

24

PROFESSIONAL RESPONSIBILITY GUIDELINES

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24-1 SCOPE OF THIS CHAPTER

A local government attorney is bound by the same ethical constraints as a private practitioner. The representation of a local government, however, often poses discrete ethical questions attendant to the governmental or organizational nature of that entity. This chapter selectively attempts to provide a compendium of Virginia authority that is relevant specifically to local government practitioners. It does not attempt to comprehensively address the larger framework of ethical constraints on all Virginia attorneys or to be exhaustive of all ethical issues facing a local government attorney.

24-2 RULES OF PROFESSIONAL CONDUCT & REFERENCE SOURCES

The [Virginia Rules of Professional Conduct](#) (Rules) were adopted as Rules of the Supreme Court of Virginia Part 6, Section II, effective January 1, 2000, and have been subsequently amended.¹ These Rules replaced the Code of Professional Responsibility (Disciplinary Rules) and marked a significant change in format, but for the most part did not change the substantive principles of the Code.² For the first time, a separate rule, Rule 1.13, was devoted to the “organization as a client,” an area of particular import to local government practitioners. For proposed rule changes and their status, the practitioner should consult the Virginia State Bar’s [website](#).

Note, too, that Virginia attorneys may be disciplined by the Virginia State Bar for misconduct committed in other states. *See, e.g., Robol v. Virginia State Bar*, 300 Va. 406, 867 S.E.2d 48 (2022) (holding Virginia Bar had jurisdiction to discipline associate member of Virginia Bar, not actively providing legal services in Virginia, for misrepresentations made to courts in Ohio).

24-2.01 Interpretation

24-2.01(a) “Comment” and Other Sections of Rules

After each Rule are several sections. The “Comment” sections “provide guidance for practicing in compliance with the Rules.” *Rules, Preamble*. Following the Comment is a “Virginia Code Comparison” to the former Code of Professional Responsibility. Finally, after each Rule is a “Committee Commentary” reflecting the rationale of the Special Committee to Study the Virginia Code of Professional Responsibility (“Special Committee”) for the language that it proposed in the Rule.

24-2.01(b) Interpretation of ABA Model Rules by Other States Is Not Binding in Virginia

While formatted like the American Bar Association Model Rules (“Model Rules”), the Virginia Rules specifically indicate that, although interpretation of similar language in the Model

¹ These amendments are promulgated pursuant to Va. Code § 54.1-3900 et seq.

² A table cross referencing the current Rules with the corresponding or related Disciplinary Rules can be found [here](#).

Rules by other states' courts and bars might be helpful in understanding Virginia's Rules, those foreign interpretations "should not be binding" on Virginia. *Rules, Preamble*.

24-2.01(c) Virginia State Bar Legal Ethics Opinions

The Virginia State Bar Standing Committee on Legal Ethics (Legal Ethics Committee) issues Legal Ethics Opinions (LEOs), which provide advisory guidance on the application of the Rules to particular hypothetical scenarios. The Legal Ethics Committee, prior to adoption of the Rules, also issued numerous LEOs with respect to the former Code of Professional Responsibility.³ Some of these Code-related LEOs continue to provide guidance interpreting the current Rules. As will be noted below, however, other LEOs have been constructively superseded by the Rules. Those opinions that have ongoing relevance are referenced as appropriate to make this outline as complete as possible.⁴

Beginning in 2016, the Virginia Supreme Court required all LEOs to be reviewed by the Court, which may approve, modify, or disapprove the opinion. See [Va. Sup. Ct. R. Part 6, sec. IV](#); Virginia State Bar, *Supreme Court of Virginia Approves Legal Ethics Opinions* (Nov. 3, 2016). Accordingly, if approved, the LEOs are not merely advisory, but become decisions of the Court. *Id.*

24-2.02 Local Government Attorneys of Virginia Legal Ethics Committee

Through cooperation with the Virginia State Bar Special Committee and Legal Ethics Committee, the LGA Legal Ethics Committee provided comments on some of the proposed Rules before they were adopted and continues to do so with new proposed Rules and LEOs. A local government attorney with a question about application of the ethics provision is encouraged to notify the LGA Legal Ethics Committee and to consult with VSB Legal Ethics Counsel through the [VSB Legal Ethics Hotline](#), by phone at (804) 775-0564, or by email at ethicshotline@vsb.org.

24-3 ORGANIZATION AS CLIENT

24-3.01 The Rule

Rule 1.13 addresses the duties and responsibilities of the attorney who represents an organization, private as well as public. That lawyer "represents the organization acting through its duly authorized constituents." Rule 1.13(a). The rule makes clear that the lawyer's primary focus must be the best interest of the organization. Rule 1.13 is so important that it is set forth below in its entirety. Its attendant Comment, also important to review, is [here](#).

Rule 1.13: Organization as Client

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and

³ The full text of Virginia LEOs from 1980 to the present is available [online](#) as a result of the work of former Virginia State Bar Ethics Counsel James M. McCauley.

⁴ Thomas E. Spahn has summarized Virginia and ABA LEOs, and offers them online in a searchable [database](#). The page related to government lawyer conflicts is [here](#).

nature of the lawyer's representation, the responsibility in the organization and apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking for reconsideration of the matter;
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization;
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- (c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign or may decline to represent the client in that matter in accordance with Rule 1.16.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Succinctly, the primary client to whom an ethical obligation is owed for a county, city, or town attorney is the governing body that employs the attorney.⁵

24-4 MULTIPLE REPRESENTATION

The realities of multiple representation in the local government context present endless opportunities for ethical dilemmas because representing the organization will necessarily and frequently include representing its duly authorized constituents, the officials charged with implementing its policies, or related entities. In the broadest way, multiple representations require sorting out interests that may conflict with that of the organization, and determining what secrets and confidences of individual clients must be preserved.

⁵ LEO 1836 (Conflicts of Interest Involved When City Attorney Provides Legal Services to Multiple Constituents within an Organization (May 6, 2008)) reiterates that "a lawyer representing an organization does not, simply 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)." See sections [24-4.03\(a\)\(2\)](#) and [24-4.03\(a\)\(7\)\(ii\)](#).

24-4.01 Generally

Before dealing with a constituent individual or entity of the organization that the lawyer represents, the lawyer should consider whether that individual or entity's interests are likely to conflict with the lawyer's primary client.

24-4.01(a) Rule 1.7 Conflict of Interest

Rule 1.7: Conflict of Interest: General Rule provides as follows:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation⁶; and:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent representation and diligent representation for 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.

When the potential conflict involves a former client, Rule 1.9 governs. Comment [4] to Rule 1.7.

24-4.01(b) Preserving Secrets and Confidences of Clients

The lawyer's obligation to preserve secrets and confidences is no less if the lawyer represents an organization such as a local government. However, the subject matter and persons involved within the organization determine whether the lawyer can assure preservation of secrets and confidences and application of the attorney-client privilege or whether they must be communicated to the organization or others.

Rule 1.6: Confidentiality of Information.⁷

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be

⁶ See generally LEO 1875, Conflict Issues When a Government Lawyer is Furloughed from Employment and Asked to Continue Representing the Agency (July 24, 2013).

⁷ Note the Rules state that attorneys have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. See Rule 1.6(d) and Comment [20].

detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).⁸

Confidences include “intangible” nuances such as the former client’s values or emotional state. *Siraj v. Bhatti*, 106 Va. Cir. 194 (Loudoun Cnty. 2020). A lawyer may be disqualified even if no confidences were revealed if the potential conflict of interest causes the appearance of impropriety. *Id.* If the protection of confidential information conflicts with a client’s right to choose the counsel of his choice, “confidentiality prevails.” *Gulf Coast Mktg. Grp., Inc. v. JTH Tax LLC*, No. 2:21-CV-78 (E.D. Va. May 18, 2021).

Rule 1.6(b)(4) allows a lawyer to reveal information that is otherwise confidential when “such information [is] reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence.”

Comment [6a] requires a client’s consent before a lawyer involved in insurance defense work can submit detailed information regarding the client’s case to an auditing firm.

Comment [9b] indicates that lawyers who represent an organization may inquire of the organization pursuant to Rule 1.13(b) when in doubt whether contemplated conduct will actually be carried out by the organization.

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, protected confidential information. Rule 1.6(d). Comment [19] to Rule 1.6 and Comment [6] to Rule 1.1 make it clear that it is an attorney’s duty to take reasonable steps to secure electronic information from inadvertent disclosure or intentional hacking.

Rule 1.13(d) provides that in dealing with an organization’s directors, officers, employees or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing. This is very important because, ultimately, a lawyer is often required to inform the local governing body of material information received from a member of the organizational entity.⁹

24-4.01(b)(1) Notification Obligation

Whether an attorney-client privilege is created that requires a local government lawyer to preserve the secrets and confidences of a component constituent individual or entity will depend on the specific circumstances. Generally, in Virginia, the privilege is recognized under the following circumstances as well as considerations of public policy:

⁸ The Comment explains the relationship between the attorney-client privilege and rule of confidentiality at section [3] and [3a].

⁹ For example, when criminal conduct of an employee or official is involved, the attorney must make a disclosure to the governing body so that it may take appropriate action. In the case of *In re: Bruce R. Lindsey (grand jury testimony)*, the United States Supreme Court denied certiorari to review the decision of the District of Columbia Circuit Court of Appeals that an attorney in the Office of the President, having been called before a federal grand jury, may not refuse, on the basis of a government attorney-client privilege, to answer questions about possible criminal conduct by government officials and others. 148 F.3d 1100 (D.C. Cir. 1998); see also *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (D.C. Cir. 1997) (requiring response to an Office of Independent Counsel subpoena for records, including those of President and Mrs. Clinton regarding their activities prior to the presidency); see also *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081 (1998) (records of deceased Deputy White House Counsel), and *Rubin v. United States*, 148 F.3d 1073 (D.C. Cir. 1998) (whether there is a “Secret Service privilege” to protect an agent who guards the President to refuse to testify unless he saw or heard conduct or statements that were clearly criminal).

1. An attorney-client relationship must have existed at the time of the disclosure.
2. The communication must have been made in confidence.
3. The communication must relate to the matter or matters about which the attorney was consulted.
4. The communication must have been made while consulting the attorney for a “proper purpose.”

