Committee Opinion
November 14, 2003

LEGAL ETHICS OPINON 1785 CONFLICT – CAN A COUNTY'S ATTORNEY REPRESENT A COUNTY BOARD OF SUPERVISORS IN A SUIT AGAINST THE BOARD OF ZONING APPEALS (BZA) WHEN THE COUNTY'S ATTORNEY ADVISES IN MATTERS BEFORE IT?

You have presented a hypothetical in which a corporation obtains a variance from the Board of Zoning Appeals (BZA). The Board of Supervisors subsequently voted to challenge the decision of the BZA and instructed the county's part-time County Attorney to file a petition with the county's Circuit Court, pursuant to Va. Code §15.2-2314 as counsel for the Board of Supervisors. The petition names both the BZA and the corporation as respondents.

The general duties of the County Attorney include providing legal counsel to the Board of Supervisors and to the various officials and agencies of or serving the county government. As part of those duties, the County Attorney on an occasional basis has rendered legal advice to the BZA when asked. The BZA considers the County Attorney to be its attorney. The BZA is not appointed by the Board of Supervisors; the Circuit Court appoints the members of the BZA. The Board of Supervisors has the power to enact zoning ordinances. The BZA has the power to grant variances to those ordinances. If the Board of Supervisors disagrees with the BZA's decision to grant a particular variance, the Board of Supervisors can challenge that BZA action by petitioning the Circuit Court.

The BZA consulted the County Attorney for legal advice regarding the public notice for this particular zoning variance. The basis of the petition's challenge of the variance involves some other aspect of the variance or its issuance.

The BZA has requested of the County Attorney that it needs counsel in this lawsuit regarding the corporation's variance. The corporation's attorney has informed the County Attorney that the corporation's attorney thinks it is a conflict of interest for the County Attorney to continue to represent the Board of Supervisors in this matter. The County Attorney maintains he has no conflict as the BZA is not a "real" party to the litigation, that the only "real" party is the corporation. On the same ground, the County Attorney maintains that the BZA does not need counsel in the matter.

You have asked the committee to opine, under the facts of this inquiry, the following questions:

1) whether it is a conflict of interest for the County Attorney to serve as counsel for the Board of Supervisors in that board's petition filed against the BZA when that attorney regularly advises the BZA on matters as needed and specifically advised the BZA on the public notice for this variance;

2) if the County Attorney does have a conflict of interest, would consent from the BZA, or anything else, "cure" the conflict, and

3) if the County Attorney does have a conflict of interest but refuses to withdraw from representation of the Board of Supervisors, would the corporation's attorney have a duty to report this conduct to the Virginia State Bar, and if so, must the complaint be filed immediately rather than at the end of the proceedings.

This committee was previously faced with a similar situation, addressed in LEO 1209. That opinion involved a county attorney filing a petition for a Board of Supervisors to challenge that BZA's grant of a special use permit. In that opinion, the committee concluded that the attorney had no conflict of interest.

At first blush, LEO 1209 would appear dispositive of the present inquiry. However, the hypothetical now before the committee contains two facts not stated in the prior opinion. Whereas in LEO 1209, the County Attorney did not advise the BZA on that particular permit, the present County Attorney advised the BZA on the public notice for this particular variance. Also, whereas in LEO 1209 no mention is made of the petition naming the BZA as a party, the petition in the present hypothetical was filed against the BZA, by name. These two distinguishing facts must be considered in determining whether or not a conflict of interest is triggered in this hypothetical.

The pertinent rules for analysis of the conflicts consequences of those facts are Rule 1.7 and Rule 1.9. Rule 1.7 addresses conflicts between two current clients, while Rule 1.9 addresses conflicts between a former client and a current client. The facts of this hypothetical suggest in one instance that the attorney advises the BZA from "time to time," which would imply that if no such advising is currently being provided, than the BZA is a former client. However, the facts also state the BZA thinks of the County Attorney as its attorney, which would imply that the BZA is a current client of the County Attorney. Whether an attorney/client relationship actually exists at the time of the petition is a factual issue, determination of which is outside the purview of this committee. Accordingly, this opinion will consider the potential conflicts under either scenario, but notes that an attorney's duty of communication under Rule 1.4 and duty to protect a client's interests upon termination, under Rule 1.16, combine to place the onus of clarity regarding the beginning and the end of the representation on the attorney and not the client. If a client's belief that a representation is on-going is reasonable under the circumstances, and the attorney does nothing to indicate that the relationship has terminated, an attorney may not be able to treat that client as a "former" client for conflicts of interest analysis.

