Committee Opinion
December 2, 1998

LEGAL ETHICS OPINION 1718

CONFLICT OF INTEREST; ATTORNEY AS MEMBER OF LOCAL GOVERNING BODY AND MEMBER OF LAW FIRM WHICH REPRESENTS A CLIENT IN MATTER WHICH MUST BE ACTED UPON BY THAT GOVERNING BODY.

You have presented a hypothetical in which Lawyer A and Lawyer B are members of the same law firm. Lawyer A is a member of a local governing body. Lawyer B represents a client of the law firm in a zoning application before the local governing body. Lawyer A will disclose his relationship with Lawyer B and will abstain from participation in the local governing body's consideration and decision concerning the zoning application of the law firm's client. Based on those facts, you have asked the committee to opine whether it is ethically permissible for Lawyer B to represent a client in a matter before the local governing body on which Lawyer A serves if Lawyer A discloses his relationship with Lawyer B and abstains from participation in the local governing body's consideration of the matter.

The appropriate and controlling disciplinary rules pertinent to your inquiry follow:

DR:8-101(A): A lawyer who holds public office shall not:

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

> DR:9-101(C): A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official.

Guidance is also provided in the Ethical Considerations to the Disciplinary Rules, as follows:

> EC:8-8: Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC:9-6: Every lawyer owes a solemn duty . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

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In prior LEOs the committee has addressed whether a lawyer may lobby the General Assembly on behalf of a client when another lawyer in the law firm is a member of the General Assembly. In LE Op. 419, dated July 21, 1981, the committee opined that it was not ethically permissible for a lawyer to lobby the General Assembly or other legislative body when his partner was a member of the legislative body, notwithstanding disclosure and abstention by the lawyer-legislator and disclosure by the lawyer-lobbyist. In LE Op. 537, dated January 18, 1984, the committee affirmed LE Op. 419. In doing so, the committee observed that "the Virginia Comprehensive Conflict of Interest Act does not obviate [the conclusion reached in LE Op. 419] nor in any way diminish the professional responsibility of the attorney."

The subject was revisited in LE Op. 1278, dated September 21, 1989. The committee was asked to consider whether, in view of the enactment of the detailed General Assembly Conflict of Interests Act (Code of Virginia §§ 2.1-639.30, et seq) a member of a law firm was permitted to lobby the General Assembly when another member of the law firm was a member of the General Assembly. The committee affirmed LE Op. 419 and LE Op. 537, stating:

> The Committee is of the view that the conclusions reached in Legal Ethics Opinions Nos. 419 and 537 continue to be applicable to the situation you have described, notwithstanding the greater detailed disclosure now required of legislators under the [Conflict of Interests] Act. It is the Committee's opinion that the legal requirements of disclosure and abstention imposed on members of Virginia legislative bodies do not override the ethical admonitions of the applicable disciplinary rules. The Committee continues to believe that compliance with the Act by the legislator is a legal, not an ethical, requirement and will not obviate the need for both lawyer-legislators and lawyer-lobbyists to adhere to the ethical obligations of the profession.
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> Therefore, upon careful reconsideration, the Committee reaffirms the prohibitions articulated in Legal Ethics Opinions Nos. 419 and 537 and opines that, the General Assembly Conflict of Interests Act notwithstanding, it is improper for an attorney to lobby before the General Assembly or other legislative body when a lawyer with whom he shares a professional relationship is an elected member of that body.

Ethics panels in most other jurisdictions have concluded that it is not ethically permissible for a lawyer in the lawyer-legislator's law firm to represent clients in matters before a legislative body on which the lawyer-legislator serves. That the lawyer-legislator recuses himself/herself from participation and voting in the matter was found to be inadequate to cure what some ethics panels described as a conflict of interest, and others, an appearance of impropriety. However the ethical proscription was described, it was imputed to the entire law firm. See Michigan Op. RI-22 (1989); Connecticut Op. 37 (1988) and Op. 94-19 (1994); Illinois Op. 90-17 (1991); Iowa Op. 92-31 (1993), 93-25 (1994), and Op. 96-20 (1996); Rhode Island Op. 93-14 (1993); Kentucky Op. E-347

(1991); Alaska Op. 76-1 (1976); Nebraska Op. 96-2 (undated); Philadelphia Bar Ass'n Op. 87-20; South Carolina Op. 90-20 (1990); and Maryland Op. 91-15 (1991); see In re Vrdolyak, 137 Ill. 2d 407, 560 N.E.2d 840 (1990), and In re Opinion 452 87 N.J. 45, 432 A.2d 829 (1981).

