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ASSISTANT PROSECUTING ATTORNEYS

LEGAL ETHICS INQUIRY 78-1

By letter you requested an opinion of this Committee with respect to the following questions:

(1) a. May an assistant prosecuting attorney represent his client in a case against the Board of Regents which was instituted prior to his appointment as assistant prosecuting attorney?

b. If he cannot, may he take a leave of absence from his position as assistant prosecuting attorney until the resolution of this suit against the Board of Regents?

(2) May one of his law partners or associates not connected with the prosecuting attorney's office in any manner whatsoever handle this lawsuit against the Board of Regents?

The duties of the West Virginia prosecuting attorney are prescribed in W. Va. Code § 7-4-1 (1976 Replacement Volume) as follows:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. Every public officer shall give him information of the violation of any penal law committed within his county. It shall also be the duty of the prosecuting attorney to attend to civil suits in such

county in which the State, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.

It shall be the duty of the prosecuting attorney to keep his office open in the charge of a responsible person during the hours polls are open on general, primary and special county-wide election days, and the prosecuting attorney, or his assistant, if any, shall be available for the purpose of advising election officials. It shall be the further duty of the prosecuting attorney when requested by the attorney general, to perform or to assist the attorney general in performing, in the county in which he is elected, any legal duties required to be performed by the attorney general, and which are not inconsistent with the duties of the prosecuting attorney as the legal representative of such county. It shall also be the duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, any legal duties required to be performed by the attorney general, in any county other than that in which such prosecuting attorney is elected, and for the performance of any such duties in any county other than that in which such prosecuting attorney is elected he shall be paid his actual expenses.

The prosecuting attorney represents the State within his county. The state is his primary client. Any representation which interferes with this responsibility is improper and should be avoided.

The Committee on Professional Ethics of the New York State Bar Association held: "Service by a lawyer in a public capacity carries the same restrictions as to conflicts of interest as service for private clients." The Committee answered the specific inquiry involved in the case by disapproving representation by the

district attorney of both the public interest and persons being prosecuted by the district attorney's office. Further, the prohibition against such representation was held to extend to the law partners and associates of the district attorney. The New York State Bar Association followed the American Bar Association's position with respect to consent, saying "no question of consent is involved because the public cannot give consent to a conflict of interest."

While the West Virginia Department of Highways usually handles condemnation matters with its own trial attorneys, the Department may call upon the prosecuting attorney of the county for assistance or may ask him to handle the case. Several years ago this Committee considered this very problem. An attorney had been employed by the State of West Virginia to handle selected condemnation cases on a contract basis. The attorney was also representing private property owners against the Department of Highways in other cases. The attorney for the Department's Right of Way Division consented to this arrangement. This Committee, however, held it was improper for the attorney to represent both the State Highway Department and the property owners.

More closely related to your situation is the case of an attorney who was appointed as a part-time special assistant attorney general attached to the West Virginia Human Rights Commission. This attorney had a large practice before the West Virginia Court of Claims. This Committee was of the opinion that it would be improper for the attorney to represent clients against

the State of West Virginia and at the same time be an assistant attorney general and counsel for the West Virginia Human Rights Commission.

It has been this Committee's position that a prosecuting attorney may engage in private civil practice, but a lawyer who attempts to act in both capacities should not accept any private employment which is in any way inconsistent with or antagonistic to his public employment.

Any disability of the prosecuting attorney would, of course, apply with equal force to his assistants. As an assistant prosecuting attorney you are under the same disability to represent private clients that the prosecuting attorney suffers.

The Committee is of the opinion that it would be improper for you as an assistant prosecuting attorney to continue to prosecute an action against the West Virginia Board of Regents on behalf of a private client.

As we understand the term "leave of absence" it connotes continuity of the employment status. The natural meaning of "leave of absence" is not that one on leave is no longer employed but, rather, that the person on leave of absence, while still employed, is temporarily excused from performing his duties. See Chenault v. Otis Engineering Corp., 423 S.W.2d 377; Bowers v. American Bridge Co., 43 N.J. Super. 48, 127 A.2d 580; and State ex rel. Cutright v. Civil Service Commission, 95 Ohio. App. 385, 120 N.E.2d 127. Accepting this to be the meaning of the term "leave

of absence" as used in your question (1)b., that question must be answered in the negative.

Disciplinary Rule 5-105(D) of the Code of Professional Responsibility provides:

If a lawyer is required to decline employment or to withdraw from employment, no partner or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.