



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

October 18, 2013

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The Honorable John S. Edwards
Member, Senate of Virginia
Post Office Box 1179
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Dear Senator Edwards:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether the Attorney General and his office have a conflict of interest so as to require a recusal of the Office of the Attorney General from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation.

Response

It is my opinion that there is no inherent conflict of interest presented, and, thus, no *per se* requirement that the Office of the Attorney General recuse from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation. It is my further opinion that any potential recusal of that Office must be determined on a case-by-case basis.

Applicable Law and Discussion

The Constitution of Virginia sets forth the qualifications of the Attorney General.¹ The Attorney General's duties are as prescribed by law, and there are no limits on the terms of the Attorney General.² Section 2.2-507 provides that the Attorney General shall perform "[a]ll legal service in civil matters for

¹ "An Attorney General shall be elected by the qualified voters of the Commonwealth at the same time and for the same term as the Governor; and the fact of his election shall be ascertained in the same manner. No person shall be eligible for election or appointment to the office of Attorney General unless he is a citizen of the United States, has attained the age of thirty years, and has the qualifications required for a judge of a court of record. He shall perform such duties and receive such compensation as may be prescribed by law, which compensation shall neither be increased nor diminished during the period for which he shall have been elected. There shall be no limit on the terms of the Attorney General." VA. CONST. art. V, § 15.

² *Id.* See also VA. CODE ANN. § 2.2-500 (2011).

the Commonwealth” except as otherwise provided by statute.³ If it is “impracticable” for such legal service to be rendered by the Attorney General or one of his assistants, he may employ special counsel.⁴ Moreover, the Governor may employ special counsel when the “Attorney General’s office is unable to render such service,” upon issuing an exemption order “stating with particularity the facts and reasons leading to the conclusion that the Attorney General’s office is unable to render such service.”⁵

Section 2.2-511 sets forth the Attorney General’s authority in criminal cases.⁶ The Attorney General’s duties in that regard include those found in § 24.2-104, which, in relevant part, provides that

A. The Attorney General shall have full authority to do whatever is necessary or appropriate to enforce the election laws or prosecute violations thereof. The Attorney General shall exercise the authority granted by this section to conduct an investigation, prosecute a violation, assure the enforcement of the elections laws, and report the results of the investigation to the State Board [of Elections].^[7]

In 2013, the General Assembly amended the statute to provide independent authority to the Attorney General so that, without involvement of the State Board of Elections, he should have authority to enforce the election laws or prosecute violations thereof.⁸ Prior to this amendment, the Attorney General could exercise this authority only upon a request from the State Board of Elections.⁹ The effect of the 2013 amendments is to permit the Attorney General to take the actions specified in § 24.2-104(A) without need for a prerequisite request from the State Board of Elections.

When the General Assembly amended § 24.2-104, it did so knowing that under the Constitution of Virginia (“Constitution”) the Attorney General could run for reelection.¹⁰ An Attorney General running for reelection would present the exact same issue that is presented herein, that of an official having law enforcement authority related to an election wherein he also is running as a candidate.¹¹

Possessing authority to enforce the election laws while running for reelection is not a new development in the Commonwealth. The commonwealth’s attorney for each Virginia locality, who is subject to popular election,¹² has broad enforcement powers in election matters, including, but not limited to, defending a petition that challenges a voter registration denial;¹³ investigating and prosecuting

³ Section 2.2-507(A) (Supp. 2013).

⁴ Section 2.2-507(C); *see also* VA. CODE ANN. § 2.2-510 (Supp. 2013).

⁵ Section 2.2-510(1).

⁶ Section 2.2-511 (2011).

⁷ VA. CODE ANN. § 24.2-104(A) (Supp. 2013).

⁸ *See* 2013 Va. Acts ch. 768.

⁹ *See* § 24.2-104(B) and (C). Section 24.2-104(C) also requires certain actions by the Attorney General when (“[t]he attorney for the Commonwealth or a member of the electoral board of any county or city . . .” makes a request in writing that makes certain allegations made under oath. The Attorney General’s duties under this section predated the 2013 amendment to § 24.2-104.