Norman A. Thomas, *LGA Handbook for Local Government Attorneys*, Ethical Concerns Frequently Encountered by the Local Government Attorney 133, 138 (1994) (hereafter “Thomas”) (citing Friend, *The Law of Evidence in Virginia* § 65, 183-84 (3d ed. 1988)); see also *Commonwealth v. Edwards*, 235 Va. 499, 370 S.E.2d 296 (1988); *Parker v. Carter*, 4 Munf. 273, 18 Va. 273 (1814); *Cogdill v. Commonwealth*, 219 Va. 272, 247 S.E.2d 392 (1978).

There is no privilege “[i]f the client does not frankly and freely reveal his object and intention as well as facts.” Friend, *The Law of Evidence in Virginia* § 65, 184 n.10 (3d. 1988) (citing *Seventh Dist. Comm. v. Gunter*, 212 Va. 278, 183 S.E.2d 713 (1971)). In LEO 1794, the Bar opined that no duty of confidentiality arose out of a visit with an attorney when the client misrepresented the purpose for the meeting.¹⁰

The lawyer should take steps to indicate to the constituent individual or entity that the lawyer’s primary obligation is to the organization and that the lawyer, therefore, is not likely to be able to preserve secrets and confidences of the constituent individual or entity if representation of the organization requires disclosure. Such notification of the lawyer’s obligation should ideally be made in writing when the lawyer undertakes the representation of the organization; it also can be made in generic written material provided to the constituent individual or entity on a periodic basis, and should also be made at the time that an actual issue arises that involves the constituent individual or entity.

Under Rule 1.13(d) [Organization as Client], when the municipal attorney speaks to an employee or official who is about to divulge information that would be harmful to the individual if disclosed and that may put the individual in a position adverse to the government, the attorney should first inform the individual that the attorney represents the government, and that the information received may not be kept confidential by the attorney. See also Rule 4.3 (requiring that an interested attorney dealing with an unrepresented person not state or imply that the lawyer is disinterested). Of particular note to government lawyers, the Rules advise the lawyer not to give advice to an unrepresented person other than the advice to obtain counsel. Rule 4.3(b).

The local government attorney must walk a tightrope in generally apprising the component constituent individual or entity of the attorney’s obligation to the organization without unnecessarily damaging the cooperative relationship with the individual or entity that is necessary to obtain relevant information so that the attorney can perform his work.

24-4.01(b)(2) Claiming the Attorney-Client Privilege

The circumstances under which the government attorney may claim the attorney-client privilege to shield confidences and secrets from disclosure to outside persons consistent with the ethical obligations of Rule 1.6 have received scrutiny in recent years, including at the presidential level. This outline does not attempt to review the area in depth but refers

¹⁰ In that instance, a husband had visited all the attorneys in a small town and given them facts relating to his desire for a divorce in an attempt to create a conflict regarding their representation of his wife.

the attorney initially to the landmark decision of *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981). In this decision the United States Supreme Court enumerated factors relevant to a corporation's attorney-client privilege claim:¹¹

The communications at issue were made by Upjohn employees, to counsel for Upjohn acting as such, at the direction of corporate superiors in order to secure legal advice from counsel The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice [T]he communications were considered "highly confidential" when made . . . and [were thereafter] kept confidential by the company.

Id.

The *Upjohn* decision, which rejected the earlier "control group test" for a "subject matter test," gives the local government attorney the ability to assert the attorney-client privilege with respect to information obtained from any source within the government entity, so long as the attorney receives and preserves the information consistent with *Upjohn*.¹² "The local government attorney should coordinate with the governing body and supervisory government officials and employees to receive and preserve information in a manner designed to maximize the scope of the privilege. Norman A. Thomas, *LGA Handbook for Local Government Attorneys*, Ethical Concerns Frequently Encountered by the Local Government Attorney 133 (1994).

The decision of the Sixth Circuit Court of Appeals in *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998), provides that circuit's view that the attorney-client privilege does not prevent disclosure of conversations of two members of the city council with city staff and the city attorney in a meeting convened to discuss the circumstances surrounding promotion of a firefighter or legal advice given by the attorney which was mentioned at that meeting.

24-4.01(b)(3) Potential Waiver of Attorney-Client Privilege

A disclosure that is inconsistent with maintaining the secrets and confidences of a client can result in a waiver of the attorney-client privilege. See generally *Chase v. City of Portsmouth*, 236 F.R.D. 263 (E.D. Va. 2006). The potential for waiver based on communication to someone or an entity deemed a third party is greater because a local government attorney must necessarily deal with multiple parties on a matter (i.e., chief administrator, staff, independent elected officials, special purpose entities). See *Commonwealth v. Edwards*, 235 Va. 499, 370 S.E.2d 296 (1988). The attorney must simply be more cautious and be able to show the clear need for the involvement of the third party in order to render the legal

¹¹ There is a dearth of case law addressing the attorney-client privilege in the government context, particularly in local government. See generally *Ross v. City of Memphis*, 423 F.3d 596 (6th Cir. 2005); *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007) and 546 F.3d 222 (2d Cir. 2008); *Chase v. City of Portsmouth*, 236 F.R.D. 263 (E.D. Va. 2006). As a result, this body of law is often supplemented by case law applying the attorney-client privilege in the corporate context. In its opinion in *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 413 S.E.2d 630 (1992) (citations omitted), the Virginia Supreme Court described the attorney-client privilege in the corporate context:

Confidential communications between attorney and client made during the course of the relationship and that relate to the subject matter of the attorney's employment are privileged from disclosure. This privilege exists between a corporation and its in-house attorney.

¹²To arrive at its decision, the *Upjohn* Court rejected the "control group" test first enunciated in *City of Philadelphia v. Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1963), and instead adopted the "subject matter" test developed in the cases *Harper & Row Publishers v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348, 91 S. Ct. 479 (1971), and *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (rehearing en banc).

services. See *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188 (4th Cir. 1991).

24-4.01(b)(4) Miscellaneous Note

Somewhat unrelated to this outline, but important to note because of the specific reference to government attorneys, is the Comment to Rule 1.6 at Comment [4]:

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

This obligation can be tested when citizens seek opinions from the attorney about the governing body's actions and argue to the attorney that "public interest" compels some action by the attorney. See *also* section [24-4.03\(a\)\(8\)](#).

24-4.02 Representation of Multiple Persons/Entities in the Same Litigation

24-4.02(a) Extant Legal Ethics Opinions¹³

LEO 1785

Advising the BZA and representation of the board of supervisors by a county attorney
(Nov. 14, 2003)

In the presented hypothetical, the county attorney advised a BZA on its public notice regarding a variance, which the BZA ultimately granted. The board of supervisors subsequently sought to challenge the decision to grant the variance in circuit court. The LEO states that the county attorney has a conflict of interest representing the board in the suit. Whether the "conflict" can be cured by consent to representation by the BZA depends on whether the BZA is considered a former or current client of the county attorney. The opinion partially overrules LEO 1209.¹⁴

LEO 1683

City attorney representing administrative agencies in grievance proceedings before City's personnel board
(Sept. 23, 1996)

A city attorney represents city administrative agencies in grievance proceedings before the city's personnel board. He also advises the board on drafting personnel rules. Because the board and the city are not adverse in grievance proceedings, there is no conflict, and consent is not required. Nor is it a conflict with the city attorney's limited representation of the board to either defend or challenge the board's grievance decision in court. However, the city attorney cannot represent the city in a challenge to a rule adopted by the board when having also represented the board in its consideration of the rule; and consent cannot cure the conflict.

¹³ The author does not find the headnotes to the LEOs particularly helpful in capsulizing the issue. For purposes of this outline a more descriptive summary has been included. The official headnotes to the LEOs appear in the [index](#).

¹⁴ Since LEO 1785 was issued, the General Assembly substantially rewrote Va. Code § 15.2-2314, which details the procedure for appealing a BZA decision to the circuit court. Under the revised procedure the BZA is no longer considered a party defendant in such a proceeding. The local governing body is a necessary party and, if the appeal is taken by a party other than the affected landowner, that landowner must be joined as a party. See *also Frace v. Johnson*, 289 Va. 198, 768 S.E.2d 427 (2015) (affirming a circuit court's dismissal of an appeal from a BZA for failure to join the board of supervisors as a defendant within the statutory time limit). This change may well alter the conclusion in the LEO that an attorney who has given some advice to the BZA at an earlier stage of the proceeding is disqualified from representing the local government.

LEO 1661

*City attorney may represent both city and individual employees in same lawsuit based on employee's conduct in official capacity
(Feb. 28, 1996)*

Municipal attorneys are not automatically disqualified from defending both the city and individual employees in the same lawsuit based upon the employee's conduct in his official capacity. Before doing so, there must be consent and full disclosure, and substantial identity of interests in defending the claims. Whether multiple representation is allowed must be made on a case-by-case basis. When punitive damages are sought and the city is not responsible for the payment of punitive damages awards, the attorney may represent the employee if the punitive damages exposure is not great. The attorney should advise the employee, however, that the city does not cover punitive damages and that the employee has the right to seek independent counsel at the municipality's expense to defend the punitive damages claim. If the employee and municipality cannot reconcile differences about a settlement proposal, the attorney must withdraw from representation. The attorney must also withdraw if discovery reveals the appropriateness of antagonistic defenses or that the employee acted outside the scope of employment or contrary to municipal policy.

For a more detailed discussion of representing a defendant against whom punitive damages are sought, see section [24-4.02\(e\)\(2\)](#).

24-4.02(b) State Law Causes of Action

Where liability is joint and several, the attorney can generally represent the governing body, officials, and employees because an employer's liability is fixed by respondeat superior principles. The doctrine of sovereign immunity will generally bar recovery against the government in a state action and, therefore, no conflict will arise in representing the locality and its agents. There still may be problems with conflicts in representing multiple defendant employees who have conflicting interests.

24-4.02(c) Federal 42 U.S.C. § 1983 Causes of Action

Where the local government may be charged with a policy, practice, or failure to act that violates the Constitution, at least theoretical conflicts of interest will arise whenever a local government and its officers and employees are sued.

In addition, a defendant employee may be able to claim qualified immunity in a suit when the government itself may not. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034 (1987); *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).

24-4.02(d) How to Minimize or at Least Anticipate Conflict Issues

The local government attorney should state the basis on which representation will be provided to component constituent entities, officials, or employees in any local government indemnification policy. Before commencing representation, the attorney should send the local government defendant a notice of claims letter, stating the nature of the claim and the conditions of representation, and make sure the defendant understands it.

