIC BODIES—
COMPENDIUM OPINION

Introduction

Members of the bar have frequent and recurring questions regarding the ethical considerations of a lawyer serving as a member of a "public body."[1] Over the past thirty years, the Committee has issued a number of opinions involving lawyers serving on public bodies while engaged in the private practice of law. Because of these continuing questions, the Committee has chosen to review those prior opinions and issue a compendium opinion, addressing not only questions raised in the past but also new ones. The Committee's review is undertaken to determine whether prior legal ethics opinions on the subject of lawyers serving on public bodies need to be overruled, clarified or reaffirmed. The Committee selects this topic for special focus due to the important public policy issues present and the unique interplay of the application of the ethical rules and the statutory provisions to this particular role of lawyer as public officer. Prior opinions expressed both a concern for the availability of lawyers for public service and for public confidence in the decisions of government. Wholesale application of the Rules of Professional Conduct to lawyers serving on public bodies may not be appropriate because the activity of the lawyer in this form of public service does not involve a traditional attorney/client relationship.[2] The Committee's review of these issues will distinguish the application of certain Rules of Professional Conduct ("RPC") that apply to lawyers serving on public bodies from the statutory requirements of the Virginia State and Government Conflicts of Interest Act, Va. Code §§ 2.2-3100 *et seq.* ("Conflicts Act" or "Act"). In some particular instances, the Act will control. However, in other instances both the Act and the RPC are complementary.

This opinion addresses only situations in which lawyers *serve* on a public body, as opposed to situations in which a lawyer *represents* a public body. At the beginning of the opinion, the Committee establishes the basic framework for analyzing the questions presented. As this is a compendium opinion addressing numerous specific questions, the reader may wish to go to that section of the opinion that addresses a particular issue of interest.

Outline of Questions Presented

Most of the questions presented arise out of a lawyer representing a client before a public body on which the lawyer or another lawyer in the lawyer's firm serves. However, a lawyer may also represent a client as a lobbyist before a public body on which she or another lawyer in her firm serves. In addition, a lawyer's connection or relationship with a public body, past or present, may present conflicts of interest issues that are addressed by either the RPC or the Conflicts Act. While specific questions and analysis appear below, the Committee notes that several important conclusions drive the discussion of these issues. First, throughout discussion of the issues below, the Committee reiterates that its purview is to interpret the Rules of Professional Conduct regarding lawyers and the practice of law. It is not within the purview of the Committee to determine whether a person may serve on a public body and when someone in that service needs to recuse himself from particular matters. The analysis in this opinion reflects that distinction. Second, many prior opinions of this Committee involve discussion of "the appearance of impropriety." While that standard was present in the former Code of Professional Responsibility, it does not appear in the current Rules of Professional Conduct. Therefore, discussion of the issues presented moves away from considerations of appearance and instead to application of specific rules and their requirements. That change leads to a third point in much of the analysis of the issues below.

FOOTNOTES

1 For purposes of this opinion, a "public body" means any board, commission, committee, authority, council, agency or other similar constituent of a local or state government.

2 The office holder's public duty is not the duty that an attorney owes to a client. It is not "representation" in the sense of an attorney-client relationship. The requirements from the RPC regarding the ethical duties of competence and diligence do not apply to the service on the public body. See Rules 1.1 and 1.3. Nor does Rule 1.6's duty of confidentiality attach to this public service. See In re: Ed Vrdolyak, 137 Ill. 2d 407, 419 (1990); Connecticut Ethics Op. 96-17.

In many of the instances at issue, the Committee does not interpret the rules as creating a *per se* prohibition, but rather, in looking at Rules 1.7, 1.9, 1.10, 1.11 and 8.4, the Committee opines repeatedly that some specific act of misconduct is required for a violation, rather than just the public service alone. Because the old "appearance of impropriety" standard has been removed from the RPC, the Committee's analysis frequently calls for case-by-case, fact-specific applications of the rules to each particular situation and the particular conduct of the lawyer or lawyers involved. These three considerations drive the discussion of the issues presented in this opinion. This opinion addresses the issues in the context of five situations:

1) Appearance Before Public Body on Which Lawyer or Firm Member Serves.

2) Appearance Before Public Body Where Lawyer or Firm Member Serves on "Parent" Body.

3) Adversity to Public Body on Which Lawyer or Firm Member Serves.

4) Connections to Member of Public Body Other Than Law Firm Membership.

5) Lobbying Activity.

Within these five situations, the opinion addresses ten specific questions under the Rules of Professional Conduct:

1) May a lawyer appear before his own public body?

2) May a lawyer appear before a public body on which a member of his firm serves?

3) May a lawyer serving on a public body participate in the discussion of and voting on an issue that, while not an actual client matter, does affect a firm client?

4) May a lawyer serving on a public body participate in the discussion of and voting on a matter involving a former client appearing before that body?

5) May a lawyer appear before a public body funded by, reporting to, established by, or with members appointed by a public body on which he or a member of his firm serves?

6) May a lawyer file or defend a lawsuit against a public body on which he serves?

7) May a lawyer challenge the decision of the public body on which he serves in a proceeding before some other public body?

8) May a lawyer serving on a city council or board of supervisors represent a criminal defendant where the charges include violations of that city or county's code? Similarly, may a member of the General Assembly represent a criminal defendant where the charges include violations of the Virginia Code?

9) May a lawyer appear before a public body where that lawyer contributed financially to the campaign of one of the elected members of the body?

10) May a lawyer lobby a public body on behalf of a client on which he or a firm member serves?

Opinion:

Topic 1: Appearance before Public Body on Which Lawyer or Firm Member Serves.

1. May a lawyer appear before his or her own public body?

Answer: In most cases, no.

Generally, there is a conflict of interest which would preclude a lawyer from representing a private client before a public body on which the lawyer serves. A number of pertinent opinions issued before January 1, 2000 relied on the ethical norm that "a lawyer should avoid even the appearance of impropriety." Such prior opinions include the following:

LEO 549, concluding that a lawyer who is a part-time appeals examiner for the Virginia Employment Commission may not represent private clients in matters before the Commission, even if the private cases are heard in locations other than where the lawyer serves as hearing officer.

LEO 632, concluding that a lawyer occasionally serving as a hearing officer may not represent a client before a state agency in a proceeding involving the same subject matter on which the lawyer serves as a hearing officer for the agency.

LEO 1278, concluding that a lawyer may not represent a client before the General Assembly if a member of the firm is elected to the General Assembly.

LEO 1611, concluding that a lawyer/legislator could vote on a matter that impacts his client indirectly, but was not actually a client matter, as such voting did not create the appearance of impropriety.

LEO 1718, concluding that a lawyer serving on a public body may not represent a client before that entity.

When the Supreme Court of Virginia adopted the RPC, effective January 1, 2000, the "appearance of impropriety" standard was removed. The Committee acknowledged this regulatory change in LEO 1763, concluding that the conflict of interest rules in the RPC were the standards applicable to analyzing the issues presented in this request. The prior opinions on this topic looked at two considerations for analysis: application of the rules and public policy. *See* LEOs 1278 and 1763. The Committee looks first at the application of the rules, with discussion of the policy considerations included with Question Two, below. The Committee notes that the current key provision is Rule

1.11(a)[3], regarding lawyers who hold public office. LEO 1763 focused especially on Comment 1 to that rule, 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.