A different conclusion was reached in In re Ethics Op. No. 74-28, 111 Ariz. 519, 533 P.2d 1154 (1975) (en banc). In that case a lawyer was an elected member of the city counsel. One question presented was whether members of the city councilman's law firm were prohibited from representing clients in civil matters before the city council.

It was argued that the Arizona conflict of interests laws controlled. The public interest was fully protected, it was contended, by compliance with the statutory curative measures by which public officials could avoid potential conflict of interests. The Arizona Supreme Court turned away the "exclusivity" of the conflict of interests laws, stating that "This court can obviously set higher standards for the members of the bar than the legislature has set for public officials in general." 111 Ariz. at 521, 533 P.2d at 1156. The court reached what it described as a common sense solution to avoid an appearance of impropriety and to encourage public service by lawyers:

> [M]embers of the firm can appear before the city council if: 1) the attorney public official publicly announces his disqualification and, if there is a record of proceedings, that disqualification appears in the record, 2) the attorney public official refrains from discussing the matters upon which the firm appears with any of his colleagues on the council and any city employees involved with the matters, and 3) there is a separation of accounts so that the attorney public official in no way shares in the fee or other remuneration received by the firm.

Id.

In a concurring opinion, Chief Justice Cameron addressed the Canon 9 axiomatic norm that lawyers are to avoid "even the appearance of impropriety," stating at 522, 533 P.2d at 1157:

> Canon 9 states, `A lawyer should avoid even the appearance of professional impropriety. ' This is, of course, a worthy and commendable goal, but that is all it can be - a goal that is often unattainable in the practical world of private law practice. What is professionally improper is frequently in the eye of the beholder and ethical conduct to those outside the legal profession can have the appearance of professional impropriety. . . . [I]t should then be emphasized that while we are concerned with avoidance of conduct that would give the appearance of professional impropriety, it is actual unethical conduct which is our primary concern. Ethical conduct which only incidentally creates the appearance of professional impropriety in the minds of the public should not, absent other factors, be proscribed. To be overly strict in interpreting Canon 9 would prevent an attorney from discharging his responsibility as a citizen to participate in public affairs and hold public office. To deny an attorney this opportunity for public service would not only unnecessarily restrict his rights as

> a citizen, but would imply that attorneys are exempt from the reasonable demands and responsibilities of citizenship, a result which, we believe, would reflect unfavorably upon the legal profession and be a loss to society.

See West Virginia Op. 84-5 (1985), permitting a lawyer to serve as a hearing examiner for a state commission when his law firm represented clients before the commission, provided he did not participate in the matters in which his law firm or law firm clients were involved; New Hampshire Op. 1996-92/14 (1992), permitting law firm to represent clients before workers' compensation appeals board on which one of its lawyers was an appointed member, provided the lawyer-member publicly disqualified himself and abstained from participation and did not attempt to influence the other members, and the law firm did not have access to information of the appeals board.

The ABA Standing Committee on Legal Ethics has issued two opinions on the ethics issue presented. ABA Formal Opinion 296 (1959) concluded that there was an inherent conflict of interest in a lawyer lobbying the legislature for a client when another lawyer in the law firm was a member of the legislature. The conflict of interest affected the public, and the public could not consent.

Three years later, the ABA reconsidered and modified its conclusion. In ABA Formal Opinion 306 (1962), the ABA said that the unintended effect of its earlier opinion deterred lawyers from serving in state legislatures, and that a modification was warranted. Its modification was tied to states' conflict of interests rules for legislators.