24-4.02(e) Considerations to Balance in Determining Whether Multiple Representation Can Be Undertaken

24-4.02(e)(1) Generally

Considerations will include, but are not limited to, the substantial identity of the defenses among parties, the likelihood of conflict arising, whether there is merit to an "organizational defense," the likelihood of trial, and the cost to the locality.

The facts of a given case should be examined in light of inquiries such as the following:

1. Do the defendants agree upon the circumstances surrounding the factual allegations of the lawsuit?
2. Do the defendants understand and agree upon their individual duties representing the factual circumstances of the lawsuit?
3. Are punitive damages sought by the plaintiffs, or other damages for which the governing body will not be liable?
4. Will the governing body benefit by taking a position that any of the individual defendants acted in a manner not in furtherance of their employment duties?
5. Can the locality or the other defendants claim any form of immunity?
6. Do the locality or the other defendants possess any right to counterclaim against one or more of the plaintiffs or cross-claim against one or more of the other defendants and, if so, are such rights consistent among the defendants that the local government attorney might represent?
7. Will conflicts actually or potentially exist among the defendants if the parties undertake settlement negotiations?
8. Does any internal local government investigation indicate wrongdoing by one or more of the defendant officials or employees as a result of their participation in events relating to the lawsuit?
9. Is it possible that the governing body will seek to administratively discipline any of the defendant officials or employees as a result of their participation in events relating to the lawsuit?
10. Are the defendant officers or employees sued in their individual or official capacities, and is the character of their alleged conduct intentional or negligent?

Norman A. Thomas, *LGA Handbook for Local Government Attorneys*, Ethical Concerns Frequently Encountered by the Local Government Attorney 133 (1994).

Whether or not the locality is a named party, the local government attorney will have to protect the interests of two clients in defending an employee for any damages, including punitive damages: (1) the locality, and (2) the defendant employee. Unless the attorney satisfies the requirements of Rule 1.7(b) (including obtaining written consent from all of the clients), the local government attorney cannot represent the defendant if there is a conflict between the employee's interests and the locality's interests, regardless of whether the conflict arises before or during litigation.

24-4.02(e)(2) Cases Where the Claims Include Punitive Damages

LEO 1661, section 24-4.02(a), indicates that a local government attorney is not automatically barred from representing a defendant against whom punitive damages are claimed. But the attorney must act with great care in doing so.

Obviously, no locality wants to assume responsibility for defendant official or employee conduct warranting payment of punitive damages, because the local government

entity is rarely at risk on a punitive damages claim,¹⁵ and because conduct that results in an award of punitive damages is so egregious that a responsible local government should not want to encourage such behavior by its employees.

However, when the government deems the employee to have acted within the scope of employment, sound public policy reasons suggest considering a selective defense of punitive damages claims unless a conflict exists between the interests of the employee and the locality in a suit. Not infrequently, for leverage purposes, out of ignorance of the law or for other similar reasons, punitive damages claims are made that are clearly not meritorious. In these cases, local government employees should have the same sense of security about their employer backing them up as they would have against claims for compensatory damages for simple negligence for which the Commonwealth and Virginia Supreme Court have protected them under the umbrella of official immunity.¹⁶ Undertaking representation under these circumstances may also preserve public funds.

An assessment along the following lines is appropriate with respect to determining whether to first, defend against or, second, recommend payment of a judgment for punitive damages against an employee or official:

1. Determine whether the employee's actions or omissions, giving rise to the alleged punitive liability, are ones that the locality wants to or should protect. Put another way, are they within the scope of employment?
2. Have a reliable review by the appropriate supervisory personnel of the defendant employee to determine whether the employee's actions are justified or create liability for compensatory damages.
3. Determine that no disciplinary action is contemplated against the employee for the alleged actions. Routinely, in-house counsel provides advice to the employee's supervisor regarding proposed discipline. This sets up an obvious conflict with the defendant employee and precludes representation.
4. Determine whether there is any conflict in the positions of the locality and the defendant with respect to allegations of compensatory damages and factual allegations.
5. Determine whether the department or chief administrator will recommend payment of punitive damages to the governing body if a judgment was entered notwithstanding the perceived lack of merit of the claim and whether, as legal counsel, the local government attorney can join in that recommendation.
6. Have a clear understanding with the defendant employee about possible secrets and confidences and their dissemination to the governing body.

¹⁵ Sovereign immunity protects a local government from tort liability for governmental functions under State law. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984). A municipality is immune from punitive damages under 42 U.S.C. § 1983. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748 (1981).

¹⁶ This indemnification for defense costs is a separate issue from a government's determination of whether to pay a punitive damages judgment. State law does not preclude the payment of punitive damages imposed on local government employees. See Va. Code §§ 15.2-1518 and 38.2-227; 1986-87 Op. Va. Att'y Gen. 21. If the government has not assumed potential payment of punitive damages, the local government attorney cannot represent the defendant unless the defendant consents with full knowledge of the risk that the locality may or will not pay a judgment.

The local government attorney who undertakes representation of defendants against whom punitive damages are claimed must proceed cautiously. If, during the course of the litigation, a conflict becomes apparent that was previously unforeseen, the local government attorney may have to ensure that there is separate counsel for each of the defendants previously represented by the local government attorney. See Rule 1.13, Comment [10].

24-4.03 Representing Multiple Parties within a Local Government in the Non-Litigation Context

24-4.03(a) Who Is the Client?

It is sometimes difficult, when representing a local government, to determine who the client is. Examples of different clients within an organization include the governing body, county executives or city or town managers, and department heads. Other various clients within the local government context include multi-jurisdictional bodies, school boards, authorities, and self-insurance trust funds.

Some local government charters require the attorney for the locality to represent or to advise the government entity, its governing body, and combinations of its departments, boards, officers, and employees. See, e.g., Chesterfield Cnty. Charter § 6.5 (requiring the county attorney to represent the Board of Supervisors, the county administrator, all departments, boards, commissions, and agencies of the county, and employees in civil litigation arising out of their official capacity); Alexandria City Charter § 11.02(a) (requiring the city attorney to serve as legal advisor for "the council, the city manager, and all departments, boards, commissions and agencies of the city in all matters affecting the interest of the city"). These entities can include Boards of Zoning Appeals (BZAs), Departments of Social Services (DSSs), Community Services Boards, the local Health Department, Park Authorities, School Boards, and Industrial Development Authorities. Some local government indemnification policies have similar provisions.

24-4.03(a)(1) Representing Various Constituent Component Agencies of Local Government

The issues of confidentiality or conflict in mission may arise depending on the transaction in issue. Where the issues do not present a problem with the attorney's primary representation of the governing body, the local government attorney can effectively represent the constituent or component agency.

24-4.03(a)(2) Extant Legal Ethics Opinions

LEO 1836

*Conflicts of interest involved when city attorney provides legal services to multiple constituents within an organization*¹⁷
(May 6, 2008)

Where a city attorney represents a governmental organization (e.g., the city) and designated constituents of the city, the attorney does not have an ethical obligation to withhold from one constituent (e.g., a mayor) information obtained from another constituent (e.g., the council or a council member) within the organization unless the organization has directed otherwise. Under certain circumstances, the attorney may have an obligation to disclose information obtained from one council member to the other council members if disclosure is necessary to carry out the representation of the client city. However, the attorney may also be precluded from revealing information of the client (e.g., the city) protected under the attorney-client privilege to organizational constituents. There may also be situations where the attorney cannot honor a request that information from a constituent be kept confidential where disclosure to the organization is necessary to prevent or mitigate severe injury to the organization or to address an action or omission or violation

¹⁷ Readers are encouraged to read this lengthy opinion, which is very fact specific.

of law which might be imputed to the organization and is likely to result in substantial injury to the city.

The attorney must abide by the client's decisions regarding representation. In the absence of an organizational policy, the attorney must be guided by independent professional judgment acting in accordance with what he believes to be in the best interests of the client. In some instances, the attorney must also consider whether a conflict of interest is created by working on a matter which creates direct adversity between a constituent and the organization.

Absent direction from the organizational client, the city attorney may not avoid his obligation to keep the client reasonably informed by assigning specific attorneys in the office to work with designated constituents; all attorneys in the city attorney's office represent the city. If the mayor and council are directly adverse on a matter, the city attorney must have the informed consent of both the council and the mayor to erect a "screen" between lawyers in the same office representing the mayor, on the one hand, and the council on the other. However, full disclosure to obtain appropriate consent negates the screening of information. Direct adversity between constituents requires an analysis of whether the attorney's office can provide competent and diligent representation to each constituent and, if so, whether the client consents to the representation after consultation.

The city attorney may continue to represent constituents when they disagree on legal or policy issues unless the conflict materially limits the attorney's representation of the city's interests or interferes with the attorney's independent professional judgment on behalf of the city.

A conflict of interest does not arise when one constituent disagrees with the city attorney's advice, because the attorney owes his ethical duties to the organization.

LEO 1422

*(Changed by Rule 1.7) County attorney simultaneously serving as general counsel to a regional commission and representing a county commission member
(June 13, 1991)*

In this hypothetical, a county attorney served as general counsel for a Regional Transportation District Commission, one member of which was the county, while simultaneously providing legal services to the county. The Legal Ethics Committee opined that it would be improper for members of a county attorney's office to provide general counsel services to a regional transportation district commission of which the county was a member. The potentially differing interests and the foreseeability of future conflicts between the county and the commission preclude the county attorney from meeting the threshold test of DR 5-105(C) [Rule 1.7]. Also, since the ripening of any such differing interests and future conflicts would mandate withdrawal from representation of both the county and the commission, all doubts would be resolved in favor of retaining the undivided loyalty of the initial client, the county.

The LGA pressed for the language in the Rules to address the problems posed by LEO 1422.¹⁸ VSB Bar Counsel's Office has indicated that this LEO is modified by Rule 1.7:

¹⁸ The LGA Legal Ethics Committee advised the Chair of the VSB Legal Ethics Committee (by letter from Joseph P. Rapisarda, dated March 8, 1995) that:

the proper result would have been to allow this simultaneous representation so long as the attorney can adequately represent both interests and each client consents after full and adequate disclosure. Put another way, we question the committee's conclusion that it was not obvious that the attorney could adequately represent the interests of each client in that situation.

