

OPINION 81-10

(June 18, 1982)

**CLASS ACTIONS; CONFLICTS OF INTEREST;
COURT-APPOINTED LAWYERS; DISQUALIFICATION**

When one member of a law firm acts as a full-time, salaried, administrative law judge, his firm is not disqualified from accepting court appointments to represent parties against the state. The administrative law judge's position does not constitute conflict-generating "representation" of the state. Therefore, the firm is not vicariously disqualified. Apparent conflict does exist where the firm is retained by the county to defend a class action suit brought by persons confined in the county jail and at the same time a court appoints the firm to defend indigents. While a fully informed private client may waive the conflicts issue, the public clients may not. To avoid the conflict, the firm must resist appointment to represent defendants during the term of the class action. In the alternative, the firm could represent juvenile cases or criminal cases in which the client will not be placed in the county jail. DR 5-105(B).

L.E.I. 81-10

(June 18, 1982)

**CONFLICTING REPRESENTATION OF COUNTY
OFFICIALS AND CRIMINAL APPOINTMENTS**

The opinion of the Committee has been asked regarding the following inquiry:

Firm X is retained to represent the County Commission, Sheriff and other named county employees in a federal civil rights suit regarding conditions in the County Jail. The suit is a class action which includes, as plaintiffs, "all persons who are confined in the County Jail." The Circuit Court has also asked firm X to take appointments to defend indigents accused in that county. One member of the firm is a full-time salaried administrative law judge. Is this such a conflict of interest such as should prompt the members of firm X to ask that no appointments be made?

Recent ethics opinions of the Legal Ethics Committee, L.E.I. 80-4 (January 16, 1981) and L.E.I. 81-3 (July 24, 1981) as well as a review of State ex rel. Sowa v. Sommerville, ___ W. Va. ___, 280 S.E.2d 85 (1981), provide some guidance in answering this inquiry.

In its discussion in L.E.I. 80-4 this Committee reaffirmed that DR 5-105(B) of the West Virginia Code of Professional Responsibility forbids a lawyer "representing the State" in any capacity to accept employment by a person who wishes to sue the state. Although one partner in firm X is employed by the state as an administrative law judge, such would not constitute conflict-generating "representation" of the state under the analysis of L.E.I. 80-4. In L.E.I. 81-3 the Committee advised that it would

be improper for a City Attorney to accept appointments to represent juveniles. In that case the Committee relied upon Rule IV(C), Trial Court Rules (T.C.R.) for Trial Courts of Record, as a statement of public policy concerning conflicting loyalties of those representing the state or public officials.

It is well to note that it would not be helpful to ask the appointed client to waive any conflicts of loyalty since, in this situation, the other clients, county officials, cannot ethically waive such conflict. While consent may be given by private clients, thus avoiding conflict of interest, it cannot be given in the case of a public officer. Kizer, Legal Ethics and the Prosecuting Attorney, 79 W. Va. L. Rev. 367, 373.

Based upon available guidance from the Code of Professional Responsibility and upon the Sowa v. Sommerville decision, the final determination of this inquiry requires weighing of DR 5-105, forbidding representation requiring conflicting loyalties, against the indigent's right to counsel. If it is reasonably possible for the conflict to be avoided by relief from appointments to defend indigents while the civil rights suit is active, such course of action should be pursued. It is noted that even while representing the county with regard to the civil rights case, firm X may carry its share of responsibility for appointed cases by accepting appointments to juvenile cases or criminal cases in which the client is not, and will not be, placed in that county's jail.

It is the opinion of this Committee that firm "X" should not undertake to represent indigent defendants who are, or will be, confined in that county's jails since such defendants are members of the plaintiff class in the action which firm X is defending.