¹⁰ When the legislature passes a new law, or amends an old one, it is presumed to act with full knowledge of the law as it stands. *Sch. Bd. of Stonewall Dist. v. Patterson*, 111 Va. 482, 487-88, 69 S.E. 337, 339 (1910).

¹¹ The fact that no Attorney General has run for reelection since the 1980s does not alter the legal analysis of this Opinion.

¹² VA. CONST. art VII, § 4; VA. CODE ANN. § 15.2-1626 (2012).

¹³ Section 24.2-422 (2011).

violations of the Campaign Finance Disclosure Act of 2006,¹⁴ and handling “any complaint or allegation of unlawful conduct” under Title 24.2.¹⁵ The authority of the commonwealth’s attorney in election matters, even in years in which the commonwealth attorney is seeking reelection, has not been statutorily conditioned upon a request from the State Board of Elections or local electoral board.¹⁶

Notwithstanding these express provisions and grants of authority, you inquire whether Rule 1.7 of the Rules of Professional Conduct governing attorneys requires automatic recusal of the Office of the Attorney General if he is a candidate for election. The General Assembly has delegated to the Virginia Supreme Court the power to establish rules and regulations “[p]rescribing a code of ethics governing the professional conduct of attorneys.”¹⁷ The Code makes clear, however, that rules promulgated by the Supreme Court may not conflict with statutory law.¹⁸ The Rules of Professional Conduct, moreover, make clear at the outset that the ethical duties of government lawyers may differ from those of lawyers in the private sector.¹⁹ While the Rules apply to all lawyers, “under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.”²⁰

Rule 1.7(a) provides as follows:

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 responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.²¹

The Comments to Rule 1.7 provide guidance with respect to application of this Rule and state that “[l]oyalty and independent judgment are essential elements to the lawyer’s relationship to a client.”²² The Comments further state that “[r]esolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.”²³ The conflicts of interest referred to in Rule 1.7 include those that would affect the representation of a client in relation to the lawyer’s “business or personal

¹⁴ Section 24.2-946.3 (2011).

¹⁵ Section 24.2-1019 (2011).

¹⁶ See 1978-79 Op. Va. Att’y Gen. 95, 97.

¹⁷ VA. CODE ANN. § 54.1-3909 (2013).

¹⁸ Section 54.1-3915 (2013) (“Notwithstanding the foregoing provisions of this article, the Supreme Court shall not promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys which are inconsistent with any statute.”).

¹⁹ Va. Sup. Ct. R. Part 6, § II, Preamble.

²⁰ *Id.*

²¹ *Id.*, Rule 1.7; in addition, subparagraph (b) sets forth certain exceptions to the general rule applicable to attorneys in private client-lawyer relationships.

²² *Id.* at n.1.

²³ *Id.* at n.9.

interests.”²⁴ Where, as here, alleged conflicts may arise in a context other than litigation, they are difficult to assess, and the “question is often one of proximity and degree.”²⁵

In recognition of the unique role of government lawyers, the Attorney General is expressly permitted to

represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity.^[26]

Thus, the General Assembly has legislated that the Attorney General may represent more than one client in a transaction, notwithstanding the general terms of Rule 1.7.²⁷

There are other Rules of Professional Conduct that might apply to the Attorney General’s authority under § 24.2-104. Rule 1.11 provides certain special rules to prevent a government lawyer from engaging in “activities in which his personal or professional interests are or foreseeably may be in conflict with official duties or obligations to the public.”²⁸ Rule 3.8 further governs the conduct of the Attorney General when acting as a prosecutor, requiring that he not file charges not supported by probable cause and that he “has the responsibility of a minister of justice and not simply that of an advocate.”²⁹

