In Favor of Proposed LEO 1829

by Thomas E. Spahn

Proposed Legal Ethics Opinion 1829 would restore Virginia's ethics rules-based approach, properly allow the General Assembly and other public bodies to regulate their own members, and eliminate an irrational restriction that flies in the face of one of Virginia's proudest traditions—public service by lawyers.

Several legal ethics opinions created a per se rule prohibiting lawyers from lobbying or appearing before any public body (including the Virginia General Assembly) on which any of the lawyer's partners sit—even if that partner recuses herself from the body's deliberations and vote on the matter. Proposed LEO 1829 eliminates the per se prohibition, and instead requires a case-by-case determination based on the pertinent ethics rules. It does not prohibit the General Assembly or any other public body from enacting whatever statute, rule or practice it wants to adopt for its own members.

The per se prohibition on a lawyer lobbying or appearing before a body on which a partner serves is relatively new, is not based on any ethics rule and is instead rooted in a vague "appearance of impropriety" test that has been mostly abandoned.

The per se prohibition at issue does not represent some ancient Virginia tradition. The prohibition apparently dates to a 1981 Legal Ethics Opinion consisting of five sentences but no analysis—which overruled an earlier opinion "expressing the view that such conduct is not per se unethical" (which is precisely the approach adopted by proposed LEO 1829). In 1988, the bar explicitly held that a lawyer could represent clients before a county Board of Zoning Appeals on which his law partner (also his wife) served, as long as the partner/wife disqualified herself from that matter. The bar reaffirmed that opinion in 1989. This is the approach of proposed LEO 1829.

The per se prohibition at issue actually dates only from a 1998 Legal Ethics Opinion (LEO 1718). In that opinion, the Ethics Committee held that a lawyer could not "represent a client in a matter before the local governing body on which his partner served, even if the partner recused himself." The Ethics Committee recognized in that opinion that "no Disciplinary Rule explicitly answers the question presented." Instead, it repeatedly cited "the appearance of impropriety test" in adopting a per se prohibition. Inexplicably, the Ethics Committee reaffirmed this conclusion in 2001 (LEO 1763), although the Supreme Court of Virginia adopted new ethics rules in 2000 that explicitly dropped the "appearance of impropriety test" from the Virginia ethics rules (joining the American Bar Association and all or nearly all other states in abandoning that undefined and sloppy standard).

Proposed LEO 1829 restores the power of the General Assembly and other governmental entities to decide for themselves how to deal with their members' possible conflicts of interest. Unless the lawyer serving in the General Assembly or on some board has an attorney-client relationship with the board, the ethics rules dealing with her conflicts of interest are fairly limited—and do not contain the per se approach adopted by the two cited opinions. LEO 1718 indicated without support that a lawyer-legislator who abstains from a vote because the matter involves her law firm's client has improperly "deprived" both the governing body and her constituents of the benefit of her "voice" in the decision-making process. Similarly, LEO 1763 found that recusal did not cure the conflict because the lawyer-member has engaged in activities in which her personal or professional interests are "in conflict with official duties or obligations to the public" (quoting Rule 1.11 Comment [1]).

The Virginia Legal Ethics Committee has no business making these kinds of decisions. The decisions should be made by the elected or appointed bodies on which the lawyers serve. This is precisely what the ABA held in its 1962 legal ethics opinion in which it abandoned the per se prohibition. The ABA held that if the legislature had dealt with conflicts of interest in a constitutional or statutory provision, "consent has been given resolving the conflict of interest questions, either by the people through the constitution or by the Legislature speaking for the state."

This is exactly what the Virginia General Assembly has done. Virginia Code § 2.2-3100 et seq. provides precise conflicts-of-interest guidance to legislators and other government officials. That law has as its stated purpose "establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests." The law requires disclosure and recusal in certain situations, but does not adopt a per se approach. Virginia's Attorney General reads the law this way as well. (1989 Va. AG 10)

It is difficult to imagine a clearer expression of the state's and the public's will. And it is presumptuous at best for the Ethics Committee to ignore this legislative statement. Indeed, another Virginia law indicates that "the Supreme Court shall not promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys which are

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inconsistent with any statute." Virginia Code § 54.1-3915. Thus, LEOs 1718 and 1763 are squarely at odds with the Virginia statute designed to establish a "single body of law" on the issue of government officials' conflicts.

The General Assembly has the right and obligation to decide whether to apply the current Conflict of Interests Act, or whether to add the per se prohibition that the Ethics Committee created. If the General Assembly or some other governmental body wants to prohibit one of its member's partners from lobbying or appearing before the body, it may do so at any time.

Least important, the per se prohibition discourages lawyers from serving on governmental bodies. Proposed LEO 1829, by returning to a rules-based analysis, should encourage increased participation by lawyers on public bodies. Virginians should welcome this. If they have concerns about any improper conduct by those lawyers or their partners, the public can demand that the public body adopt appropriate restrictions.

Proposed LEO 1829 properly abandons the one-size-fits-all per se rule that the Ethics Committee created. The proposed opinion applies the ethics rules as the Virginia Supreme Court has adopted them—without the sort of policy overlay that the Ethics Committee is not equipped or empowered to make.