"Rule 1.7(a)(1) follows a subjective 'reasonably believes' standard rather than the old Code's objective 'obvious' standard."

LEO 1393

County attorney representing local building official and local board before state board (Jan. 14, 1991; reconsidered and reaffirmed Mar. 21, 1991)

In a hypothetical appeal of a local Board of Building Code Appeals decision before the State Board of Technical Review, a county attorney represented both a local building official and the Board of Building Code Appeals in a hearing to determine whether a builder had corrected certain deficiencies and the local building official. The Legal Ethics Committee opined that the county attorney may not represent the builder before the state board, because there would be a conflict under DR 5-105(A) [Rule 1.7(a)] since the firm represents and advises the local board and official who holds the power to find the builder out of compliance with the building code. Also, representation of the builder in a civil lawsuit against the buyers of the home would be improper because the firm would have had substantial responsibility for the specific matter in question in its capacity as county attorney. See DR 9-101(B) [Rule 1.11(b)].¹⁹

LEO 1086

County attorney who represents DSS, representing other clients before board of supervisors or other county departments in unrelated matters (June 9, 1988)

An attorney who represents the county only as counsel for the county's department of social services may represent other clients before the board of supervisors or other county departments in a non-social services related matter, as long as the county retains the services of different attorneys for those matters, and the county and DSS consent to the representation after full disclosure.²⁰

LEO 1209

County attorney representing BOS on a petition for review of BZA decision where attorney has not previously represented BZA on same special use permit (Feb. 16, 1989)

A county attorney may represent the Board of Supervisors on a petition for review of BZA decision brought by the Board of Supervisors where attorney has represented BZA in the past but not on this special use permit. There is no substantial relatedness to which the instant representation could be adverse under DR 5-105(D) [Rule 1.9]. Given the statutory authority of the BOS to request a review of the ruling of its agencies, the county attorney should represent the BOS in the petition for review.

LEO 394

¹⁹ See also LEO 1408 (Mar. 12, 1991; affirmed and expanded May 13, 1991). It would be improper for a firm to simultaneously represent a bank's borrower and that bank's commercial finance division in unrelated litigation because it is not obvious that adequate representation of both clients' interests can be provided. Since that threshold test cannot be met, full disclosure of the potential conflict and consent from both clients will not cure the impropriety. [Note from VSB Bar Counsel's Office: "This opinion's conclusion that consent would not cure this conflict could be different under Rule 1.7(a)'s 'reasonably believes' subjective standard rather than the old Code's 'obvious standard.'"]

²⁰ See also LEO 1096, Simultaneous representation by attorney of DSS and parents prosecuted by DSS in unrelated matters (June 16, 1988): It would not be improper for an attorney to represent both the DSS and simultaneously represent parents who are being prosecuted by DSS in unrelated matters if the attorney believes that he can adequately represent the interests of each, and if each consents to the representation after full and adequate disclosure of the possible effects on the exercise of the attorney's independent professional judgment on behalf of each.

County attorney representing county interests before a local county retirement board (Nov. 14, 1980)

A county attorney may represent the interests of the county before a local county retirement board even though the attorney normally acts as legal advisor to the board, so long as independent counsel is retained to represent the board. The county attorney initially began representing the county in the matter before it was brought to the board and both the county and the board consented after full disclosure.

LEO 216

Attorney about to be appointed town attorney representing a client appealing a zoning ordinance (July 28, 1972)

It is improper for an attorney, who is representing a client on appeal of a zoning ordinance, to fail to disclose to the client his imminent appointment as town attorney and to withdraw from representation.²¹ *But see Turner v. Commonwealth*, 259 Va. 645, 529 S.E.2d 787 (2000) (no conflict of interest where defense counsel representing client on murder charge applied for employment with prosecuting attorney fourteen days before trial without informing client).

LGA Ethics Committee Opinion

The LGA Ethics Committee issued an opinion on November 29, 2005, regarding an alleged conflict regarding a city attorney representing the Department of Social Services (DSS) and the Community Management and Policy Team (CMPT). A hypothetical was presented as follows:

An assistant city attorney assigned the responsibility of providing legal advice and representation to the locality's Department of Social Services ("DSS") is also responsible for providing legal advice and representation to the locality's Community Management and Policy Team ("CMPT"). Recently, the DSS and the locality's School Division (each, a statutorily-required member of the CMPT) have become engaged in a dispute regarding the allocation of responsibility for educational costs for foster care children placed in residential facilities. The school division's attorney has suggested to the assistant city attorney that she may have a conflict of interest, citing LEO 1422.

It was the opinion of the LGA Ethics Committee that under the circumstances described, LEO 1422 was not controlling and the assistant city attorney has no improper conflict of interest under the applicable Ethics Rules 1.13 and 1.7.

LEO 1422 (see discussion of [LEO 1422](#)), which was referenced by the school board attorney, is not controlling in matters arising after January 1, 2000. As discussed above, LEO 1422 was changed effective January 1, 2000, by new Rule 1.7(a)(1) of the Virginia Rules of Professional Conduct. LEO 1422 opined that it was improper for a deputy county attorney to provide general counsel services to a Transportation District Commission of which the county was a member along with another county and three cities because the county attorney could not meet the threshold test of DR 5-105 (C) [Rule 1.7(b)], i.e., it

²¹ See also LEO 843, County attorney representing county committee may not represent private party before committee (Oct. 9, 1986): A county attorney charged with the duty to represent the interests of a county subdivision committee may not represent the interests of a developer in a subdivision application before the committee. "If the county and the developer are agreeable, and if the county retains independent counsel for the subdivision committee, then after full disclosure and consent, the attorney may represent the developer"

must be “obvious that [the lawyer] can adequately represent the interest of each.” In contrast, Rule 1.7(b)(1) provides that:

- (b) Notwithstanding the existence of a concurrent conflict of interest . . . 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

(emphasis added).

Because this Rule change substituted a subjective “reasonably believes” standard for the old Code’s objective “obvious” standard for conflicts, the current result for LEO 1422 would be to allow the simultaneous representation so long as the attorney reasonably believes he can adequately represent both interests and each client consents after full and adequate disclosure. Therefore, even if DSS and the CMPT were to have a conflict (which is not apparent from the facts presented to the LGA Ethics Committee), if the city attorney’s belief that she can adequately represent both is reasonable and she obtains consent, then she can do so without violating Rule 1.7.²²

The LGA Ethics Committee examined the statutes applicable to the creation of CMPT, in particular, and the requirement of Va. Code § 2.2-5204 that every locality “shall arrange for the provision of legal services to the team.” The Committee was of the opinion that this statute left to the discretion of the locality (or for a multi-jurisdictional CMPT, the localities) the decision of whether to use in-house or outside counsel to represent the CMPT. In circumstances like those presented, where in-house counsel is used, new Rule 1.13 supplements the Rule 1.7 provisions on multiple representations.

The Comments to Rule 1.13 observe that, although in some circumstances the government lawyer’s client may be a specific agency, it is generally the government as a whole. Assuming that the DSS is an agency of the locality, it would be deemed a constituent of the locality for the purposes of Rule 1.13. While it is not clear whether a CMPT would be deemed a constituent of the locality, it is arguable that it is one because every locality that receives Children’s Services funding is required to establish a CMPT to administer a pool of state funds to pay for public or private residential and nonresidential services for troubled youths and families and the locality must appoint the CMPT members that include many of the locality’s own officers and employees, in addition to some private parties.

In the case at hand, it appears that two component agencies of the CMPT (the local school division and DSS) have differing positions on a funding issue. The CMPT does not appear to have taken any position yet and there is no indication that the assistant city attorney believes that representation of either the CMPT or the DSS will be materially limited by her responsibilities to either, or by her responsibilities to the city organization as a whole. Therefore, the LGA Ethics Committee concluded that the interests of neither the CMPT nor DSS would necessarily be directly adverse to the other and thus there was no concurrent conflict requiring consent under Rule 1.13(e) or Rule 1.7(a)(1).

Even though no concurrent conflict requiring consent under Rule 1.13(e) or Rule 1.7(a)(1) exists, because a potential conflict has been raised by the school board’s attorney, the LGA Ethics Committee stated it would be prudent to make clear to the DSS and the CMPT that the city is the city attorney’s client. Pursuant to Rule 1.13(b) and (d), it would also be appropriate for the city attorney to: (i) clearly explain to both entities that she and the members of her office represent the interests of the larger city organization and (ii) in the event that either the CMPT or the local DSS is acting or taking a position that is a violation of a legal obligation to the city organization, or which reasonably might be imputed

²² The situation would be different if the city attorney also represented the school board.

to the city organization, and which is likely to result in substantial injury to the city organization, then the assistant city attorney would be required to take the remedial measures referenced in Rule 1.13(b). It should be explained to the CMPT and the DSS that the city organization in this situation shares with these entities two overriding interests: (1) satisfying the dual statutory CSA mandate of ensuring efficient use of state-pool funding and providing access to services; and (2) minimizing the unnecessary expenditure of local funds.

24-4.03(a)(3) Judicial Opinions

In *Hladys v. Commonwealth*, 235 Va. 145, 366 S.E.2d 98 (1988), a doctor alleged that he was denied due process in being terminated as a Medicaid provider. He argued that assignment of an assistant attorney general to counsel the hearing examiner and one to prosecute the case violated due process per se (i.e., combined adjudicative and prosecutorial functions), but the Virginia Supreme Court held that, where there was no demonstration to the contrary, it would assume that the participants acted properly. Here, one assistant AG said he had not discussed the case with the other and the assistant AG counseling the hearing examiner said that he would only advise the examiner on the procedural rules and not the decision. The Court also noted that it could be problematic if one attorney served in both roles held by the assistant AGs here, but in this case different attorneys performed different functions.

In *City of Roanoke v. Early*, Rec. No. 85-0948 (Va. June 27, 1988) (unpubl.), the Supreme Court reversed a decision that the grievance procedure was fatally defective because one of the panel members was a city employee and the panel was represented by the city attorney's staff. The Court said that where there was no sufficient showing of bias or improper conduct, neither the structure of the panel hearing the grievance nor the procedure which it followed violated due process rights. The Court cited *Hladys v. Commonwealth*, 235 Va. 145, 366 S.E.2d 98 (1988).