If in fact this County Attorney previously advised the BZA on various matters but currently does not represent the BZA, the BZA would be a former client for purposes of Rule 1.9. That rule provides that an attorney may not represent a current client in a matter adverse to a former client in a matter substantially related to the prior representation. Here, the current and prior matters in question are the petition challenging the variance and the advice to the BZA regarding the public notice for that variance. As noted in the facts set out above, the notice is not the ground stated in the petition for this challenge, but this

corporation's variance was the subject of each representation. This committee opines that the notice for the variance *is* substantially related to the variance itself. By filing a petition on behalf of the Board of Supervisors against the BZA as defendant involving the same variance discussed with the BZA in the past, this attorney has a conflict of interest.

It is the position of the County Attorney that despite filing a petition against the BZA, that the BZA is not a "real" party for conflicts of interest purposes, that the only "real" party is the BZA's co-defendant, the corporation. This committee sees no such wiggle room in Rule 1.9; when an attorney files a lawsuit on behalf of one client naming a former client as the adverse party, that counts as "a matter adverse to" that former client. The rule contains no notion of some parties being less real than other parties. The committee finds the County Attorney's position untenable under these Rules. Under an assumption that the BZA is a former client of the attorney, he has a conflict of interest under Rule 1.9.

Alternatively, if the County Attorney's representation of the BZA is on-going, with no termination occurring between various instances of advice, then the BZA is a current client and Rule 1.7 would govern this conflicts question. Rule 1.7 would find a conflict of interest whenever one attorney represents adverse parties in the same litigation; there are no exceptions. As discussed above, the committee is unpersuaded by the County Attorney's argument that he has no conflict of interest because the BZA is not a "real" party. Comment Seven to Rule 1.7 specifically states that the rule "prohibits representation of opposing parties in litigation." By naming the BZA in the petition, the County Attorney made the BZA a party and triggered this conflict.

Under the above analysis, the committee concludes that regardless of whether the BZA is a former or a current client, the County Attorney has a conflict of interest in filing this petition against the BZA. Indicative of the nature of that conflict is that the BZA went to him to request representation in the lawsuit, and it was he who evaluated their legal need and determined that, in his view, the BZA needs no counsel. The mere provision of that advice, which is legal advice, triggered a conflict of interest for this attorney as his client, the Board of Supervisors, would seem to have an interest in whether or not a party it is suing has counsel in the matter.

Your second inquiry is whether a conflict of interest of this sort is "curable." The conflict of interest in this situation was analyzed under two alternatives. If the conflict stems from adversity to a former client under Rule 1.9, then consent from the former client (here, the BZA) would "cure" the conflict and allow the County Attorney to represent the Board of Supervisors. In contrast, if the source of this conflict of interest is Rule 1.7's provisions regarding adversity between current clients, consent will be ineffective. Consent may only cure such conflicts where "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client." As outlined above, Comment Seven to that rule establishes that such is never the case when the adversity is in the context of litigation. If in fact the BZA remains a current client of the County Attorney, his conflict of interest would not be "curable" by consent of the parties.

Your third inquiry with respect to this hypothetical is whether the corporation's attorney would have a duty to file a complaint against this County Attorney and, if so, whether he must file that complaint immediately or, instead, after the end of this litigation. As to whether there is a duty to report this misconduct, the corporation's attorney should look to Rule 8.3(a), which states that the duty to report is triggered where the information regarding the misconduct is "reliable" and where the nature of the misconduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness to practice law." That determination is a fact-specific judgment call, which would require consideration of more in depth facts than are provided in this hypothetical. The committee suggests LEO 1635 as a useful source of guidance in that determination; that opinion reviews numerous factors for consideration of the matter. As to whether the corporation's attorney, were he to determine he did have a duty to report the misconduct, would need to file the complaint immediately or whether he could wait until the end of the litigation, this committee has repeatedly maintained that upon determining a duty to report, "the attorney is obligated to report such misconduct without any unnecessary delay." LEO 1635, quoting LEO 1545.

To the extent that any portion of this opinion is inconsistent with LEO 1209, that opinion is overruled.

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