

L.E.I. 83-4

(June 3. 1983)

**PROPRIETY OF PROSECUTING ATTORNEY'S
REPRESENTATION OF CLAIMANT IN A
MATTER BEFORE THE COURT OF CLAIMS**

A member of The West Virginia State Bar has asked the Committee on Legal Ethics for its opinion regarding representation, by a prosecuting attorney or assistant prosecuting attorney, of the widow of a state employee in her presentation of a claim against a state agency before the Court of Claims of West Virginia.

The Committee has received frequent requests from prosecuting attorneys concerning the propriety of various activities in which they might become involved. These problems continue to arise because many prosecuting attorneys are not allowed by law to serve a sufficiently large area or are not sufficiently reimbursed to allow them to devote their full time to their prosecutorial duties.

By statute, all prosecutors are subject to being required by the Attorney General to perform the duties of the Attorney General within their respective counties. W. Va. Code Ann. § 5-3-2 (1979 Replacement Volume); State ex rel. Matko v. Ziegler, 154 W. Va. 872, 179 S.E.2d 735 (1971). The prosecuting attorney may also be required to perform, or to assist the Attorney General in performing, any duties required of the Attorney General in any county other than that in which the prosecutor is elected, under certain specified conditions. W. Va. Code Ann. § 7-4-1 (1976 Replacement Volume).

In the hypothetical case presented to this Committee, the claim of the individual client is against a state agency. While it is primarily the duty of the Attorney General to represent state agencies, it is also clear that the potential duty of representing a state agency falls upon the prosecuting attorney.

In L.E.I. 77-9 (Winter, 1978) this Committee decided that prosecuting attorneys may represent private clients in claims involving the Workers' Compensation Fund since such cases are in fact cases involving the employee and employer and do not involve the state. It would be improper for the prosecutor to sue the Fund on behalf of a private client. In L.E.I. 78-1 (Spring, 1978) this Committee advised that it is improper for an assistant prosecuting attorney to bring an action for private clients against the Board of Regents. That opinion also reaffirmed that the public, as represented by its officials, cannot give consent to a conflict of interest of a lawyer who represents the public. Opinion 78-1 also discussed, is illustrative of an improper loyalty conflict practice before the Court of Claims by a part-time special assistant attorney general.

The basic ethics code authority for opinions of this Committee on questions relating to the loyalties and duties of prosecuting attorneys is EC 5-14, EC 5-15 and DR 5-105(A) of the Code of Professional Responsibility of The West Virginia State Bar, W. Va. Code Ann., Vol. 1A, pp. 281-333 (1982 Replacement Volume). EC 5-14 indicates that representation of differing interests often dilutes the lawyer's loyalty to the client. EC 5-15 indicates

that a lawyer should resolve any doubt as to a loyalty conflict by refusing the employment which presents actual or potential conflict. DR 5-105(A) of the Ethics Code requires rejection of proffered employment if such is likely to affect adversely a lawyer's independent professional judgment on behalf of a client or if it is likely to involve the lawyer in representing differing interests. As noted previously, the state and its agencies are the continuous and primary client of the prosecuting attorney; any employment of a prosecuting attorney by a private client with claims against the state or its agencies therefore carries substantial risk of creating a conflict of loyalty. When, as here, there is statutory authority establishing the prosecuting attorney's duty to represent the state agency involved in the private client's claim, avoidance of loyalty conflicts requires that the prosecuting attorney refuse the employment proffered by the private client or withdraw from such private employment when the conflict first becomes known to the lawyer.

Canon 9 of the Ethics Code also warns against "even the appearance of impropriety." It is the Committee's view that allowing the prosecuting attorney, the state's lawyer, to present a claim, against a state agency, for payment from the public treasury raises an unacceptable appearance of improper activity. For this additional reason, the prosecuting attorney should not accept private employment in the circumstances outlined in this ethics inquiry.

While the Committee is aware that discharge of the duties of prosecuting attorney may often be practically and financially difficult, it may decide the question presented here only by use of ethics authorities. Based on its analysis of such authorities, the Committee advises that it is not ethically proper for a prosecuting attorney or assistant prosecuting attorney to represent a claimant in a matter before the Court of Claims of the State of West Virginia.