In LEO 1763, the Committee adopted the position that the conflict of interest created by a lawyer's appearance on behalf of a client before a public body on which the lawyer or another lawyer in the firm sits could not be "cured" by consent and/or recusal, because withdrawal from duty would "deprive citizens of the representative elected to exercise judgment in such matters." The Committee now notes that the determination of the "official duties or obligations to the public" of a member of a public body is not within the parameters of this Committee's charge to interpret the RPC. The duties and obligations owed to the public by these public officials are governed by the Conflicts Act, [Va. Code §§ 2.2-3100 *et seq.*].[4] Thus, the Committee overrules that particular conclusion from LEO 1763.

When a lawyer serves on a public body, the lawyer must consider whether there will be any overlap between his public service and his private practice. Specifically, will the lawyer ever want to represent clients before that particular body? If so, the lawyer must consider application of the Conflicts Act to determine if the private representation would be contrary to his public role as defined by the provisions of the Act. While application of the Conflicts Act in any particular instance for any particular lawyer/public officer is outside the purview of this Committee, the Committee notes that the Act contains specific language for representation of clients. Virginia Code § 2.2-3112(3), clarifies that a member of a public body may participate in the body's discussion and voting regarding a matter in which "a party to the transaction is a client of his firm if he does not personally represent or provide services to such client and he complies with the declaration requirements of § 2.2-3114 (G) or § 2.2-3115 (H)."

FOOTNOTES

3 Rule 1.11(a) states as follows:

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.

4 Further, Virginia Code § 54.1-3915 dictates that, "the Supreme Court shall not promulgate any rules or regulations proscribing a code of ethics governing the professional conduct of attorneys which are inconsistent with any statute." Finally, the Act expressly states that its purpose is to establish "a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests." That section, 2.2-3100, goes on to state that "[t]his chapter shall supersede all general and special acts and charter provisions which purport to deal with matters covered by this chapter [with certain exceptions]." Thus, the Committee's interpretation and application of the RPC to the issues in this opinion must not contradict the provisions of the Act. The Committee will respond to the issues in this opinion accordingly.

There are ethical requirements consistent with and thus not superseded by the Conflicts Act. For example, Rule 1.11(b)[5] 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 danger here is misuse of the public office for the benefit of the private client. Rule 1.11(c) limits a lawyer's use of information on behalf of a private client where such information is confidential information about a third person learned during the lawyer's public service.[6] Rule 1.11(d)[7] prohibits a lawyer from acting in an official capacity in a matter which he handled while in private practice, unless there is no one else who may act in the lawyer's stead. Again, the objective of this rule is to avoid divided loyalties, so that the public will have confidence that the lawyer is acting in the public's best interest when he acts in an official capacity. Rule 1.11(a)(1) prohibits the lawyer's use of public office to obtain a special advantage for himself or for a client, when such is not in the public interest. *See e.g.*, Alabama Opinion 1993-12 (potential for improper influence when the hearing examiner removes his authoritative hat and becomes just another advocate before his or her own agency).

The Committee's current approach to these issues differs somewhat from the "bright line" prohibition expressed in LEO 1763 and a number of prior opinions on this point.[8] To the extent that LEOs 1763, 1718, 1278, 537 and 419 are inconsistent with these conclusions, they are hereby superseded.

FOOTNOTES

5 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.

6 Rule 1.11(c) states as follows:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee there from.

7 Rule 1.11(d) states, in pertinent part, the following:

Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter.

8 The bright line rule expressed in LEOs 1765, 1718, 1278, 537 and 419 was that it is impermissible for a lawyer to lobby a governmental body when his partner was a member of that body notwithstanding disclosure and abstention by the lawyer-legislator and disclosure by the lawyer-lobbyist in conformity with the Conflicts Act.

2. May a lawyer represent a client before a public body if another lawyer in the firm sits on that public body?

Answer: There is no bright-line prohibition and the answer depends upon the particular facts in each instance.

The Committee notes that Virginia Code §2.2-3112 (3), quoted above, distinguishes representation of a firm client by the public officer from representation of a firm client by some other member of that officer's firm.

This does not necessarily mean that a lawyer may represent a client in all instances before a public body on which a member of his firm sits. While the duties and obligations of the public officer are governed by the Virginia Code, the private practice of members of his firm remains within the purview of the RPC.

Whether a lawyer may properly represent a client before a public body on which a firm member serves can be determined with an application of Rules 1.7, 1.11 and 8.4 to each particular matter. Rule 1.7 addresses whether the lawyer has a conflict of interest in the representation. Specifically, under Rule 1.7(a), 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." The question becomes: Will the public service of the one firm member pose such a risk for the client represented by the other attorney? 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. The Committee notes that in proper instances, Rule 1.7(b)[9] provides a "cure" for conflicts of interest that have arisen under Rule 1.7(a). However, if there is a conflict of interest under Rule 1.7(a) created by a lawyer's service on a public body, all of the lawyers in the firm have a conflict in representing a client before that public body. Rule 1.10.[10]

A second factor for a lawyer in this context to consider is Rule 1.11. The application of that Rule in the present context is fully addressed by the discussion provided with Question One, above.

A third factor for a lawyer in this situation to consider is Rule 8.4(d), which directs a lawyer not to "state or imply an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." A lawyer hired by a client to represent him before a public body on which a firm member serves must be cognizant of the possibility that the client may have selected the lawyer with some belief or hope that he will exercise improper influence with the public body due to the firm member's service. The lawyer should clarify that he in fact does not offer such influence as part of his legal services.

The Committee in prior opinions involving attorneys on public bodies has looked not only to the application of the ethics rules but also to public policy considerations. LEO 1718 highlights two, at times competing, primary public policy concerns in the present context. One is maintaining public faith in the legitimacy of government decisions. The other is ensuring the availability of qualified attorneys for service on public bodies. The discussion of these concerns in LEO 1718 treats the latter as merely speculative, with most emphasis placed on the need for ensuring public faith in the process. The Committee maintained that balance in LEO 1763, which reconsidered and affirmed the conclusions of LEO 1718. However, the Committee no longer considers the risk to availability of attorneys for public service to be merely speculative. The issuance of those opinions established a principle that a lawyer may never appear before a board on which his firm member sits. In the year since the issuance of those opinions, the Committee has become cognizant anecdotally that law firms are beginning to restrict the service of firm members on public bodies to prevent conflicts of interest requiring the loss of clients. Because of their legal education and work, attorneys bring a unique perspective to public service that is invaluable. A chill on that availability both reduces the number of citizens able to serve on public bodies and erodes the quality of decisions made by those bodies. Thus, the Committee departs from its early conclusions and opines that the blanket prohibition against representing clients before public bodies on which a firm member serves does not serve the public well. To the contrary, the public is better served by the case-by-case application of Rules 1.7 and 8.4, outlined above.

The conclusion that a bright-line prohibition would be appropriate in this context, as drawn in LEOs 1763, 1718, 1611, 1278, 632, and 549 (outlined above with the discussion of Question One), is inconsistent with the present conclusions; therefore, those opinions are hereby superseded on this point.

3. May a lawyer serving on a public body participate in the discussion of and voting on an issue that, while not an actual client matter, does affect a firm client?