24-4.03(a)(4) How to Avoid Problems

The local government attorney should advise the department or board of the jurisdiction in advance so that it can anticipate that the attorney sometimes may have conflicts in being able to provide advice to the department or board.

It is unlikely that a "Chinese Wall" can be created within a local government law office. See LEOs 594, 696; LEO 1020 (Jan. 21, 1988) (Commonwealth's Attorney's Office cannot create an artificial wall by providing for separate telephone lines and separate offices).²³ The Virginia Supreme Court repudiated the use of a "Chinese Wall" by a law firm to continue representing plaintiff clients after hiring a former assistant county attorney whose prior representation was adverse to the firm's clients.²⁴ See Order, dated Sept. 12,

²³ Note from VSB Bar Counsel's Office regarding application: "The Rules of Professional Conduct define 'Firm' as 'a professional entity, public or private, organized to deliver legal services, or a legal department, corporation or other organization.'" See also Comment [1d] to Rule 1.10. This presumably includes a Commonwealth's Attorney's Office. Rule 1.11(b) prohibits the prosecutor who handled the criminal case from participating in the subsequent related civil case absent consent. Where the prosecutor is *the* Commonwealth's Attorney (as opposed to an assistant commonwealth's attorney), obtaining consent is problematic. The same rule prohibits members of the law firm from handling the civil case unless the requirements of Rule 1.11(b) are met. The Ethics Committee believes that the Rules prohibit a part-time prosecutor and any assistant in the office from participating in a civil matter which is related to a prosecution handled by that office unless Rule 1.11(b)'s requirements are met." See LEO 1746 (Aug. 30, 2000).

²⁴ The ABA House of Delegates approved an amendment to Model Rules of Professional Conduct 1.10 at the February 2009 ABA meeting. The change treats private lateral attorneys the same as attorneys moving from government jobs to private firms. Firms can now screen incoming attorneys and continue representing clients without the consent of the incoming attorney's former clients (a/k/a firm-to-firm screening).

1990, disapproving LEO 1302. Furthermore, on July 31, 2015, the Supreme Court approved an amendment to Rule 1.10 which changed the “knowingly” standard with regard to the conflict to “knows or reasonably should know” with the purpose of eliminating the situation in which a lawyer avoids the imputation of a conflict of interest by avoiding the knowledge that another lawyer in the firm has a conflict.²⁵

24-4.03(a)(5) Staff Vis-à-Vis Governing Body

24-4.03(a)(5)(i) Additional Relevant Authority

Rule 1.6: Confidentiality of Information.

- (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

Particularly relevant to this issue is that a lawyer may reveal confidences or secrets (1) with the consent of the client(s), after full disclosure, (2) as required by court order, or (3) where the client advises that they intend to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another, or perpetrate a fraud on the tribunal. Rule 1.6 (b) and (c).

24-4.03(a)(5)(ii) How to Avoid Problems

The local government attorney should give notice of the attorney’s role as counsel for the governing body as early as possible in the discussion, address the issue immediately, and confirm in writing as appropriate. See Rule 1.3. Diligence; *see generally* Rule 1.2. Scope of Representation.²⁶

24-4.03(a)(6) Individual Legislators Vis-à-Vis the Governing Body

Dealing with individual members of the governing body, who may have a different agenda than the majority, can be especially dicey for local government attorneys. See LEO 1836.²⁷

²⁵ The application of Rule 1.10 to local government attorneys is not clear. Note that Comment [1d] to Rule 1.10 states: “On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.”

²⁶ Rule 1.3 Diligence.

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.
- (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 or Rule 3.3.

²⁷ See *also* LEO 1841, Member of town’s governing body also attorney representing client challenging constitutionality of ordinance that member voted to adopt (June 27, 2008): There is no blanket prohibition against the member-lawyer representing a client challenging a town ordinance, nor is there blanket approval. A case-by-case determination is necessary. Because there is a current conflict, the lawyer must obtain both the client’s and government’s consent. The lawyer also needs to consider whether his representation of the client will be materially limited by his personal interests and responsibilities to other parties. The lawyer may continue the representation, after complete disclosure and client consent, if the lawyer reasonably believes that he can competently and diligently represent the client. Note that this opinion does not overrule LEO 683.

24-4.03(a)(6)(i) How to Avoid Problems

See "Staff Vis-à-Vis Governing Body," section 24-4.03(a)(5)(ii).

24-4.03(a)(7) Outside Counsel Representing Private Clients and Issues Related to Private Employment**24-4.03(a)(7)(i) Examples of Potential for Conflicts**

Examples of situations with the potential for conflicts include:

- Outside bond counsel on retainer desires to represent a private client in litigation against the locality
- Outside counsel for a town desires to represent a third party client in litigation against the locality
- Outside counsel for a local government hired for a single case desires to represent another private client in litigation against the locality.

24-4.03(a)(7)(ii) How to Avoid Problems

In advance, develop an agreement with outside counsel regarding scope of representation and conflicts.

24-4.03(a)(7)(iii) Extant Legal Ethics Opinions

LEO 1718

Private firm representing a client in a matter before a governing body when one of its members is a member of the governing body
(Dec. 2, 1998)

A law firm may not ethically 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 full disclosure is made and the member of the governing body abstains from participation and voting in the matter.²⁸

24-4.03(a)(8) Relationship of Local Government Attorney to Citizens and Others

In dealing with members of the public, the local government attorney must make it clear that the attorney represents the governmental entity and not the general, and perhaps esoteric, "public interest."

LEO 1464

City attorney who assists citizens in drafting ordinances
(May 11, 1992)

Where a city attorney acts as a scrivener for citizens of his jurisdiction by approving citizen-initiated ordinances as to form, drafting them in legal language and rendering them proper for council action, such service does not create an attorney-client relationship. However, where the expectation of an attorney-client relationship with the city attorney is created in the minds of the citizens of the municipality, such an expectation would constitute a conflict of interest that would not be curable utilizing the provisions of DR 5-105(C) [Rule 1.7].

24-5 THE LEGALLY INDEFENSIBLE**24-5.01 Actions to Take**

What should you do when asked to do the legally indefensible?

²⁸ This opinion was reconsidered by the Bar in light of the revised rules and reaffirmed as an incurable conflict of interest in LEO 1763 (Jan. 6, 2002).

1. Ascertain whether the position desired is truly legally indefensible and not just a bad policy decision. In other words, can you punt? See Rule 1.2(c) (Scope of Representation).²⁹ If the position will be indefensible, anticipate the issue and advise the governing body in writing as much as possible in advance of the action being taken. See Rule 1.13(b) (Organization as Client); Rule 1.16 (Declining or Terminating Representation); Rule 3.3 (Candor Toward the Tribunal).³⁰
2. Consult other local government attorneys, the Attorney General's Office, or State Bar counsel in a manner that does not jeopardize the attorney/client relationship. Interestingly, Va. Code § 15.2-1245 requires a county attorney, whenever a claim allowed by a board of supervisors appears illegal, to seek an opinion from the Attorney General as to the legality. Note, however, that the ethical rules require the attorney to protect the client's secrets and confidences even while consulting others in order to further representation of the client. See Rule 1.6, Comment [5a] and [5c]. Of course, if the client consents, the attorney can share secrets and confidences.
3. Tell the governing body that it can consult other counsel about the issue to confirm or reject your opinion.
4. Other Preventive Actions:
 - a. The local government attorney should prepare an "orientation manual" that advises the governing body and agencies on the role of the attorney's office, the attorney-client privilege, and the lawyer's obligations under law and ethical rules.
 - b. The attorney should periodically remind the governing body and agencies of the foregoing advice and do so at the time of a specific transactional concern.

24-5.02 What If the Foregoing Fails?

Rule 1.13(c) (Organization as Client) includes the attorney's options if the organization insists on an illegal course of action, to include the lawyer resigning or declining to represent the client in that matter. (Rule 1.16(a) and (b) also provide guidance in this regard.) Neither option is particularly palatable, so the attorney should lay groundwork early so that this Hobson's choice may be avoided.

24-6 PRIVATE SECTOR/GOVERNMENT EMPLOYMENT

24-6.01 Former Local Government Attorney Employed by Private Firm

Rule 1.11(b) states that 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.

²⁹ "(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

³⁰ Note that the duties regarding candor to the tribunal specified in Rule 3.3(a) and (d) continue until the conclusion of the proceeding and apply even if compliance requires disclosure of information protected by Rule 1.6. Rule 3.3(e).

With respect to representation of former clients against former members of a public body, see LEO 1698 (June 24, 1997) (regarding representation of former clients against former members of a public body). A former planning commissioner may represent clients before the commission and the board of supervisors on matters for which he had no substantial responsibility while a commissioner so long as he does not state or imply that he is able to improperly influence the board or commission as a result of having been a commissioner. The attorney may represent clients on matters for which he did have responsibility if the commission consents. He may also represent clients before the commission and the board even though he and his wife were on a supervisor's campaign staff if he does not state or imply that he has any special influence on either body because of the campaign role.

24-6.02 Local Government Attorney Formerly Employed by Private Firm

Rule 1.11(d)(1) provides that, except as law may otherwise expressly permit, a local government lawyer cannot 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 can be, authorized to act in the lawyer's stead in the matter. This conflict may be waived, however, if the private client and the appropriate government agency consent after consultation. Rule 1.11(d)(1).

24-6.03 Comment 3

The Virginia Supreme Court approved amending Rule 1.11 to adopt ABA Model Rule Comment 3. Comment 3 to Rule 1.11 states:

[3] Paragraphs (b) and (d) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (b). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

24-6.03(a) Matters Not Adverse to Former Public Clients

"Rule 1.11 allows a law firm to avoid disqualification in certain circumstances if it screens the former government lawyer. Also, Rule 1.11(d)(2) prohibits negotiation of the government lawyer's employment with the private firm while they were both involved with the subject litigation." Legal Ethics Committee Notes to LEO 1430.³¹

³¹ LEO 1430 (Changed by Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees) discusses an attorney who accepts private employment in a matter in which the attorney had substantial responsibility while a public employee (Feb. 22, 1992). In this LEO, a local government lawyer was hired by a private law firm that was employed by the local government as outside counsel in an ongoing matter. The lawyer worked with the firm on the matter while he was still with the local government. There is no imputed disqualification of the firm as long as the former government lawyer does not personally participate, professionally or financially, in the ongoing representation of the local government. Participation of the former government attorney in the matter would be a per se violation of DR 9-101(B).

