

LEGAL ETHICS INQUIRY 78-2

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By letter addressed to the Executive Director of The West Virginia State Bar you and other members of the X County Bar asked for an opinion of this Committee as to the propriety of a prosecuting attorney or his assistants in accepting employment on behalf of claimants in personal injury litigation arising out of motor vehicle accidents.

You state in your letter that for a period of over 20 years it has been the practice in X County for prosecuting attorneys to decline employment in personal injury litigation arising out of motor vehicle accidents occurring in X County for the reason "that practically all such accidents are investigated by one of the police agencies which files a report and generally issues a citation for a criminal offense to one or more of the parties involved in the accident." You further state that the present prosecutor and his assistant take the position that there is not a conflict of interest when they accept employment as counsel for the party seeking damages for injuries arising out of such an accident. You enclosed with your letter a copy of the complaint in a case pending in the Circuit Court of X County in which the plaintiffs are represented by the incumbent prosecutor and his assistant and seek damages arising out of an automobile accident. The defendant was charged with improper registration and was convicted thereof on his plea of guilty and paid a fine and costs. You state an

accident report was prepared and filed by a X County deputy sheriff.

You further state that you are informed that the prosecutor and his assistant have settled one or more civil cases, without suit, and have other cases in which they are negotiating settlements, all of which are similar in that they involve injuries arising out of motor vehicle accidents which were investigated by a police agency and accident reports were prepared and filed by the investigating officers.

You refer in your letter to an article entitled Legal Ethics and the Prosecuting Attorney, authored by the chairman of this Committee, which appears in 49 W. Va. L. Rev. at p. 367. The views expressed in that article are the opinions and views of the author and should not be regarded as necessarily representing the view of the Committee on Legal Ethics.

The prosecuting attorney represents the state within his county. The state is his primary client, and his primary responsibility is the prosecution of the guilty and the protection of the innocent. Any representation which interferes with this responsibility is improper and should be avoided. Our system, which permits the prosecutor and his assistants to engage in private practice, creates many problems of conflicts of interest for those who attempt it, as pointed out by the Committee on Professional Ethics of the American Bar Association:

The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private client,

involving subordination of the interest of one or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both.

DR 5-105(A) of the Code of Professional Responsibility provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests. . . .

DR 5-105(B) provides:

A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests. . . .

The above disciplinary rules extend their prohibition beyond cases of actual present conflict to those in which the interests may with some reasonable degree of probability become conflicting. Even the possibility of conflict should deter a lawyer in public office from engaging in a civil action involving parties and facts which may have been the subject of previous criminal investigation, as later developments may indicate, notwithstanding previous decisions to the contrary, that criminal action should be taken.

In Formal Opinion 39 the Committee on Professional Ethics of the American Bar Association held that where a prosecuting attorney, in the performance of his official duty, joined with

police officers and an agent of the Board of Underwriters in investigating the origin of a fire which destroyed an insured building, the facts being such as to arouse suspicion as to the responsibility of the assured for the fire, but the investigation failing to produce information which would warrant prosecution of the assured, it was improper for the prosecuting attorney to represent the assured for the purpose of collecting the insurance. The Committee said:

As stated in Opinion 30, the Committee also believes the provision of Canon 31 of judicial ethics to the effect that a judge "who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success" is applicable to public prosecutors "who should even at a personal financial sacrifice be and remain above suspicion."

In Formal Opinion 77 the ABA Committee held that it would be improper for a prosecuting attorney who is prosecuting a criminal charge against a defendant to represent him in a personal injury suit.

In Formal Opinion 135 the ABA Committee stated that a West Virginia prosecuting attorney, though not prohibited from engaging in private practice, who investigated an automobile accident but determined that criminal prosecution was not warranted, may not represent one of the parties to the accident in a civil suit for personal injuries. In its opinion the Committee said:

Automobile accidents frequently give rise to inquiry into both criminal responsibility and civil liability of the persons involved. It is the duty and common practice of public prosecutors and peace officers to investigate such occurrences to determine whether prosecution is warranted.

In the case stated, it appears that the prosecutor decided there was no criminal responsibility. In disposing of the question submitted, we shall assume that he acted in entire good faith and without contemplation of employment in any subsequent civil action growing out of the accident.