Answer: Generally, yes, absent specific circumstances triggering a violation.

In some instances, a lawyer serving on a public body may be faced with a matter that, while not specifically a client matter, does nonetheless affect his client. Does that sort of indirect effect constitute a conflict of interest as if the client's own matter were before the body? Again, the Act is the legal authority by which the lawyer must decide whether or not he must recuse himself. However, the Committee also notes a pertinent provision in the RPC: Rule 1.11(a). Paragraph (a) of Rule 1.11, in pertinent part, directs that a lawyer/public officer must not:

FOOTNOTES

9 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;

(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.

10 Rule 1.10 (a) states: "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.6, 1.7, 1.9 or 2.10 (e).

(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; [and]

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

The Committee reads Rule 1.11 as consistent with the provisions of the Conflicts Act, with Rule 1.11(a) providing additional direction specifically for lawyers in public service. LEO 1611 addressed an issue of this sort. In that opinion, the Committee applied Rule 1.11's predecessor, DR 8-101(A)(1)[11], to determine whether an associate attorney in the legislature could vote on a bill of significant interest to a client of the associate's law firm. The firm strongly believed that the associate needed to abstain from voting "to avoid any appearance of impropriety" or from voting against a client's interest on a substantial issue affecting that client. The Committee disagreed, holding that for there to be misconduct, the lawyer-legislator must attempt to secure a "special advantage" which would not be in the "public interest." The lawyer-legislator's voting on the matter would not violate the plain language of the rule unless some benefit would accrue to the firm's client which would be beyond the issue of whatever benefit (or detriment) would accrue to the public at large. Of course, as with similar issues earlier in this opinion, the issue of whether the legislator may vote or abstain is governed by the Conflicts Act, not the RPC. Whether such a vote involves an ethical breach under Rule 1.11(a)(1) is a separate issue.

This Committee opines that the conclusions of LEO 1611 remain correct; however, the Committee notes the discussion in LEO 1611 references the standard of "the appearance of impropriety." As discussed earlier in the present opinion, the Committee finds no authority for that standard in the RPC. Thus, while the Committee reaffirms the final conclusions drawn in LEO 1611, it expressly notes that opinion's appearance of impropriety discussion as no longer pertinent.

4. May a lawyer serving on a public body participate in the discussion of and voting on a matter involving a former client appearing before that body?

Answer: There is no bright-line prohibition and it depends upon the circumstances of each particular instance.

A lawyer serving on a public body may also at times be faced with a *former* client bringing a matter before the body. As to whether the lawyer can participate in the matter or would need to recuse himself, the Conflicts Act controls. In addition, the lawyer should be aware that Rule 1.11(d) prohibits a lawyer/public officer's involvement in matters in which he personally and substantially participated in his private practice.[12] Again, the Committee notes that Rule 1.11(d) does not override the Act, but instead provides guidance for attorneys serving as public officers regarding their private practice of law. In addition, Rule 1.9(c) might also apply, prohibiting the lawyer from using or disclosing information obtained in the course of representing a former client and therefore serving as an additional basis to prohibit the lawyer/public officer's involvement in a matter affecting the former client.

Prior LEO 208 presented a bright-line prohibition for this context. Specifically, that opinion concluded that a lawyer who is a member of a City Council may not preside over a hearing into a zoning matter in which the lawyer had earlier (before being elected) represented a party in front of the Council.

Topic 2: Appearance before Public Body Where Attorney or Firm Member Serves on "Parent" Body.

5. May a lawyer appear before a public body funded by, reporting to, established by, or with members appointed by a public body on which he or a member of his firm serves?

Answer: Generally yes, except for limited exceptions.

A slightly different scenario than those addressed in Topic 1, above, is where an attorney represents a client before a public body while a firm member serves on a "parent" public body.[13] For example, an attorney may need to represent a client before a committee operating as a tribunal where that committee's members are appointed by another public body, such as a Board of Supervisors. Is that connection still so close as to trigger possible conflicts of interest?

In LEO 245, the Committee opined that a lawyer who is a member of a Board of Supervisors may not represent applicants for loans from an authority appointed by the Board. The lawyer-Board member in LEO 245 retained appointive power over the Authority. Other LEOs in this context include LEO 549 (prohibiting a lawyer from representing clients before the Virginia Employment Commission where that attorney is an appeals examiner for the Commission) and LEO 826 (prohibiting a lawyer from representing clients before a local health

FOOTNOTES

11 DR 8-101(A)(1) of the Virginia Code of Professional Responsibility stated that a lawyer who holds public office shall not use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for a client under circumstances where he knows or it is obvious that such action is not in the public interest. That language mirrors current Rule 1.11(a)(1).

12 Rule 1.11(d) specifically states as follows:

Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer, mediator or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b)

13 By "parent" body, the Committee is referring to those situations where one body provides funds for another, appoints it members, reviews its decisions, or directs its activities.

department that was an extension of the state health department for which the lawyer served as a hearing officer).

The Committee issued each of those prior opinions before the adoption of the RPC. Under current rules, a lawyer in this context should review Rules 1.7, 1.11, and 8.4, as discussed earlier in this opinion. Rule 1.7 would only trigger a conflict of interest if the firm member's service on the parent body significantly risked material limitation of the representation of the client in the matter. While such a determination is of course to be made on a case-by-case basis, the Committee suggests that such conflicts would be the exception rather than the norm as the lawyer would not be seeking action for his client from the very body on which a firm member serves.

The lawyer and his firm member should also be mindful of the related prohibitions, discussed above, against implying the ability to use one's public office for improper influence and against implying the ability to influence improperly a public body's decisions. *See* Rule 1.11(a) and Rule 8.4(d), respectively. A lawyer may not use his public position in order to gain an improper advantage for himself or a client. The question in each instance becomes whether the lawyer is attempting to influence the public body *improperly*. For example, suppose a lawyer-legislator appears before a commerce commission to urge a rate increase on behalf of a private client. This lawyer-legislator also serves on the state house committee that oversees the state commerce commission and sets the commissioners' salaries. Such circumstances alone do not make the lawyer-legislator's advocacy before the commission improper. Some additional act would be required for a violation. The lawyer-legislator must also have actually engaged in an overt attempt to exert *improper* influence over the state commerce commission. ABA Informal Op. 1182 (1971); *See also State ex rel. Nebraska State Bar Ass'n v. Holscher*, 193 Neb. 729, 738, 230 N.W.2d 75, 80 (1975). Similarly, the mere fact that a lawyer-legislator serves on a legislative committee that appoints or reappoints judges in the geographical area where the lawyer-legislator practices does not disqualify him or her from appearing before a judge appointed by that committee. A lawyer's representation before a public body on whose parent body he serves is not *per se* improper, but would become so only where some incident of wrong-doing occurs.

To the extent that prior LEOs 245 and 826 present bright line prohibitions inconsistent with the case-by-case application of the Rules outlined in this discussion, they are hereby superseded.[14]

Topic 3: Adversity to Public Body on Which Attorney or Firm Member Serves.

6. May a lawyer file or defend a lawsuit against a public body on which he serves?

7. May a lawyer challenge the decision of the public body on which he serves in a proceeding before some other public body?