Applying the above-referenced Rules of Professional Conduct to the question presented, it is clear that there is no inherent conflict of interest requiring recusal. The Constitution expressly provides that the Attorney General serve a four-year term and may run for reelection and does not prohibit him from running for Governor. The Code prescribes various duties to the Attorney General, including enforcement of election laws under § 24.2-104(A). The 2013 changes to the law do not provide for any form of blanket disqualification by the Attorney General if he is on the ballot. Thus, with respect to this statutory provision, it is the duty of the Attorney General to determine if the specific factual scenario at issue would affect his ability to ethically represent the Commonwealth. Clearly, this question of “proximity and degree” must be answered on a case-by-case basis.³⁰

I note that ample safeguards exist should an issue develop involving an Attorney General’s own campaign for reelection or for election to another office. The General Assembly was aware of such potentialities when it amended § 24.2-104. First, the commonwealth’s attorney in the relevant jurisdiction has concurrent jurisdiction to enforce the election laws.³¹ In addition, the State Board of Elections has authority to “request the Attorney General, or other attorney designated by the Governor for such purpose, to assist the attorney for the Commonwealth of any jurisdiction in which election laws have been

²⁴ *Id.* at n.10.

²⁵ *Id.* at n.26.

²⁶ VA. CODE ANN. § 2.2-507(A).

²⁷ *See also* Hladys v. Commonwealth, 235 Va. 145, 148-49, 366 S.E.2d 98, 100 (1988).

²⁸ Va. Sup. Ct. R. Part 6, § II, Rule 1.11, n.1.

²⁹ *Id.*, Rule 3.8, n.1.

³⁰ The consideration of any given factual scenario would include reference to any applicable provisions of the State and Local Conflict of Interests Act. VA. CODE ANN. §§ 2.2-3101 through 2.2-3131 (2011 & Supp. 2013). *See especially* § 2.2-3103 (2011).

³¹ *See supra* notes 11-13, and accompanying text.

violated,” and upon unanimous request, “[t]he Attorney General, or the other attorney designated by the Governor, shall have full authority to do whatever is necessary or appropriate to enforce the election laws or prosecute violations thereof.”³² Also, the Attorney General can appoint outside counsel or request that a commonwealth’s attorney review a matter.³³ Moreover, the Governor can appoint special counsel if a factual scenario develops in which he determines such action to be necessary.³⁴

Thus, with respect to the exercise of the authority granted by § 24.2-104(A), should ethical considerations warrant that the Attorney General recuse his Office from the investigation or prosecution of a specific alleged electoral law violation, the General Assembly has provided adequate alternatives for the Commonwealth’s legal representation.

In summary, there is no legal or ethical requirement that a sitting Attorney General who is on the ballot for an election disqualify himself or his Office from performing all of the Office’s statutory responsibilities pursuant to § 24.2-104. If, regarding an application of § 24.2-104 to a specific set of facts, the Attorney General determines that he cannot appropriately perform the statutory function, he may recuse himself, leaving the task to either the appropriate lawyers in the Office or outside counsel appointed by the Office. Necessarily, such a determination is fact specific and cannot be made in the abstract.³⁵

Conclusion

Accordingly, it is my opinion that there is no inherent conflict of interest presented, and, thus, no *per se* requirement that the Office of the Attorney General recuse from investigating and prosecuting alleged violations of election law, when the Attorney General is a candidate for public office in the same election that is under investigation. It is my further opinion that any recusal of that Office must be determined on a case-by-case basis.

With kindest regards, I am

Very truly yours,

A handwritten signature in dark ink, appearing to read "Ken C" followed by a stylized "II" in a box.

Kenneth T. Cuccinelli, II
Attorney General

³² Section 24.2-104(B).

³³ Section 2.2-507(C).

³⁴ See § 2.2-510. See also *Wilder v. Attorney Gen.*, 247 Va. 119, 439 S.E.2d 398 (1994) (upholding power of the Governor to appoint special counsel in situations where he determines that the Attorney General is unable to render services).

³⁵ For example, if there were an allegation of voter fraud regarding three votes in a House of Delegates race decided by one vote and all of the statewide races were decided by 100,000 vote margins, there would not even be a colorable claim that the Attorney General or his Office could be conflicted out of performing the functions outlined in § 24.2-104.