In response to LEO 1430, DR 9-101(B) was amended, effective January 8, 1993, by adding the underlined language:

24-6.03(b) Matters Adverse to Former Public Body Clients

LEO 1841

*Member of town's governing body also attorney representing client challenging constitutionality of ordinance that member voted to adopt
(June 27, 2008)*

A lawyer who participated “personally and substantially” in the adoption of an ordinance as a governing body member is barred in bringing a defense on behalf of a client challenging the constitutionality of the ordinance unless both the client and the government consent, and the lawyer also believes that he can provide competent and diligent representation. The lawyer’s public support of the ordinance to be challenged could undermine both credibility and effectiveness as an advocate, so it may not be possible to meet the Rule 1.7(b) requirement to continue representation.

LEO 1699

*Attorney who drafted ordinance while employed as city attorney may not file suit on behalf of private party to challenge ordinance
(Sept. 12, 1997)*

A former assistant city attorney who drafted zoning ordinances as part of her duties may not file suit on behalf of a private party to challenge a zoning ordinance on which the attorney provided legal advice to the City Council when it was considering adopting the ordinance indicating that it was legally sufficient, since the ordinance to be challenged is substantially related to the work product prepared by the attorney while employed as a staff attorney in the city attorney’s office. The fact that the ordinance had been amended and reordained does not make such a challenge on behalf of a private client any less violative of DR 9-101(B) [Rule 1.11].

LEO 1299

*Former federal attorney may represent private party in challenging rule on which attorney worked on an original draft if rule is substantially different
(Sept. 13, 1990)*

A former federal attorney’s substantial responsibility in the matter of a proposed regulation was with respect to the initial draft and the new rule was ultimately promulgated based upon a third draft for which the attorney had no substantial responsibility and which differed substantially from the original draft. Thus, it would not be improper for the now private attorney to represent private parties challenging the rule unless the preservation of the former client’s confidences and secrets negatively impacted upon the attorney’s ability to zealously represent the clients challenging the rule.³²

LEO 605

*Attorney may not represent defendant in suit against county when attorney was county attorney when the suit was first brought
(Aug. 10, 1984)*

It is improper for a former county attorney to represent a defendant/owner in a current suit brought by the county alleging special use permit violations when the attorney

A lawyer may not accept private employment in a matter in which he had substantial responsibility while he was a public employee unless the public entity by whom he was employed consents after full disclosure.

Note, however, that DR 9-101(B) has been superseded by Rule 1.11.

³² Note from VSB Bar Counsel’s Office: “Rule 1.11 allows a law firm to avoid disqualification in certain circumstances if it screens the former government lawyer.”

had been county attorney at the time the county initially sued the defendant/owner of the subject property and took a nonsuit.

LEO 373

*Former county attorney in private practice
(May 15, 1980)*

Former county attorney may represent a party who seeks a public service franchise from the county, so long as the attorney did not have substantial responsibility in the franchise matter while serving as county attorney.

24-6.04 Issues Involving Representation by Part-Time Local Government Attorneys

Numerous LEOs address the ethical responsibilities of part-time local government attorneys. They are summarized below.

LEO 1671

*Attorney who is jointly Commonwealth's attorney and city attorney in capacity as Commonwealth's attorney prosecutes violation of which he became aware as city attorney
(Apr. 1, 1996)*

An attorney who served jointly as city attorney and Commonwealth's attorney may not as Commonwealth's attorney act on a violation of the building code when in his joint role he became aware of information against the city's interest in its defense of a civil suit against the building inspector. An attorney who served as an assistant city and assistant Commonwealth's attorney may serve as the city attorney in the civil matter even though in his capacity as assistant Commonwealth's attorney he interviewed the plaintiff in the current civil suit.

LEO 1669

*Part-time county attorney acting as part-time public defender
(Apr. 1, 1996)*

A part-time county attorney may act as part-time public defender, but he may not represent criminal defendants if the county is the alleged victim nor may he represent defendants accused of violating county ordinances. A part-time county attorney, who is also a part-time public defender, may review the county's annual budgets for the sheriff and Commonwealth's attorney. Such attorney may accept by appointment the defense of persons charged with criminal contempt by the Department of Child Support Enforcement for failure to pay child support when the attorney represents the local department of social services, assuming that the interests of DSS and the defendant charged are not conflicting.

LEO 1128

*County attorney representation of clients in a lawsuit against planning commissioner on a private unrelated matter
(Oct. 14, 1988)*

If individual members of the Planning Commission are clients of the county attorney, then representing the plaintiff against a member of the Planning Commission in a private matter, unrelated to Commission activities, would violate DR 5-105(B), unless it is obvious that the attorney can adequately represent each, and each has consented to the representation after full disclosure of the possible effect on the independence of the lawyer's professional judgment pursuant to DR 5-105(C) [Rule 1.17].

LEO 244

Attorney representing a minor in a personal injury case against a city while serving as a part-time city attorney

(May 9, 1974)

An attorney representing a minor in a personal injury claim against the city may accept employment as part-time city attorney so long as another attorney is retained to represent the city in that matter and both the city and the attorney's client consent after full disclosure.³³

LEO 610

Part-time municipal attorney representing a private client against an adverse party in an individual capacity when that party is an attorney and mayor of the municipality
(Nov. 13, 1984)

A part-time town or city attorney, representing private clients, may represent his private clients in an action against an adverse party in an individual capacity even though the adverse party is an attorney and the mayor of the same town or city. However, the part-time town or city attorney may not represent any parties to a matter in which the mayor of the same municipality is an adverse party by virtue of the position the attorney occupies as mayor of that municipality.

LEO 581

Part-time county attorney who does not prosecute traffic offenses representing personal injury litigants whose cases stemmed from said offenses
(May 31, 1984)

Part-time county attorney, who is not responsible for prosecution of traffic offenses, can represent personal injury litigants whose injuries resulted from accidents that led to charges of violations of county ordinances. It is improper for the county attorney to represent persons charged with violations of county traffic offenses.

LEO 518

Attorney representing law enforcement officers also representing an indigent person in a criminal case investigated by said officers
(May 2, 1983)

It is not improper for an attorney, who represents a county and county law enforcement officers, to defend an indigent person in a criminal case investigated by them if the attorney, before undertaking the representation, discloses the relationship to the indigent client and obtains the client's informed consent. The attorney must also disclose to the client on a continuing basis all influences affecting his professional judgment.

LEO 495

Attorney representing a student at a school board hearing even though the attorney or his partner represents the BOS
(Sept. 3, 1982)

It is not improper for an attorney to represent a student at a school board hearing when the attorney or his partner represents the board of supervisors, because the government agencies are separate entities with neither being a parent body of the other.

³³ See discussion of LEOs in section 24-6.03(b); see also LEO 438, Representation of estate of employee of corporation by former corporate counsel prohibited (Nov. 17, 1981) (a law firm cannot represent a corporation against the estate of an employee of that corporation when the firm had previously represented the employee in the same matter).

24-7 ADDITIONAL LEGAL ETHICS OPINIONS**24-7.01 Communications with Represented Persons****24-6.01(a) Generally**

LEO 1890

Communications with Represented Persons (Compendium Opinion)
(Jan. 6, 2021)

In this compendium opinion, the Committee addressed several issues related to the application of Rule 4.2, which prohibits a lawyer from communicating “about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.” This “no-contact rule” applies:

1. Even if the represented person initiates or consents to the communication;
2. Only if the communication is about the subject of the representation in the same matter;
3. Only if the lawyer actually knows that the person is represented by counsel;
4. Even if the communicating lawyer is self-represented; and
5. Even if opposing counsel is uncooperative, or the lawyer reasonably believes that opposing counsel has failed to communicate settlement offers.

The rule does *not* apply to:

1. The represented persons themselves, who may communicate directly with each other regarding the subject of the representation, provided that the lawyer does not use the client to circumvent the no-contact rule;
2. Government lawyers in certain criminal and civil investigations;
3. Communications with former constituents of a represented organization;
4. Communications with an insurance company’s employee/adjuster after the insurance company has assigned the case to defense counsel;
5. Communications with a represented person if that person is seeking a second opinion or replacement counsel; or
6. Any communications that are otherwise “authorized by law.”

Moreover, the lawyer may not use an investigator or third party to communicate directly with a represented person. The fact that an organization has in-house or general counsel does not, in itself, prohibit another lawyer from communicating directly with constituents of the organization. Likewise, a lawyer is generally permitted to communicate with the in-house or general counsel about a case in which the corporation has hired outside counsel.

LEO 1537

Communication with Adverse Party: Special Education Hearing; Attorney Representing Child Contacting School Employees
(June 22, 1993)

In a rare opinion addressing professional responsibility, the Virginia Supreme Court held that while Rule 4.2 categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to “immediately” disengage from such communications when they are initiated by others, the Rule does not require attorneys to

disengage instantaneously “without regard to courtesy.” *Zaug v. Va. State Bar*, 285 Va. 457, 737 S.E.2d 914 (2013). Therefore, it was not a violation of Rule 4.2 for an attorney to attempt to disengage politely from the prohibited telephone conversation rather than immediately hang up on the distraught caller. *Id.*

LEO 1897

Replying All to an Email When the Opposing Party Is Copied
(Sept. 19, 2022)

It is not a violation of Rule 4.2 for a lawyer to “reply all” to an email from opposing counsel when the opposing party is copied on the email. “A lawyer who includes their client in the ‘to’ or ‘cc’ field of an email has given implied consent to a reply-all response by opposing counsel.” This is in accord with a recent opinion by the New Jersey State Bar, but in contrast to the conclusion of state bars of other jurisdictions, including those of Washington, Illinois, California, and New York City, which advise that the receiving lawyer must review the list of recipients and remove the opposing party from any response.

24-6.01(b) Communications with Represented Government Officials

LEO 1891

Are communications with represented government officials “authorized by law” for purposes of Rule 4.2?
(Jan. 9, 2020)

In the case of a lawyer who wishes to communicate with an agent or employee of a represented government entity, the communication may be “authorized by law” in two situations. First, the communication is authorized by law if the lawyer or his client has a constitutional right to petition the government, or a statutory right under FOIA or another law to communicate with a government official about matters that are the subject of the representation. Second, the communication is authorized by law if it is made for the purpose of addressing a policy issue and the agent or employee of the represented government entity has the authority to take or recommend government action regarding the policy at issue.