8. May a lawyer serving on a city council or board of supervisors represent a criminal defendant where the charges include violations of that city or county's code? Similarly, may a member of the General Assembly represent a criminal defendant where the charges include violations of the Virginia Code?

Answer: In these particular scenarios the effect of the public service on the representation and the particular facts associated therewith will determine the specific answer.

The Committee had previously addressed a lawyer representing a client whose interests are adverse to those of a public body on which the lawyer serves. In LEO 847, the Committee concluded that a lawyer may not represent the party against the board or agency on which the lawyer currently serves as a part-time hearing officer, but may do so once the lawyer leaves the board or agency (provided the lawyer has no material confidential information).[15] In that opinion, the Committee further explained that if the part-time hearing officer is disqualified from any matter, everyone in the lawyer's firm is disqualified. *Id.* In LEO 409, the Committee opined that unless all parties consent, a lawyer who serves on an education committee (established to advise a school board) and who will review material that could be used against the school board in litigation may not represent a plaintiff in an action against the school board involving the same issues.

To reiterate conclusions drawn earlier in this opinion, whether or not the firm member serving on the body can participate on the board in that matter is subject to the Conflicts Act; however, whether the other members of the firm have conflicts of interest in representing clients adverse to the public body is governed by the RPC. As with the earlier conflicts discussion, the key provision is Rule 1.7. The Committee notes that conflicts arising under Rule 1.7 are imputed to everyone in a firm via Rule 1.10. Thus, if the lawyer serving on the body would have a conflict of interest in representing the client adverse to the public body, then no one else in the firm could represent that client in that matter. *See e.g.,* LEO 847 (if the part-time hearing officer is disqualified from appearing before Board, everyone in the lawyer's firm is disqualified). Determination of whether any lawyer in the firm has a conflict under Rule 1.7 involves case-by-case analysis of whether there is a significant risk that the representation would be materially limited by the personal interest of the lawyer (i.e., the public service). If such a conflict does exist, a "cure" would be possible where the requirements of Rule 1.7(b) can be met.

One specific context in which this issue of adversity arises is for lawyers who sit on city councils, county board of supervisors, and/or in the General Assembly. If a lawyer in any of those positions represents

FOOTNOTES

14 LEO 245 concludes that it is improper for an attorney who is a member of a board of supervisors to represent applicants for loans from the industrial development authority appointed by the board. LEO 826 concludes that it is improper for an attorney to represent a client before the local health department if the health department is merely an extension of the state health department or health regulatory board for whom the attorney sits as a part-time hearing officer. Neither opinion provides any explanation why the lawyer's conduct is improper.

15 Some agencies may also employ a "cooling off" period during which the attorney cannot represent the client before that agency until a specified time has passed. See Va. S. Ct. R., Pt 6, § IV, Para 13(F)(2)(b).

criminal defendants in private practice, he needs to consider the affect of the public service on such representations. For example, where a city councilman represents a criminal defendant charged with violating a city ordinance, the opposing party is the city. Whether that situation affects his service as a councilman is resolved by the Conflicts Act; however, how the Council service affects his representation of the client is governed by Rule 1.7. The lawyer must determine whether his role as councilman creates a "significant risk that the representation … will be materially limited by the lawyer's responsibilities to a third person or by personal interest of the lawyer." A lawyer serving in the General Assembly would use the same analysis were he to represent a criminal defendant charged with violation of a Virginia Code provision. As with many determinations discussed in this opinion, a bright line prohibition is not called for under that provision. Rather, the lawyer would make the determination by applying the quoted standard from Rule 1.7 to the specific facts of his representation and his service on the public body.

Topic 4: Connections to Member of Public Body other than Law Firm Membership

9. May a lawyer appear before a public body where that lawyer contributed financially to the campaign of one of the elected members of the body?

Answer: Yes, so long as the lawyer's conduct is in compliance with Rule 8.4(b) and (d).

Throughout the discussion thus far, the Committee has focused on lawyers and members in their firms. What about other relationships with members of public bodies? For example, may a lawyer represent a client before a public body where the lawyer contributed to the political campaign of a member of that body.

Rule 8.4(d) prohibits a lawyer from stating or implying an ability to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official. In Legal Ethics Opinion 1360 (1990), the committee stated that whether a lawyer's contribution to a public official's political campaign is done to improperly influence the public official requires a factual determination beyond the purview of this committee. If, in fact, a payment or contribution is made to a public official or political candidate with the intent to improperly influence the public official's actions on a particular matter, Rule 8.4(d) has been violated. In addition, the lawyer's conduct may constitute a criminal act, i.e., bribery,[16] and thereby violate Rule 8.4(b).[17] Thus, while the particular circumstances of a lawyer's contribution to a public official's political campaign does not cause a *per se* violation of the cited rules, there may be circumstances that imply that the interests of the lawyer's client have been improperly enhanced for improper reasons. As stated in LEO 1360, it is the opinion of the committee that a lawyer may not suggest or imply the ability to obtain results for a client through improper influence of a public official. The committee stated further that: "… it is axiomatic that such suggestion or implication alone would be improper, regardless of whether the lawyer making the suggestion intends or attempts to perform the act suggested, and further, regardless of whether the matter's outcome is actually affected." Conversely, where a lawyer or law firm contributes to a public official's election campaign or other political action committee, but makes no suggestion or implication to a client of an intent to improperly influence the public official, no presumption exists that the cited rules have been violated merely because the lawyer appears or intends to appear before a public body on which that public official serves.

In Legal Ethics Opinion 1421 (1991), the Committee stated that it is not *per se* unethical for a lawyer or a firm to contribute to the re-election campaign of an official with whom the lawyer deals. While the lawyer's contribution to the public official's political campaign is not *per se* improper, the Committee stated that the better practice is for such contributions to be made to the official's campaign committee rather than directly to the official.

Topic 5: Lobbying a Public Body

10. May a lawyer lobby a public body on behalf of a client on which he or a firm member serves?

Answer: Yes, as long as the lobbying activity is conducted in a manner complying with Rules 1.11 and 8.4.

This opinion has thus far addressed scenarios involving lawyers providing legal representation to clients in situations involving public bodies. Would the conclusions be different if the services provided were lobbying activities rather than legal representation?

A threshold question is whether the Rules of Professional Conduct even apply to a lawyer when engaging in lobbying activity as opposed to the practice of law. In other words, should this Committee draw any distinction between a lawyer serving as a lobbyist for a client versus appearing on behalf of a client before a public body as a lawyer?

Virginia Code § 2.2-419 states that "lobbying" means influencing or attempting to influence executive or legislative action through oral or written communication with an executive or legislative official; or solicitation of others to influence an executive or legislative official.

In addressing this issue, the Committee is mindful of the fact that "lobbying" is not the practice of law and that non-lawyers engage in such activity. Nevertheless, the Committee believes that a lawyer may engage in certain types of conduct that would violate the Rules of Professional Conduct even though lobbying is not the practice of law. In prior opinions the Committee has held lawyers subject to the applicable RPCs when performing activities outside the traditional

FOOTNOTES

16 § 18.2-438. Bribes to officers or candidates for office.—If any person corruptly give, offer or promise to any executive, legislative or judicial officer, sheriff or police officer, or to any candidate for such office, either before or after he shall have taken his seat, any gift or gratuity, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding, which is or may be then pending, or may by law come or be brought before him in his official capacity, he shall be guilty of a Class 4 felony and shall forfeit to the Commonwealth any such gift or gratuity given. This section shall also apply to a resident of this Commonwealth who, while temporarily absent therefrom for that purpose, shall make such gift, offer or promise.