The investigation of the prosecutor was ostensibly in the exercise of official authority; information was obtained from persons, who may have felt, quite naturally, under a sense of coercion or respect for actual or supposed power. The person later sued as a tortfeasor may thus have disclosed facts inimical to his best interests in a civil action. Unsuspecting, unshielded, and at serious disadvantage, he submitted to interrogation by one who later, as opposing counsel in a civil action, might use the knowledge thus acquired against him.

Such approaches by an attorney in private practice are improper; they are calculated to mislead to his prejudice a party not represented by counsel, contrary to the provisions of Canon 9. The wisdom of this Canon is emphasized in Opinion 108.

If the lawyer making the approach does so under sanction or color of official power, he thereby more certainly disqualifies himself from later participation as counsel in any civil litigation having its basis in or connected with the occurrence previously investigated as to its potential criminal aspects.

A prosecutor cannot profit by information gained in the course of performance of his duties as a public official. Public policy forbids. Aldridge v. Capps, 56 Okla. 678, 156 P. 624.

This policy is reflected in Canon 36 which prohibits a lawyer who has once been in public employ, after retirement, accepting employment in connection with any matter which he has investigated or passed upon while in such office or employ. It follows, of course, that in a similar situation he cannot accept such employment before retirement. See Opinions 39 and 77.

The Committee in Advisory Opinion 2 adopted with approval the foregoing opinion of the ABA Committee. We are committed to the principle that a prosecutor cannot profit by information gained in the course of his duties. Likewise, we believe it to be highly improper for public prosecutors to use the weight of their office to influence the outcome of civil litigation in which they are involved. If a crime has been committed, it is the duty of the prosecutor to prosecute. In such a case, he should withdraw immediately from any civil litigation in which the accused is involved.

While we deem it improper for a prosecuting attorney to represent any of the parties to an accident in a civil suit where the prosecutor has investigated the accident but determined that criminal prosecution was not warranted, we do not believe that a prosecutor should be prohibited from representing a party to an accident simply because motor vehicles are involved and the accident is investigated by a policy agency. Certainly, cases involving minor statutory violations which are not the proximate cause of the accident, i.e., improper registration, would not be likely to involve an official investigation by the prosecuting attorney or his assistants.

If the prosecutor is involved officially with the investigation of the accident, directs the taking of the statements of witnesses by police officers or members of his staff, determines whether a person involved in the accident should be charged with a crime, is consulted concerning the drafting of warrants for the arrest of any party involved in the accident, or is likely to be called upon to prosecute or try a charge against a party either initially or on appeal, it would be improper for him to represent a party to the accident in civil litigation.

The situation where an accident is investigated by a police agency and charges are preferred against a party to the accident presents a more complex problem. Suppose, for example, one of the parties to an accident is charged with speeding or reckless driving by the police without the intervention of the prosecutor and is found guilty by the magistrate. Thereafter, the defendant appeals his conviction to the circuit court of the county. Is it not then the duty of the prosecutor to prosecute the appeal? In such a situation, the prosecutor who is representing one of the parties to the accident in civil litigation would have to withdraw. See DR 5-105(B). As pointed out by the ABA Committee in Opinion 128:

A lawyer should not be permitted to accept other or subsequent employment in a matter which may conflict with the interests covered by his professional obligations or which may be adverse to interests which are closely related to the law and facts involved in a matter which he has previously handled.

A prosecutor who accepts employment in civil litigation under circumstances which make it likely that he may be involved in the matter in his official capacity shows lack of appreciation of general ethical principles and considerations of sound public policy and subjects himself to just public criticism.

To summarize:

(1) This Committee is of the opinion that it would be improper for a prosecuting attorney or for any partner, or associate, or any other lawyer affiliated with the prosecutor or his firm to accept employment in private civil litigation which seeks to recover damages for personal injuries resulting from a motor vehicle accident in which the prosecutor or a member of his staff was officially involved.

(2) The mere fact that an accident involves motor vehicles does not in and of itself make it improper for a prosecutor to represent one of the parties thereto in civil litigation arising out of such accident.

(3) A more complex situation exists where the accident is investigated by a policy agency and one of the parties is charged with a crime. It is not unlikely in such a situation that the prosecutor may be involved officially in such a case. If he becomes involved in his official capacity, he must immediately withdraw from any civil litigation on behalf of any party to the accident.

(4) It is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice.

The public might well believe that a prosecuting attorney was influenced in a decision relating to criminal prosecution by the fact that one of the parties to the accident is his private client. An attorney should not only avoid all impropriety but should likewise avoid the appearance of impropriety. Ethical Considerations, Canon 9.