This analysis applies “only to a narrow subset of government officials, those within the ‘control group’ or ‘alter ego’ of the government entity,” as defined in *Upjohn v. United States*, 449 U.S. 383, 101 S. Ct. 677 (1981).³⁴ See Comment [7] to Rule 4.2 (discussing *Upjohn*). If the government official with whom the lawyer wishes to communicate is not within the organization’s “control group,” it is unnecessary to consider whether the communication is “authorized by law” because low-level employees generally would not be “represented by counsel.” Likewise, the attorney may communicate *ex parte* with former employees or agents of the governmental entity, even those who were members of its “control group.”

Due diligence may be required to determine if the government official possesses the requisite level of authority to take or recommend action in the policy matter.

³⁴ *Upjohn* and Comment [7] state that members of an organization’s “control group” include those employees who, because of their status or position, have the authority to bind the organization; for example, an officer or director of an organization is likely a member of the organization’s control group. *Upjohn* rejected the “control group” test for determining which communications between a lawyer and employees of the lawyer’s client-organization are covered by the attorney-client privilege. However, Comment [7] to Rule 4.2 and LEO 1891 incorporate the definition of “control group” provided in *Upjohn* for purposes of determining which members of a represented governmental entity may be contacted by an attorney.

The communication may be proper even if the policy relates to the subject of a claim or controversy in which the client and government are represented by counsel, or if the policy decision will directly affect the matter of the representation. However, if the communication crosses the line into impermissible evidence gathering, the lawyer must end the communication or redirect it to the policy issue.

Departing from ABA guidance, LEO 1891 provides that if the communication is authorized by law and permissible pursuant to Rule 4.2, the lawyer engaging in the communication is not required to give the government official's lawyer advance notice of the communication.

24-7.02 Ethics Opinions Related to Application of the Freedom of Information Act

LEO 1566

Zealous representation by county attorney who refuses to comply with FOIA request (Dec. 14, 1993; reaffirmed July 20, 1994)

County attorneys did not violate DR 7-102(A)(3), regarding failure to disclose that which is required by law to be revealed, in responding to a FOIA request. Attorneys did not violate DR 7-102(A)(5) [Rule 3.3(a)(1)], which prohibits knowingly making a false statement of law or fact, when they stated that a certain unwritten procedure was the "policy" of a county agency even though the policy was not reduced to writing. [Note from VSB Bar Counsel's Office: "Rule 8.3(a) requires a lawyer to report another lawyer's ethics violation under certain circumstances if the lawyer has 'reliable information' about the breach."]

LEO 1504

Attorney making FOIA request need not notify local government attorney (Dec. 14, 1992)

Opposing counsel or his paralegal in either litigation or an administrative proceeding may request records relevant in the proceeding which are available under FOIA, without advising the legal counsel for the governing body.

LEO 1205

Local government attorney cannot reveal false certification of FOIA executive session unless fraud has been committed to dilute respect for government; may have to report attorney chairman (Apr. 13, 1989)

Absent a statute requiring a government attorney to reveal a false certification of executive session, the client's secrets and confidences must be preserved unless in the government attorney's professional judgment a fraud has been committed to "dilute the citizenry's respect for the workings of government." A lawyer-member of a governing body may violate DR 1-102(A)(4) [Rule 8.4(c)] if he fails to make a truthful certification of executive session. If the attorney chairman of the governing body falsely certifies that nothing improper occurred in closed session and the county attorney believes that the misconduct perpetrates a fraud, the county attorney has an obligation to report the violation to the "appropriate professional authority." Note from VSB Bar Counsel's Office: "If information about the ethics violation is a client confidence, a lawyer may report the other

lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report *must* consult with the client under that Rule."³⁵

24-7.03 Ethics Opinions Relating to Guardian Ad Litem Issues

LEO 1870

Does the ethical restriction against communicating with represented persons apply in matters where a guardian ad litem has been appointed for a minor child? Are government attorneys prohibited from communicating or directing investigators to communicate with represented persons in such matters?
(Oct. 4, 2013)

This opinion states that Rule 4.2 applies when a guardian ad litem is appointed to represent a child. Thus, an attorney representing a parent or guardian may not communicate with a child represented by a GAL without the GAL's consent or legal authority, nor may the GAL communicate regarding the matter with a represented parent or guardian of the child without that parent's or guardian's attorney's consent or authorization conferred by a court order or other legal authority.

Attorneys who represent government agencies in civil proceedings may communicate directly or indirectly with a minor child prior to the time that a court has appointed a GAL. Once the government attorney becomes aware that a GAL has been appointed, the government attorney must obtain the consent of the GAL before communicating with the child, either directly or indirectly through the agency of a social worker or investigator. If the government attorney cannot obtain the appointed GAL's consent to have such contacts with the child, and no court order authorizes such contact, that attorney should move the court to authorize such contact with the child.

However, a government lawyer does not violate Rule 4.2 merely by requesting a social worker or investigator to communicate with a represented person, including a child for whom a GAL has been appointed, if the law entitles or charges the investigator or social worker to have such communication. While the government lawyer may request that the social worker or investigator contact and interview a represented person, and advise generally what information the lawyer seeks, the lawyer may not "mastermind" or "script" the interview or dictate the content of the communication. Such conduct would be viewed as circumventing Rule 4.2 through the actions of another.

LEO 1725

*Municipal attorney who represents DSS appointed as guardian ad litem for infant in case where DSS is a party*³⁶
(Apr. 20, 1999)

³⁵ Rule 1.6(c)(3) was amended to provide that the attorney must consult with the client when the information about another attorney's misconduct was learned during the course of representing the client *and* the information is protected as a confidence or secret under Rule 1.6.

³⁶ See also LEO 1537, Duties of attorney representing child in a special education hearing (June 22, 1993): An attorney, who represents a disabled child in a special education matter, seeks to talk with teachers and school professionals who evaluated the child. Such direct contact, without school board counsel present, would not violate the rule prohibiting contact with adverse parties which rule should be narrowly construed.

See also LEO 1891 (Jan. 9, 2020) (noting that, "[s]ignificantly," the attorney in LEO 1537 "did not seek to have *ex parte* interviews with 'control group' employees of the school board, but only the child's teachers and evaluators"); LEO 1729, Guardian ad litem as visitation supervisor and witness in same matter (Mar. 26, 1999).

A lawyer who routinely represents the local department of social services must so inform the court and obtain its consent before being appointed guardian ad litem for an infant in proceedings in which DSS is a party.

LEO 1626

Guardian ad litem who represents a child in a termination of parental rights case employed by DSS for the appeal
(Feb. 17, 1995)

An attorney, who as a guardian ad litem for a child appeals a termination of parental rights proceeding brought by the parents, may be employed by the Department of Social Services for the appeal, if the attorney determines that there is an identity of interest between the child and DSS.

24-7.04 Ethics Opinions Relating to Spouse Attorneys of Local Government Attorneys

LEO 665

Attorney represents client in obtaining approval of plat on which spouse/partner county attorney is required to provide advice
(Mar. 15, 1985)

It is improper for the spouse who is the law partner of a part-time Commonwealth's, city, or county attorney to accept employment in obtaining the approval of a subdivision plat or a change in the condition of plat approval if the public attorney is required to render advice on the matter. In situations in which the public attorney is not required to render advice, the spouse and law partner may proceed with the representation provided they fully disclose the relationship to the client, and further provided that there is no interest that would impair the independent professional judgment of the spouse and law partner of the public attorney.

LEO 643

County attorney represents Board of Zoning Appeals of which attorney's spouse/partner is a member
(Apr. 5, 1985)

A part-time Commonwealth's attorney/county attorney may render legal services as Commonwealth's attorney/county attorney to the county's board of zoning appeals, the membership of which includes said attorney's wife/law partner.

LEO 556

(Changed by Rule 1.8) Attorney who accepts employment as assistant county attorney when attorney's spouse conducts significant litigation against the county
(Apr. 10, 1984)

"It is not improper for an attorney to accept employment as an assistant county attorney when that attorney's spouse, either individually or through his law firm, conducts significant litigation against the county, so long as the assistant county attorney has no contact with any litigation involving the spouse."

Legal Ethics Committee Notes to LEOs 665 and 556: "Rule 1.8(i)³⁷ now allows related lawyers to be directly adverse to one another if the clients consent."

³⁷ "(i) A lawyer related to another lawyer as parent, child, sibling or spouse, or who is intimately involved with another lawyer, shall not represent a client in a representation directly adverse to a

24-7.05 Ethics Opinions Related to Receipt of Confidential Material

The following opinions apply to attorneys generally (and not only to local government attorneys). They are included for reference because of increasing technological innovations.

LEO 1871

Inadvertent receipt of confidential information during the discovery phase of litigation (July 24, 2013)

To the extent that the confidential information is received in the discovery phase of litigation, a lawyer: (1) may review the information if necessary to determine his obligations under the discovery rule; (2) must notify the party producing the documents that the lawyer is in possession of them; (3) is not ethically obligated to return the information to opposing counsel; and (4) may sequester the material pending a judicial determination of whether and to what extent the receiving lawyer may use the information. This LEO partially overrules LEO 1702.

LEO 1802

Advising clients on the use of lawful undisclosed recording (Sept. 29, 2010)

There are circumstances under which a lawyer may ethically advise a client that he may record a conversation with a third party without disclosure of such recordation. See the opinion for examples and extensive discussion.

LEO 1842

Confidential information left on website or voicemail (Sept. 30, 2008)

A lawyer who receives confidential information from a caller who contacts the firm by telephone and leaves a voicemail is under no ethical obligation to maintain its confidentiality and may use the information in representing an adverse party. A lawyer who maintains a passive website that does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by email, but provides an email address for every lawyer, does not owe a duty of confidentiality to a person who unilaterally submits unsolicited information via email to the firm using the lawyer's email address posted on the firm's website, and may use the information in representing an adverse party. Important to both of these determinations is that the lawyer did not invite confidentiality or give a reasonable expectation of confidentiality to a prospective client. See also Rule 1.18 dealing with the confidentiality of information learned from a "prospective client," defined in the Rule as a "person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter."