17 Rule 8.4(b) states that it is professional misconduct for a lawyer to commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness to practice law.

attorney/client relationship.[18] In certain instances a lawyer serving as a lobbyist may engage in conduct violating Rules 1.11 and 8.4(d).

As early as 1981, in LEO 419, this Committee opined that it was *per se* improper for a lawyer to lobby the General Assembly when someone in his firm is a member of the legislature. *See also* LEOs 537 and 1278. The pertinent RPC provisions for this determination are Rules 1.11(a) and 8.4(d).

In contrast to the prior LEOs, Rules 1.11(a) and 8.4(d) do not create a blanket prohibition against lobbying in this context. Further, the Committee is of the opinion that such a blanket prohibition is neither required by the rules, nor justified when the lawyer-lobbyist has not attempted to improperly influence the public servant lawyer and the latter has not used his or her public position to influence the public body to act in favor of the client on whose behalf the lawyer-lobbyist has acted. However, whenever one firm member will be lobbying the legislature of a firm member, the firm member/legislator must be careful to avoid using his public position for improper special advantage for clients, and the other members of the firm must be careful to avoid suggesting that they have special influence for clients through the legislative service of their firm member. *See* Rules 1.11(a) and 8.4(d). The lobbying activity would be permissible if the lawyers comply with the outlined provisions. To clarify, the Committee again makes the distinction that it is not answering whether the legislator may vote on the matter, as that falls under the Act. Rather, the Committee's comments on this point are limited to whether the members of the legislator's firm may lobby the legislature.

To the extent that LEOs 1278, 537, and 419 are inconsistent with these conclusions, they are hereby superseded.

Prior Opinions

This opinion departs significantly from positions taken in prior opinions. In sum, to the extent that the conclusions in this opinion conflict with LEOs 208, 245, 409, 419, 537, 549, 632, 826, 847, 1278, 1360, 1502, 1611, 1718, 1763, and 1773, those opinions are hereby superseded.

This opinion is advisory only, and not binding on any court or tribunal.

FOOTNOTES

18 See Legal Ethics Opinion 1368 (1990) (lawyer mediators subject to legal ethics rules when performing mediations). See also LEOs 1301 (lawyer serving as trustee); LEO 1442 (lawyer acting as lender's agent); and 1617 (lawyer serving as executor, trustee, guardian, attorney-in-fact or other fiduciary).

VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1832

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1832, Potential Conflict of Interest When Prospective Client Speaks Only With the Secretary and Has No Direct Contact with the Lawyer.

This proposed opinion generally addresses whether a conflict of interest is created prohibiting a lawyer from representing husband when wife, as a prospective client, has communicated with the lawyer's secretary and shared details of her case. Wife chooses not to retain lawyer, and the committee is asked to opine as to whether it is ethically permissible for this lawyer to continue to represent the husband against wife. The draft opinion finds that even though the wife never retained the lawyer and never became a client, the lawyer (through his staff person) has a duty of confidentiality, which may "materially limit" the lawyer's representation of the ex-husband. The Committee provides analysis as to what factors must be considered in determining the disqualification of the firm or possible use of an ethics "screen" between non-lawyer staff and the lawyer.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **April 18, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1832
POTENTIAL CONFLICT OF INTEREST WHEN PROSPECTIVE CLIENT SPEAKS ONLY WITH THE SECRETARY AND HAS NO DIRECT CONTACT WITH THE LAWYER

You have presented a hypothetical request in which a year ago, a woman, Ms. X, called a lawyer's office for an initial consultation. Ms. X communicated only with the lawyer's secretary, who scheduled an appointment for Ms. X to meet with the lawyer. Ms. X called the secretary a second time and advised the secretary that the lawyer had previously represented her ex-husband's sister. The secretary advised the lawyer of Ms. X's relationship to that former client. Prior to Ms. X's second call, the ex-husband had made an appointment to meet with the lawyer. The lawyer advised the secretary that he would not take Ms. X's case. The lawyer agreed to represent the ex-husband regarding petitions filed by Ms. X.

Ms. X now objects to that representation. Ms. X says she told the secretary "all the facts" about her case. Despite Ms. X's claim that

she told the secretary all about her case, the lawyer and his secretary maintain they are in possession of no confidential information about Ms. X.

With regard to this hypothetical scenario, you have asked the Committee to opine as to whether it is ethically permissible for this lawyer to continue to represent the ex-husband against Ms. X. Resolution of your question involves a determination of whether this lawyer has a conflict of interest in representing the ex-husband after his office acquired information from Ms. X. The source of the conflict of interest is the lawyer's duty of confidentiality under Rule 1.6.[1] As set out below, the Committee believes that Ms. X's communication with the secretary is information the lawyer is obligated to keep confidential under Rule 1.6. Thus, any information obtained from Ms. X could not be used by the lawyer in representing the ex-husband.

Based on the facts you present, there was no agreement, express or implied, that the lawyer would undertake representation of Ms. X.[2] However, Ms. X's contact with the law firm via the secretary does raise ethical obligations with respect to any confidential information given the secretary.

In prior opinions, the Committee has stated that a person who consults with a lawyer may reasonably expect that confidential information a person shares with a lawyer is protected under Rule 1.6, even if the lawyer and client do not agree to a professional engagement. See LEO 629 (1984) (A lawyer who learns confidences during a professional discussion at a social engagement may not reveal the contents without the client's consent); LEO 1453 (1992) (potential client's initial consultation with lawyer creates reasonable expectation of confidentiality which must be protected even if no lawyer-client relationship arises in other respects); LEO 1546 (1993) (wife who had initial consult with lawyer during which confidential information was disclosed precluded another lawyer in the same firm from representing husband in divorce).

FOOTNOTES

1 Rule 1.6 would require the lawyer and the secretary to preserve the confidentiality of any confidences and secrets Ms. X claims to have imparted to the secretary. A lawyer has an ethical duty to ensure that non-lawyer employees comply with the duty of confidentiality. Rule 5.3

2 Whether or not a lawyer-client relationship was created is a legal issue outside the purview of the Committee. However, the Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with the power to do so appoints the lawyer to provide the services.

See also LEO 1546 (1993) holding that a prospective client's initial consultation with an attorney creates an expectation of confidentiality that would conflict the firm if it later represented the opposing party in the same matter.

In LEO 1794 (2004), the Committee observed that the ethical obligation to protect confidential information of a prospective client encourages people to seek early legal assistance and such persons must be comfortable that the information imparted to a lawyer while seeking legal assistance will not be used against them. That Ms. X in the present scenario never retained the lawyer and never became a client does not relieve the lawyer of this duty of confidentiality.

There is, however, a significant factual difference between the present scenario and that of LEO 1794. In LEO 1794, the prospective client actually meets with the lawyer. In contrast, in the present scenario, the prospective client speaks only with the secretary and has no direct contact with the lawyer. The question then is whether the duties of Rule 1.6 are triggered by the provision of information to support staff rather than to a lawyer.

