Against Proposed LEO 1829

by Philip V. Anderson

For almost thirty years, the Virginia State Bar has followed a "bright-line rule"[1] that it is improper for a lawyer to lobby or represent a client before a local or state governing body or agency on which another lawyer from the same firm serves in an official capacity. This "bright-line rule" is obviously not necessary to avoid actual conflicts in every instance, but it does serve the dual purpose of reducing improper influence in government and effectively promoting consistency, certainty and, most importantly, the public's confidence in the integrity of government and, hopefully, the legal profession.

The Virginia State Bar's Standing Committee on Legal Ethics now proposes, in a new seventeen-page opinion, to eliminate the bright-line rule in favor of a case-by-case, fact-specific application of the ethics rules to each individual situation, or what might be called a "maybe rule." By way of example, under the current opinions a lawyer or law firm could not represent a client before the State Water Control Board if another lawyer in the firm served on the board. Under the proposed opinion, the answer to whether this would be permissible would be "maybe," provided the lawyer serving on the board did not participate in deliberations of the firm's client's matter.

What this proposed change does to consistency and certainty is obvious. What it does to the public's confidence in our profession and our institutions of governance is harder to measure. If the editorial pages of our state's major papers are any indication[2], there is reason for concern. This concern is only heightened by the comments of numerous public officials who have publicly voiced their concern, even though they stand to benefit financially if the proposed opinion were adopted. This proposal will serve as yet another arrow in the quiver of those who believe that all public officials are on the take and all lawyers facilitate those transactions. The naysayers will always be with us, but we certainly should reflect long and hard before softening an ethical stance that has worked well for the past twenty-six years.

Why change the bright-line rule? Lawyers who want to engage in public service and who are committed to doing so with integrity will automatically eliminate their firms from being able to represent clients before the bodies on which they serve. Yes, continued adherence to the bright-line rule will result in either continued restriction of firms from an attractive area of practice, or their lawyers will be restricted from public service. While perhaps neither option is desirable, this is a price well worth paying for trust and integrity in government.

Who has asked for this change? Where is the groundswell of support for the ability of law firms to lobby before a public body on which one of its own lawyers serves? The Ethics Committee is recommending this change not at the request of the public, a state or local governing body or a member of the bar. Rather, the committee proposes this change on its own initiative.

The Ethics Committee opines that the bright-line rule discourages lawyers from engaging in public service. While ample evidence exists of the decline in public service by lawyers, no empirical data establishes that this bright-line rule is either the reason for that decline or that the more flexible "maybe rule" will result in an increase of lawyers engaging in public service. The more likely explanation for the decline almost certainly has to do with the increasing demands of public service and the commensurate reduction in time available for maintaining a law practice in a fiercely competitive market.

Legal Ethics Opinion 1829

Proposed Legal Ethics Opinion 1829 can be read in the March 2007 edition of *Virginia Lawyer Register* (p. 30–37), or online at **www.vsb.org/site/regulation/leo-1829**. The Virginia State Bar will accept public comment on LEO 1829 through June 8, 2007.

Philip V. Anderson and Thomas E. Spahn here offer their opinions of the proposal. Anderson, a former president of the Virginia State Bar, practices general litigation with Frith, Anderson & Peake PC in Roanoke. Spahn serves on the Virginia State Bar's Legal Ethics Committee; he is a litigator with McGuireWoods.

The automatic disqualification of firms and the decline in public service are certainly valid concerns and provide substance for a healthy discussion of the existing rule. However, in the final analysis, what will be the costs of adopting the proposed opinion? The answer, I believe, is obvious: The public's confidence in the integrity of government, our profession, and, yes, even in the agency charged with the responsibility for protecting the public and enforcing our profession's ethics rules will only erode at an even more feverish pace.

We should all offer a heartfelt thanks to those lawyers who have chosen public service. We can only hope that they will work with firms that see value in their abilities and talents, separate and apart from the clients potentially drawn to the firms because they have matters before the bodies on which lawyers in the firm serve.

While firms that wish to further expand their practices before public bodies may find the bright-line rule overly restrictive—when appropriate safeguards are in place to prevent actual influence—the cost to the entire profession of perceived undue

Against *continued on page 20*

Against *continued from page 14*

influence is simply too high a price to be paid by all for the furtherance of business objectives of the few.

Finally, it is worth pointing out that the "bright-line" approach that has been in effect for twenty-six years has been an easy and straightforward standard up to this point. In contrast, the new "maybe" standard in proposed LEO 1829 will make it extremely difficult for the bar and its disciplinary officials to enforce the applicable ethics rules. Developing and presenting "clear and convincing" proof of an actual conflict or improper influence would be difficult if not impossible, despite the assumptions of many observers that a conflict of interest may have been involved. This would be an unhealthy position in which to put our lawyer regulatory agency.

Accordingly, I sincerely hope that the Virginia State Bar will not propose the adoption of this opinion by the Supreme Court of Virginia.

Endnotes:

1 The reference to a "rule" throughout this article is in fact a group of advisory ethics opinions on the subject of lawyers appearing before a public body on which another lawyer in the firm serves and the conflict of interest that may be created. In a technical sense, these advisory opinions are not a "rule," but the lawyers typically abide by these ethics advisory opinions as if they were a "rule."

2 *See* "Va. Bar Could Reverse Limits on Firms Hiring Legislators," *The Washington Post*, Feb. 16, 2007, at A01; "Senate Debates Legal Ethics Change," *Richmond Times-Dispatch*, Feb. 21, 2007; "Invitation to Mischief," *Richmond Times-Dispatch*, Feb. 20, 2007, at A9; "In God We Trust, Not Lawmakers" *The Roanoke Times*, Feb. 20, 2007