LEO 1738

Tape Recordings³⁸ (Apr. 13, 2000)

A prosecutor, a lawyer who works in law enforcement, or a lawyer who is a crime victim can record his conversations with third parties without their knowledge, or the attorney can direct another to do so in the context of a law enforcement investigation, during housing discrimination testing, and when the lawyer is the victim of a threat or actual criminal activity. One party to the conversation must be aware of and consent to the

person whom the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

³⁸ See also LEO 1802 (Sept. 29, 2010).

recording. See also Va. Code § 19.2-62(B)(2). This opinion overrules previous LEOs to the extent that they are in conflict. See, e.g., LEO 1635.

LEO 1702

Attorney who inadvertently receives privileged materials from opposing counsel
(Nov. 24, 1997)

A lawyer who receives materials from opposing counsel that on their face appear to be privileged or otherwise confidential should refrain from examining the materials, notify the sending lawyer, and abide by the instructions of the lawyer who sent them. (Note that boilerplate language on fax and e-mail cover pages is not necessarily sufficient to put lawyer on notice that the transmission was inadvertent.) If such material deliberately is sent to the lawyer from an unknown third party, the same restrictions apply except that the lawyer may seek judicial resolution if the documents show a discovery violation or establish that they were received from someone acting under the authority of a whistle blower statute. This opinion overrules LEO 1076 regarding third party transmittal, but is overruled in part by LEO 1871.

LEO 1635

Nonconsensual recording of telephone conversations
(Feb. 7, 1995)

The nonconsensual tape recording of telephone conversations, even if not prohibited by state or federal law, is improper and violates DR 1-102(A)(4) [Rule 8.4(c)]. This recording is unethical even if it is not undertaken during an attorney-client relationship.³⁹ This opinion is modified by LEO 1738; however, that opinion only applies to attorneys in the specific situations described.

³⁹ The amended language of Rule 1.6(c)(2), Confidentiality of Information, could be relevant to the attorney's duty with respect to such a situation. It provides in pertinent part:

[A lawyer shall promptly reveal:] information concerning the misconduct of another attorney to the appropriate professional authority under Rule 8.3. When the information necessary to report the misconduct is protected under this Rule, the attorney, after consultation, must obtain client consent. Consultation shall include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Index to LEOs

LEO No. HEADNOTE

- 1897 Replying All to an Email When the Opposing Party Is Copied
- 1891 Communications with Represented Government Officials
- 1890 Communications with Represented Persons (Compendium Opinion)
- 1879 Rule 3.8 applies to prosecutors prosecuting criminal matters only, not to a government attorney acting as a prosecutor in an administrative proceeding
- 1875 Conflict Issues When a Government Lawyer is Furloughed from Employment and Asked to Continue Representing the Agency
- 1871 Inadvertent Receipt of Confidential Information During the Discovery Phase of Litigation
- 1870 Does the Ethical Restriction Against Communicating with Represented Persons Apply in Matters Where a Guardian Ad Litem has been Appointed for a Minor Child? Are Government Attorneys Prohibited from Communicating or Directing Investigators to Communicate with Represented Persons in such Matters?
- 1842 Obligations of a Lawyer Who Receives Confidential Information via Law Firm Website or Telephone Voicemail
- 1841 Member of Town's Governing Body Also Attorney Representing Client Challenging Constitutionality of Ordinance that Member Voted to Adopt
- 1836 Conflicts of Interest Involved When City Attorney Provides Legal Services to Multiple Constituents within an Organization
- 1819 Conflict of Interest—Lawyer Working as a Lobbyist Rather Than in an Attorney Client Relationship
- 1815 Can a Local Government Attorney Represent a Zoning Administrator in an Appeal Against the BZA while Representing the BZA in an Unrelated Appeal Before the Circuit Court?
- 1810 Attorney Serving as Guardian Ad Litem When Opposing Counsel Was a Former Client
- 1802 Advising Clients on the Use of Lawful Undisclosed Recording
- 1800 Non-Attorney Staff Support Are Not Subject to the Conflicts of Interest Prohibition
- 1798 Unethical for a Commonwealth's Attorney to Accept More Cases than He Can Competently Prosecute
- 1792 Whether a Social Worker can Assist a Pro Se Litigant in Completing Forms for Small Claims Court Without Engaging in the Unauthorized Practice of Law
- 1785 Whether a County Attorney can Represent a County Board of Supervisors in a Suit Against the Board of Zoning Appeals (BZA) When the County Attorney Has Advised the BZA on Matters Before It
- 1773 Whether an Attorney in the General Assembly Can Represent Private Parties Before Local Governing Boards

- 1767 Conflict of Interest: Commonwealth's Attorney as Client of Private Law Firm Which Represents Defendants in that Jurisdiction
- 1763 Reconsideration of LEO 1718; Representation of Client Before Governing Body When Other Attorney in Same Firm Is Member of Governing Body
- 1755 Threatening Criminal Action in a Civil Matter; Contact Between Opposing Parties
- 1752 Contact with Represented Party
- 1746 Practice Issues for Former Commonwealth's Attorney Now in Private Practice (Reconsider LEO 1243)
- 1738 Attorney Participation in Electronic Recording Without Consent of Party Being Recorded
- 1729 Guardian Ad Litem as Visitation Supervisor and Witness in Same Matter
- 1725 Conflict; Appearance of Impropriety; Representing Dept. of Social Services and Acting as Guardian Ad Litem for Other Client With Matter Adverse to Dept. of Social Services
- 1723 Confidences; Attorney Following Procedures Required by Liability Insurance Company Which Restrict Discovery, Use of Third Party Vendors and Require Review of Detailed Billing Invoices by a Third Party Without Insured/Client's Consent or Knowledge
- 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
- 1702 Inadvertent Receipt of Confidential Information; Zealous Representation
- 1699 Former City Attorney Who Participated in Drafting Zoning Ordinances Anticipates Filing a Lawsuit Challenging Current Zoning Ordinances
- 1698 Attorney Handling Zoning Case after Having Served on County Planning Commission and as Campaign Treasurer for a County Supervisor
- 1683 Conflict of Interest; Consent Required When City Attorney Represents Department/Agency in Grievance Hearings and in Adopting and Amending Personnel Rules
- 1671 Commonwealth's Attorney Also Working as City Attorney
- 1669 Part-Time County Attorney as Part-Time Public Defender; Private Defense Counsel
- 1661 City Attorney's Representation of City Employee in Civil Suit Wherein Employee Would Be Responsible For Payment Of Any Award For Punitive Damages; City Attorney's Participation In Settlement Negotiations
- 1635 Duty to Report Misconduct; Fraud; Attorney's Tape Recording Telephone Conversation When Not Acting in Attorney Capacity; Threatening Disciplinary Action Against Opposing Attorney in Civil Matter
- 1626 Attorney-Client Relationship; Guardian Ad Litem; Conflict of Interest; Attorney Representing DSS in Appeal of Decision on Termination of Parental Rights When Attorney was Guardian Ad Litem in Termination Proceeding

- 1566 Zealous Representation—Duty to Report: Refusal of Local Government Attorney to Comply with Freedom of Information Act Request
- 1537 Communication with Adverse Party: Special Education Hearing; Attorney Representing Child Contacting School Employees
- 1504 Communication with Adverse Party: Attorney’s Paralegal Contacting Opposing Party for Information Available under Virginia Freedom of Information Act
- 1464 Communication with Adverse Parties—City Attorney: City Attorney Providing Petitioners with Legal Assistance While Continuing to Carry Out Duties to the City Council
- 1430 Appearance of Impropriety: Former Local Government Attorney Hired by Firm Employed as Outside Counsel for Same Local Government Entity
- 1422 Conflict of Interest—Multiple Representation—Government Attorney: County Attorney as General Counsel for Regional Transportation District Commission, One Member of Which Is the County, While Simultaneously Providing Legal Services to the County
- 1408 Confidences and Secrets—Conflict of Interest—Multiple Representations: Multiple Representation Adversely Affecting Attorney’s Professional Judgment
- 1393 Conflict of Interests—Multiple Clients—County Attorney: County Attorney Representing Builder Before State Board; Previously Represented Local Building Official Before the Local Board of Building Code Appeals
- 1299 Appearance of Impropriety—Former Government Attorney: Representation of Client by Former Government Attorney in Matter in Which He Was Originally Involved While a Public Employee
- 1209 Conflict of Interest—County Attorney—Multiple Representation: Representing Board of Supervisors on Petition for Review of Board of Zoning Appeals Matter and Also Representing Board of Zoning Appeals [Partially overruled by LEO 1785]
- 1205 County/City Attorney—Disclosure—Attorney-Client Relationship—Confidences and Secrets: Duty to Reveal a False Certification in an Executive Meeting
- 1150 Confidences and Secrets—Conflict of Interest—Multiple Representations: Multiple Representations Adversely Affecting Attorney’s Professional Judgment
- 1128 Conflict of Interest—County Attorney—Multiple Representation: Commission Attorney Representing Plaintiff Against Defendant Member of Commission
- 1096 Conflict of Interest—Multiple Representation of Social Services and Parents Prosecuted by the DSS in Unrelated Matters
- 1086 Conflict of Interest—County Attorney
- 843 Conflict of Interest—County Attorney
- 777 Communicating with One of Adverse Interest
- 761 Confidences and Secrets—Client Identity Disclosure—City Council
- 759 Appearance of Impropriety—Conflict of Interest—Spouse with Department of Social Services

- 713 Conflict of Interest—Hearing Officers—Part-Time City Attorney
- 665 Conflict of Interest—Part-Time Commonwealth's, City or County Attorney—Private Practice—Familial Relationships—Spouse
- 643 Appearance of Impropriety—Representation of Board of Zoning Appeals
- 610 Conflict of Interest—City Attorney—Part-Time Private Practice
- 605 Appearance of Impropriety—Former County Attorney
- 581 Part-Time County Attorney—Personal Injury Representation
- 556 Appearance of Impropriety—Attorney's Spouse Employed as Assistant County Attorney
- 529 Conflict of Interest—Communication with Adverse Party—County Board of Supervisors
- 518 Conflict of Interest/County Attorney—Representation of Indigent Person
- 495 Conflict of Interest—School Board/Board of Supervisors
- 394 County Attorney—Conflict of Interest
- 373 Former Government Attorney—Private Practice
- 290 Proposed Merger of Law Firms—County Attorney—Conflict of Interest
- 244 Part-Time City Attorney—Conflict in Interest
- 243 Counsel for Board of Supervisors—Conflict
- 216 Town Attorney—Conflicts in Interests

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