While the secretary in your scenario is not governed by the Rules of Professional Conduct applicable to lawyers, Rule 5.3(b) imposes a duty on the lawyer to ensure that the secretary's conduct is compatible with the professional obligations of the lawyer. Comment [1] of that rule adds that: "[a] lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. …" (emphasis added).

The Committee applied these ethical precepts in LEO 1800. In that opinion, the Committee analyzed whether the conflicts rules apply when a firm hires the secretary of the law firm representing the opposing party in a litigation matter. The opinion concludes that Rules 1.7 and 1.9 apply exclusively to lawyers, not to support staff. However, that conclusion did not end the discussion or the lawyer's duties in that situation. The opinion looked to Rule 5.3, which governs a lawyer's duty to supervise support staff so that staff conduct is consistent with the lawyer's ethical responsibilities. In other words, lawyers are required to train support staff to preserve client confidences and secrets.

In LEO 1800, the Committee opined that the lawyer in the hiring firm is directed to screen the secretary from the matter so that the secretary will not disclose information regarding the former employer's client to the lawyer. For prospective clients to feel comfortable divulging information about their legal matters to law firms, those clients need assurance that the information will remain confidential, regardless of which individual at the firm does the intake interview and/or initial consultation. Without screening procedures, information obtained by support staff is imputed to the lawyers in a firm.

Returning to analysis of the present scenario, your facts state that Ms. X claims to have "told everything" to the secretary, but the lawyer and the secretary claim to have no confidential information. Further, when the secretary advised the lawyer of Ms. X's relationship to a former client, the lawyer advised that he had already agreed to represent the husband and that he would not represent Ms. X.

The Committee believes that LEO 1800 offers appropriate guidance in your scenario. To avoid the imputation of confidential information to the lawyer, and possible disqualification, the lawyer has an ethical duty to establish a screen between the secretary and lawyer as to Ms. X

and the ex-husband's case. The lawyer must instruct the secretary that she cannot reveal to the lawyer any confidential information obtained from Ms. X. To preserve information protected by Rule 1.6, the lawyer must use another staff person in lieu of the secretary for any work performed relating to the representation of the ex-husband against Ms. X and should send a written communication to Ms. X or her lawyer that these measures have been taken.

In the event that the ethics "screen" is breached and the lawyer learns confidential information communicated by Ms. X to the secretary, the lawyer may find it necessary to withdraw from representing the ex-husband. The lawyer's duty of confidentiality to Ms. X may materially limit the lawyer's representation of the ex-husband, since he would be foreclosed from using any information Ms. X may have given the secretary. See Rule 1.7(a)(2) (a conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a *third person* or by a personal interest of the lawyer) (emphasis added). Even assuming that Ms. X is not a "client" or "former client" she is a third person to whom the lawyer owes a duty of confidentiality which may "materially limit" the lawyer's representation of the ex-husband. Whether such a conflict exists depends, of course, upon the extent that the "screen" was breached and the nature of the information actually learned by the attorney.

For the protection of clients, the law firm, and public, the Committee recommends that the firm train non-lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis.

In rendering this opinion the Committee continues to reiterate their position that confidential information learned by one lawyer in a firm is imputed to all lawyers in the firm and a screen can only be used to cure a client conflict with client consent, pursuant to Rule 1.7(b). Exceptions exist for conflicts that are carried with a departing lawyer pursuant to Rule 1.10 and government lawyers pursuant to Rule 1.11.

This opinion is advisory only, and not binding on any court or tribunal.

VIRGINIA STATE BAR'S
STANDING COMMITTEE ON LEGAL ETHICS
SEEKING PUBLIC COMMENT ON
LEGAL ETHICS OPINION 1836

Pursuant to Part Six: Section IV, Paragraph 10(c)(iii) of the Rules of the Supreme Court of Virginia, the Virginia State Bar's Standing Committee on Legal Ethics ("Committee") is seeking public comment on proposed advisory Legal Ethics Opinion 1836, *Conflicts of Interest Involved When City Attorney Provides Legal Services to Multiple Constituents Within An Organization.*

This proposed opinion generally addresses hypothetical situations in which a City Attorney operates under a government structure in which a Mayor, popularly elected in a citywide election, serves as the chief executive officer of City. Pursuant to the City's Charter, the City Attorney represents the City, as an organization, through its duly authorized constituents. The opinion addresses the issues of confidentiality as it exists between constituents, conflicts as between independent constituents and the designation of subordinate city attorneys to individual constituents.

Inspection and Comment

The proposed advisory opinion may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 a.m. and 4:30 p.m., Monday through Friday. Copies of the proposed advisory opinion can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at http://www.vsb.org..

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed advisory opinion by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **April 18, 2007**.

(DRAFT—January 23, 2007)

LEGAL ETHICS OPINION 1836
CONFLICTS OF INTEREST INVOLVED WHEN CITY ATTORNEY PROVIDES LEGAL SERVICES TO MULTIPLE CONSTITUENTS WITHIN AN ORGANIZATION

You have presented hypothetical situations in which a City Attorney operates under a government structure in which a Mayor, popularly elected in a citywide election, serves as the chief executive officer of City. In addition, the Mayor appoints a Chief Administrative Officer to administer the day-to-day operations of the City government. Pursuant to the City's Charter, the City Attorney represents the City, as an organization, and its constituents. The General Assembly approves the City's Charter, and any amendments thereto, which take effect upon the Governor's signature. The Charter's language regarding the City Attorney's role reads:

The city attorney shall be the chief legal advisor of the council, the mayor, the chief administrative officer and all departments, boards, commissions, and agencies of the city in all matters affecting the interests of the city. The city attorney shall perform particular duties and functions as assigned by the council. The city attorney shall be appointed by the council, shall serve at its pleasure, and shall devote full time and attention to the representation of the city and the protection of its legal interests. The city attorney shall have the power to appoint and remove assistants or any other employees as shall be authorized by the council and authorize any assistant or special counsel to perform any duties imposed upon him in this charter or under general law. The city attorney may represent personally or through one of his assistants any number of city officials, departments, commissions, boards, or agencies that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, commission, board or agency. In matters where the city attorney determines that he is unable to render legal services to the mayor, chief administrative officer, or city departments or

agencies under the supervision of the chief administrative officer due to a conflict of interests, the mayor, after receiving notice of such conflict, may employ special counsel to render such legal services as may be necessary for such matter.

The next to the last sentence in the foregoing paragraph roughly parallels language in Virginia Code § 2.2-507 (A) concerning the Attorney General's provision of legal services to agencies of the Commonwealth of Virginia.

Hypothetical Situations

In your request for this advisory opinion, you have presented the following scenarios in which potential or actual conflicts may arise for the City Attorney:

A. At the request of a Council member, the City Attorney drafts a proposed resolution, which if adopted, would request that the General Assembly make specific amendments to the City Charter. The City Attorney employs a legislative drafting practice used by the Virginia Division of Legislative Services, under which the City Attorney does not disclose a legislative drafting assignment received from either the City Administration[1] or a member of Council until the legislation is introduced at a Council meeting. All parties normally learn about the existence of proposed legislation upon its introduction at a Council meeting. However, the Administration believes that it should be advised of the contents of any proposed legislation, in advance of the Council meeting, where such proposed legislation, if enacted by the General Assembly, would weaken or dilute the powers of the Mayor.