The ABA reasoned that when a state had adopted constitutional or statutory conflict of interests rules requiring legislators to disclose personal interests and abstain from voting, those rules expressed the public policy of the state. Hence, a disclosure of the lawyer-legislator's interest in and relationship to the lobbying by a lawyer in his/her law firm, coupled with abstention from voting on the matter, cured the conflict of interest. The "implied consent" rule was stated, as follows:

> We have concluded that if in any particular state there are constitutional or statutory provisions or legislative rules which expressly or by necessary implication recognize the propriety of a lawyer appearing before legislative committees, or otherwise lobbying in the legislature for a client where a member of his firm or associate was at the time a member of the legislature, or where provision has been made permitting a member of the legislature to disqualify himself from voting on or participating in the discussion of the matter involved, 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.

Notwithstanding the ABA's conclusion, the committee is not persuaded that a lawyer-legislator's compliance with the applicable conflict of interests laws ethically permits his law firm to represent clients in matters before a state or local governing body on which he serves. Such compliance discharges a legal obligation only. Conduct that is permissible

as a matter of law is not necessarily permissible as a matter of ethics. The distinction was clearly drawn in Gunter v. Virginia State Bar, 238 Va. 617, 621 (1989):

> The lowest common denominator, binding lawyers and laymen alike, is the statute and common law. A higher standard is imposed on lawyers by the Code of Professional Responsibility, many parts of which proscribe conduct that would be lawful if done by laymen. . . . [W]e emphasize that more is expected of lawyers than mere compliance with the minimum requirements of that standard . . . .
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> [C]onduct may be unethical, measured by the minimum requirements of the Code of Professional Responsibility, even if it is not unlawful. . . .

State and local government conflict of interests laws express a salutary public policy. The public policy expressed embraces citizen legislators generally. Lawyers who hold public office assume responsibilities beyond those of other citizens by virtue of the Code of Professional Responsibility. See Annotated Rules of Professional Conduct, Rule 8.4, com. 3 (3rd ed. 1996). Moreover, the committee has opined in several opinions that the Code of Professional Responsibility governs the conduct of lawyers who serve in a capacity other than lawyer for a client. See LE Op. 1443 (lawyer acting as "lender's agent"); LE Op. 1487 (lawyer acting as executor); LE Op. 1587 (lawyer acting as Chapter 7 bankruptcy trustee); LE Op. 1617 (lawyer acting as executor, trustee, guardian, or attorney-in-fact). Hence, the committee affirms its conclusion in LE Op. 1278 that the legal requirements of disclosure and abstention applicable to all members of legislative bodies do not override the ethical constraints under the Code of Professional Responsibility applicable to lawyers who are members of legislative bodies.

The committee recognizes that no Disciplinary Rule explicitly answers the question presented. As the committee observed in LE Op. 1702, legal ethics, like ethics generally, are fraught with gray areas that do not fit under a literally dispositive Disciplinary Rule. There is not an ethical vacuum, however. The polestar is conduct that, consistent with the admonitions of EC:9-2 and EC:9-6, reflects credit on and inspires public confidence in and respect for the integrity of the legal profession and avoids the appearance of impropriety.

Compliance with conflict of interests laws does not necessarily satisfy those ethical admonitions. The Virginia Attorney General has addressed the purpose of the conflict of interests law, as follows:

> Our system of government is dependent in large part upon its citizens maintaining the highest trust in their public officials. The conduct and character of public officials is of particular concern to state and local governments, because it is chiefly through that conduct and character that the government's reputation is derived. The purpose of the conflict of interests law is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised or

> affected by inappropriate conflicts. To this end, the [Conflict of Interests] Act defines certain standards or types of conduct which clearly are improper. The law cannot, however, protect against all appearance of conflict.

Attorney General COI Advisory Opinion No. 9-A10 (1989) [AG COI:9-A10] (emphasis supplied).

