

L.E.I. 83-8

(October 21, 1983)

**REPRESENTATION OF A PRIVATE CITIZEN'S CRIME  
VICTIMS REPARATION ACT CLAIM BY AN  
ATTORNEY EMPLOYED BY THE STATE**

The Committee has been requested to render an ethics advisory opinion on the following question:

May a special assistant attorney general representing the Department of Human Services who is also a full-time civil service employee of a state agency represent a client before the Court of Claims in an action to recover reparations under the West Virginia Crime Victims Reparation Act of 1981?

While the Committee has issued opinions regarding a prosecutor's representing claimants before the Commissioner of Workers' Compensation (L.E.I. 77-9, Winter, 1978), a prosecutor's bringing private suit against the Board of Regents (L.E.I. 78-1, Spring, 1978) and, most recently, a prosecutor's representing a claimant before the Court of Claims (L.E.I. 83-4, June 3, 1983), this question is a matter of first impression.

The West Virginia Crime Victims Reparation Act of 1981 has as its stated purpose "defining and presenting, for legislative consideration, the nature and extent of the moral obligation of this state and its ability to afford reparations through its law abiding citizens who suffer from the effect of violent criminal conduct." W. Va. Code § 14-2A-2. A special revenue fund was established, funded from an additional cost levied against any person found guilty of either a felony or a misdemeanor (except

for certain traffic expenses). W. Va. Code § 14-2A-4. The duty of investigating claims was given to the Clerk of the Court of Claims. W. Va. Code §§ 14-2A-9 and -12. Findings of fact and recommendations are made by an investigator employed by the Clerk and then awards are approved by the Court of Claims or a Claims Commissioner appointed by the Court. W. Va. Code §§ 14-2A-5, -13, -14 and -15. Request for hearings may be made following an additional determination. W. Va. Code § 14-2A-15. After a final decision is rendered, the Governor includes in his budget request a list of awards recommended by the Court of Claims for approval by the Legislature. W. Va. Code § 14-2A-20. Subrogation is allowed to the state upon payment of the award if the award is not reduced by an appropriate amount in cases wherein the claimant may be eligible for payment from "a collateral source." W. Va. Code § 14-2A-22.

It is clear that an attorney who is a state employee should not engage in a suit against the state or any of its agencies. DR 5-105(A) requires an attorney to reject employment which is likely to affect his independent professional judgment. Any question of whether representation may dilute his loyalty to his previous client should result in refusal of new employment. EC 5-15. In L.E.I. 78-1 (Spring, 1978) the Committee reaffirmed that the public at large cannot give consent to any conflict of interest experienced by an attorney who represents a state interest (in that instance, a prosecuting attorney who sued the Board of Regents). Only where a suit is not instituted against

the state per se may an attorney working for the state represent a client before a state agency: a prosecuting attorney may present Workers' Compensation claims on behalf of a person not employed by a state agency, but he may not bring suit against the Workers' Compensation Fund itself. L.E.I. 77-9 (Winter, 1978). In L.E.I. 83-4 (Spring, 1983) the Committee stated that a prosecuting attorney should not represent a private claimant in a claim against a state agency before the Court of Claims.

In this instance, while most claims for payment from the Crime Victims Reparation Fund can be processed administratively, guilt of the offender having previously been determined, provision is made for an adversarial hearing. W. Va. Code § 14-2A-15. This hearing is to be held before a single judge of the Court of Claims or before a Commissioner appointed by the Court. W. Va. Code § 14-2A-15. Even this hearing, however, is for the sole purpose of ascertaining the correct amount to be paid from the Fund.

Unlike most hearings before the Court of Claims in which the state is, in fact, a party in interest, a claim brought to the Court under the West Virginia Crime Victims Reparation Act, even if it requires an adversarial hearing, is not a claim against the state. The fund here, like the Workers' Compensation Fund, is merely administered by the state and is composed of monies collected from persons already convicted of crimes against the state. W. Va. Code § 14-2A-4. In addition, we note that the Attorney General, who formerly represented the state's interest in contested cases regarding the Fund, is no longer involved in this

process. The "reparations investigator" of the office of the Clerk of the Court of Claims makes recommendations to the Court of Claims and presents the adverse position in any subsequent hearing. W. Va. Code § 14-2A-15. Moreover, unlike a prosecuting attorney, who has a statutory duty to assist the Attorney General whenever called upon (and who therefore stands in constant danger of being forced to represent the state's interests before the Court of Claims), this state-employed attorney would never have a duty to represent the state as a Special Assistant Attorney General. When acceptance of appointment as a Special Assistant Attorney General may create a conflict, he could simply refuse the appointment.

We conclude, therefore, that the presentation of a private citizen's claims for reparation, including representation in an adversarial hearing, by an attorney employed by a state agency who also acts from time to time as a Special Assistant Attorney General, presents no conflict of loyalty as contemplated by DR 5-105.

We note that a different question is presented if the suit is contemplated against the Court of Claims itself based on the improper discharge of the Court's duty; similarly, the presentation of a claim on behalf of an employee of the state may require a different result. Since these issues were not presented, we do not decide them at this time.