B. At the request of a Council member, the City Attorney prepares an ordinance which, if adopted, would establish certain parameters and regulations under which all commissions or similar entities established by Council or the Mayor would operate. Like all ordinances and resolutions introduced before the Council, the proposed draft bears on its face this text: "Approved as to form and legality by the City Attorney" and, in the City Attorney's opinion, is legal. After the proposed ordinance is introduced before the Council, the Administration issues a memorandum opining that the provisions of the ordinance, as applied to the Mayor, are both unconstitutional and in violation of the Freedom of Information Act. The Administration believes that the City Attorney either should have advised the Council member that the proposed ordinance was illegal or informed the Administration of the Council member's intent to introduce the proposed ordinance.

C. Pursuant to the Charter, the legal services of the City Attorney are available upon request to all constituents of the City organization, including the Council, the Mayor, the Chief Administrative Officer, and all agencies, boards, commissions and departments of the City government. While the Council and the agencies, boards, commissions, and departments of the City government regularly avail themselves of these legal services, the Mayor and the Chief Administrative Officer do so only infrequently.

The Mayor has expressed to the City Attorney that he has a lack of trust in the City Attorney and therefore a need for the Mayor to have the benefit of his own ongoing legal counsel. The City Attorney has offered to the Mayor one of his assistants to serve as ongoing legal counsel to the Mayor. However, the Mayor has rejected this offer, insisting that the Charter specifically designates the City Attorney as the chief legal advisor for the Mayor. Notwithstanding the Mayor's lack of trust in the City Attorney, the Mayor, from time to time, chooses to confide in the City Attorney, but requests that the City Attorney not share with the Council any information the City Attorney obtains while representing the Mayor. In addition, the Mayor has requested that the City Attorney designate *two* assistants, rather than City Attorney, to represent the interests of the Council.

The City Attorney has responded to the Mayor that he is willing to make himself available to provide legal services to the Mayor and that his policy is to make all resources of his office, including attorneys with concentration and expertise in different practice areas, available to all of the constituent clients the Charter obligates him to represent. However, the City Attorney has advised the Mayor that he cannot agree to maintain the confidentiality of all information, in advance and without knowledge of the substance of the information, due to the requirements of Rules 1.6 and 1.7 of the Virginia Rules of Professional Conduct. The City Attorney has further advised the Mayor of the prevailing rule that, as between commonly represented clients, the privilege does not attach.[2] In addition, the City Attorney advised the Mayor that he cannot agree to represent the Mayor, to the exclusion of the Council, because of the Charter's language requiring the City Attorney to represent all of the constituents of the City government, including the Council.

Questions Presented

Based on the foregoing hypothetical situations you have asked the Committee to address the following questions regarding the ethical conduct of the City Attorney:

1. Where an attorney represents a governmental organization and also designated constituents of that organization, does the attorney have an ethical obligation to maintain as confidential information obtained from one constituent while concurrently providing legal services to another constituent? Conversely, is the attorney required to reveal information obtained in the course of performing legal services for one constituent to other constituents within the organization?

Answer: In the absence of any direction from the organizational client, the City Attorney does not have any ethical obligation to maintain as confidential information obtained from a constituent while concurrently providing legal services to

FOOTNOTES

1 The City Administration consists of the Mayor, the Chief Administrative Officer and all of the City employees that report to the Mayor and the Chief Administrative Officer.

FOOTNOTES

2 *See* Rule 1.7, Cmt. [30].

another constituent within the organization. Conversely there may be situations in which the City Attorney is required to reveal information obtained in the course of providing legal services to one constituent to other constituents within the organization.

2. Where an attorney represents a governmental organization, including a council of elected officials as a constituent, does the attorney have an ethical obligation to reveal to or withhold from one member of that council confidential information provided or requests for legal services made by another member of that council?

Answer: The City Attorney does not have an ethical duty to protect as confidential information obtained from one member of Council, but the City Attorney may have an ethical duty to disclose to the other members of Council information obtained from a Council member if disclosure is necessary for the City Attorney to carry out the representation of the City.

3. Where an attorney is charged by a special law enacted by the General Assembly (the Charter) to represent all independent constituents of a governmental organization:

A. May the attorney continue to represent two independent constituents when they disagree on legal or policy issues?

Answer: The City Attorney may continue to represent independent constituents even when they disagree on legal or policy issues unless the conflict materially limits the City Attorney's representation of the City's interests or interferes with the City Attorney's exercise of independent professional judgment on behalf of the City.

B. Does an ethical conflict arise when one independent constituent believes that the attorney's legal conclusions favors another constituent and disagrees with those conclusions?

Answer: An ethical conflict does not arise because one constituent disagrees with the City Attorney's advice. The City Attorney owes his ethical duties to the organization, the City, and not its constituents.

C. May the attorney designate subordinate attorneys from his office to represent each independent constituent under an arrangement where those separate attorneys do not share with their supervisors or any other attorney in the office confidential information obtained while providing legal services to their independent constituent client?

Answer: Absent authorization or direction from the organizational client, the City Attorney may not avoid his Rule 1.4 obligation to keep his client reasonably informed by assigning specific lawyers in his office to work with designated constituents. The organization is the client, not the constituents, and all the attorneys in the City Attorney's office represent the City.

Discussion

1. Before answering your first question, the Committee believes it is important to discuss the role of an attorney representing a local governmental entity. The Committee accepts your conclusion that the City Attorney has one organizational client, the City, which acts through various constituents (Mayor, CAO, Council, etc.). Whether a constituent may also become a "client" of the City Attorney is a question of law beyond the purview of this Committee.[3] Generally, under Rule 1.13 of the Virginia Rules of Conduct, a lawyer representing an organization does not, by virtue of his status as lawyer for the organization, represent the organization's constituents. Rather, "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Rule 1.13 (a).

Your first question asks whether the City Attorney may ethically disclose or withhold confidential information obtained from another constituent. When one of the constituents of an organization communicates with the organization's lawyer in that person's organizational capacity, the communication is protected under Rule 1.6. *See* Rule 1.13, Comment [2]. However, this duty of confidentiality is owed to the "client," i.e., the City, and not to the "constituent" with whom the City Attorney is communicating. Rule 1.6 prohibits the City Attorney from revealing information protected under the attorney-client privilege; however, this privilege belongs to the organizational client, not its constituents.

In the absence of direction on these issues from the organization, Rule 1.6 and 1.13 apply by default. In other words, the City Attorney may look to the highest authority in the city for the treatment of confidential information obtained from a constituent; and, to what extent such confidential information may be shared with other persons in the organization.