You express a concern that LE Op. 1278 is unduly restrictive and could have a chilling effect on lawyers who wish to stand for election to a local governing body. The committee is not insensitive to your concern, yet a different rule could have a chilling effect on the adequacy of a lawyer-legislator's representation of his constituents. For example, if the lawyer-member of the local governing body in your hypothetical is associated with a law firm that has a substantial zoning practice before the local governing body, his/her recusal from participation in all of those applications would effectively leave his constituents without a voice in the decision-making process.

The sense of the committee is that public confidence in the legal profession is not inspired, nor is an appearance of impropriety avoided, if a law firm represents clients before a governing body on which one of its lawyers is a member even if he/she abstains from participation and voting. A likely public perception, and an understandable one, is that the lawyer for the client has an advantage or an "inside track" because another lawyer in the law firm is a member of the governing body.

Regardless of the lawyer-member's recusal, his/her cultivation of a relationship of trust and respect with the other members and their inter-personal relations are likely to result in a public perception that his/her law firm profits from that relationship in its representation before the governing body. Conversely, if the law firm's representation is unsuccessful, a nagging suspicion for the client is whether the governing body's decision was the result of an unarticulated concern that it not be accused of impropriety in dealing with a member's law firm.

That the lawyer-legislator would not, as required in In re Ethics Op. No. 74-28, receive any portion of the legal fee does not diminish an appearance of impropriety. The requirement itself seems to elevate form over substance. Even if a portion of the defined fee is not distributed to the lawyer-member of the governing body, the fee paid the law firm may well be used to pay law firm overhead allocable to the lawyer-member and thus benefit him/her. If the lawyer-member of the governing body produces significant clients that the law firm represents before the governing body, the law firm may consider his/her production of business in arriving at his/her compensation or percentage of profits. There, too, the lawyer-member has derived an economic benefit from his law firm's representation of clients before the governing body on which he/she serves.

Moreover, if a law firm represents clients before a governing body when one of its lawyers is a member, there is the appearance, if not the fact, of conflicting loyalties. The law firm, which includes the lawyer who sits on the governing body, owes a duty of loyalty to the client and must use all available resources to achieve the client's lawful

objective. The duty of loyalty is diluted and the available resources impaired, however, when the law firm must exclude the lawyer-legislator from the representation, and the law firm cannot enlist his knowledge of the subject matter or of the governing body in the representation. The lawyer-legislator may have acquired non-public or even confidential information as a member of the governing body that would serve the client's interest. The client is denied the benefit of such information, however. If the law firm seeks client-consent to the limitation on its resources, the law firm might well be asking for consent to less than adequate representation.

Similarly, the lawyer-legislator has a duty to the governing body on which he/she serves and to his/her constituents. When he/she abstains from the governing body's decision-making because it involves his/her law firm's representation of a client, then his/her personal interest is elevated over his/her duty as a public servant. Both the governing body and the lawyer-legislator's constituents are deprived of the benefit of his/her voice in the decision-making process.

The committee is not unmindful of Chief Justice Cameron's observation that avoiding an appearance of impropriety is but a worthy goal that is often unattainable in the private practice of law. The rationale underlying the worthy goal is, as Plato's allegory of the cave illustrated long ago, that appearance can be understood to be reality. "[W]here public confidence is in issue, what people think is true may be as important as what is true." Association of the Bar of New York, Report of the Special Committee on the Federal Conflict of Interest Laws, Conflict of Interest and Federal Service 17 (1960). "The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself." Lloyd N. Cutler, Conflicts of Interest, 30 Emory L.J. 1015, 1020 (1981). Significantly, the appearance of impropriety test remains in the ethics law of the federal government. See generally Daniel L. Koffsky, The Appearance of Wrongdoing, 6 Georgetown J. of Legal Ethics 501 (1993).

The sense of the committee is that whenever lawyers' conduct presents an appearance of impropriety that can diminish public confidence in and respect for the integrity of the legal profession, as well as the administration of government, lawyers must adhere to the "higher standard" of ethical conduct emphasized in Gunter to avoid the appearance of impropriety The committee concludes, therefore, that it is not ethically permissible for a law firm to represent a client in a matter before a governing body when one of the law firm's lawyers is a member of the governing body even if he/she discloses the conflict and abstains from participation and voting in the matter.