One of the most fundamental ethical duties a lawyer owes to a client is the duty to keep the client reasonably informed about matters in which the lawyer is handling for the client. Rule 1.4 (a). In order to discharge this ethical duty, and competently represent the interests of the City, the City Attorney may need to disclose information obtained from a constituent within the organization to others. Indeed, in such circumstances, the City Attorney may be impliedly authorized to

FOOTNOTES

3 The Restatement (3d) of the Law Governing Lawyers, § 14 (2000) offers some guidance on whether an attorney-client relationship is created:

A relationship of client and lawyer arises when:

(1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either:

(a) the lawyer manifests to the person consent to do so; or

(b) the lawyer fails to manifest lack of consent to do so and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or

(2) a tribunal with the power to do so appoints the lawyer to provide the services.

disclose information obtained from a constituent in order to carry out his representation of the City. Rule 1.6(a). Also, there may be situations where the City Attorney cannot honor a request that information obtained from a constituent be kept confidential, where disclosure is necessary to prevent or mitigate severe injury to the organization or to address an action or omission or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization. Under those circumstances, a lawyer must proceed as is reasonably necessary in the best interests of the organization, including the disclosure of information to other constituents or higher authority within the organization. Rule 1.13(b).

In dealing with the constituents of the organization, the lawyer must clarify his role as attorney for the organization when it is apparent that the organization's interests are adverse to those of the constituent with whom the lawyer is dealing. Rule 1.13(d).

Applying this analysis to your first question, the Committee opines that the City Attorney does not have any ethical duty to maintain as confidential, information obtained from one constituent while concurrently providing legal services to another constituent. Conversely, the City Attorney may have an ethical duty to disclose information learned in the course of providing legal services to a constituent within the organization, if it relates to the City Attorney's representation of his client—the City. Whether or not the City Attorney must or should disclose in advance to the Mayor or the Administration the circumstances of the proposed resolution or ordinance, as described in Scenarios 1 and 2, must be guided by the City Attorney's independent professional judgment acting in accordance with what he reasonably believes to be in the best interests of his client, the City. Such a factual and/or legal determination cannot be made by this Committee and is beyond its purview.

2. The discussion and analysis in response to your first question applies equally to your second question. An individual member of an elected body (i.e., Council) is a "duly authorized constituent" of that public body. This does not make the individual Council member a "client" of the City Attorney. The City Attorney has no ethical duty to keep confidential information obtained from a single Council member. In fact, the City Attorney may believe that disclosure of such information to others within the organization is authorized or required in order to diligently and competently carry out his representation of the City.

3. In regard to your third set of questions you ask:

   A. May the City Attorney continue to represent two independent constituents when those two constituents disagree on legal or policy issues?

The mere fact the Council or Mayor disagree on policy or legal issues does not necessarily create a conflict of interest for the City Attorney, precluding him from continuing to serve as their chief legal advisor under the Charter. The Administration may have a difference of opinion with a proposed action by Council, and there may be legal ramifications stemming from that difference of opinion. However, the Administration's disagreement with Council's proposed action or a desire to be advised on the legal ramifications of not complying with the proposed action is not sufficient to constitute a conflict of interest.

   B. Does an ethical conflict arise when one independent constituent believes that the attorney's legal conclusion favors another independent constituent and disagrees with those conclusions?

The Committee does not believe a conflict exists simply because one or more constituents disagree with the City Attorney's legal opinions or conclusions. The City Attorney, in his role as chief legal advisor to the City and the constituents named in the Charter, may render legal opinions or conclusions with which a constituent might strongly disagree or perceive as favoring another constituent. The provision of such legal advice would be consistent with the City Attorney's role as lawyer for the entire organization and would not be a conflict of interest. Moreover, an attorney serving in his role as an advisor may be ethically driven to candidly tell his client things the client does not want to hear. Rule 2.1 requires the City Attorney, as an advisor, to exercise independent professional judgment and render candid advice. Comment [1] to Rule 2.1 recognizes that such advice may be unpleasant to the client and the lawyer should not be deterred from giving such advice by the prospect that the advice will not be palatable to the client.

Although the Charter appears to contemplate the City Attorney representing multiple constituents with divergent interests, the Charter also recognizes that the City Attorney may not be able to represent them because of a conflict of interest. For example, if one constituent desires to file a lawsuit against another constituent, or join them as an adverse party in pending litigation, the City Attorney may not wish to rely on the authorization of Section 4.17 of the Charter, to the exclusion of other factors, to support common representation in a lawsuit between two constituents. Rather, instead of representing directly adverse constituents in litigation, the City Attorney should withdraw and request appointment of special counsel as provided in Section 4.17 of the Charter.[5]

Section 4.17 of the Charter obviously contemplates that the City Attorney will at times serve multiple constituents that have conflicting interests. While such circumstances may be less than ideal, the City Attorney cannot be routinely disqualified simply because the legal interests of concurrently served constituents are in conflict.

FOOTNOTES

5 In such a situation, the City Attorney should recommend the hiring of outside counsel for all independent constituents. Section 4.17 of the Charter authorizes the Mayor to hire outside counsel to represent himself or members of the Administration upon receipt of notice from the City Attorney that a conflict of interest exists. The City Attorney would likely recommend several lawyers to the Council, which would decide whom to hire to represent its interests.

C. May the City Attorney designate subordinate attorneys from his office to represent each independent constituent under an arrangement where those separate attorneys do not share with their supervisors or any other attorney in the office confidential information obtained from the independent constituent during the course of the representation?

This question essentially asks if the City Attorney may use a "screening mechanism" (formerly "Chinese Wall") to resolve conflicts of interest arising out of the representation of two independent constituents within the same governmental organization. A "screen" prohibits the lawyer(s) from participating in any matters involving a particular client. Its elements generally include a policy (1) prohibiting certain lawyers and staff from having any connection with a particular matter; (2) banning discussions with or the transfer of documents to those individuals; (3) restricting access to pertinent files; and (4) educating all attorneys and staff about the separation (both organizationally and physically) or "screen" separating the lawyers from the pending matter.

The screening procedure you propose in your inquiry differs from the typical ethics screen in that the proposed screen would be (i) related to an ongoing representation instead of specific legal matters and (ii) designed to screen attorneys representing potentially adverse interests within the organization. Because the "screened" attorney would be unable to reveal to the City Attorney or his assistants any confidential information given to him by the assigned constituent, this mechanism would likely have the effects of limiting the City Attorney's ability to (i) make all of the resources of his office available to the particular constituent and (ii) ensure that the assigned attorney is properly representing the interests of the organization as a whole.

The City Attorney should seek guidance from the organization regarding the designation of lawyers within his office to serve specific constituents. In the absence of such direction, the Committee believes that the Rules of Professional Conduct would preclude such utilization of a screen.

Finally, such an arrangement would likely interfere with the City Attorney's availability to keep his client, the City, reasonably informed about matters handled by other lawyers in his office. *See* Rule 1.4.

In addition, such a screening mechanism is inconsistent with the premise of Rule 1.10 that "a firm of a lawyer is essentially one lawyer for purposes of the rules governing loyalty to the client" or "that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." Rule 1.10, Comment [6]. The screening mechanism is also inconsistent with the premise of Rule 1.6 that confidential client information is shared with attorneys in a law firm. *See* Rule 1.6, Comment [6]. The Rules of Professional Conduct define a "firm" or "law firm" as including a legal department of a corporation *or other organization*. (emphasis added).[6]

Moreover, if a "screening mechanism" of the nature you describe would make it more difficult for the City Attorney to adequately represent the City as an organizational client, then it should not be implemented by the City Attorney.

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

FOOTNOTES

6 Virginia Rules of Professional Conduct, Terminology ("Firm" of "Law Firm"). See also Rule 1.10, Cmt. [1a] stating "with respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct."