

L.E.I. 83-11

(January 20, 1984)

**PROPRIETY OF LAWYER-LEGISLATOR'S REPRESENTATION  
OF A CLIENT BEFORE THE COURT OF CLAIMS**

The Committee has been requested to render an opinion regarding the propriety of a lawyer who is a member of the West Virginia Legislature representing a client in a matter before the Court of Claims of West Virginia.

In a previous decision the Committee has ruled that an attorney employed by the state may represent a client before the Court of Claims for the limited purpose of obtaining reparations pursuant to the West Virginia Crime Victims Reparations Act, L.E.I. 83-8 (October 21, 1983). The Committee has also concluded, however, that a conflict exists in the representation of a client before the Court of Claims by a prosecuting attorney. L.E.I. 83-4 (June 3, 1983).

We conclude that representation is also improper in this case but for vastly different reasons. While the representation in the previous cases involved a real or potential conflict of interest sufficient to dilute the attorney's loyalty to one or more of his clients or potential clients, the situation presented here involves an attorney's being judge of his client's case and, indeed, controlling the very forum in which the attorney presents the case.

The West Virginia Court of Claims is an arm of the West Virginia Legislature. It sits as a three judge panel to hear

claims against the state, to make findings of fact and to award monetary damages subject to the approval of the Legislature.

W. Va. Code §§ 14-2-4 and 14-2-12. Judges are appointed by the President of the Senate and the Speaker of the House of Delegates, by and with the advice and consent of the Senate. W. Va. Code § 14-2-4.

The salaries and expenses of court administrative personnel and of the judges themselves are fixed by the Legislature as follows: for administrative personnel and court expenses, through the Legislature's Joint Committee on Government and Finance, W. Va. Code §§ 14-2-5 and 14-2-7; for judges and their expenses, by Act of the Legislature, W. Va. Code § 14-2-8. "Awards" made by the court are then submitted to the Legislature as part of the Governor's budget request. W. Va. Code § 14-2-23.

Clearly, in such a situation a lawyer who is also a member of the West Virginia Legislature is able to exercise the sort of undue influence contemplated by DR 7-110(A):

DR 7-110(A). A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

EC 7-16 requires a lawyer who is attempting to influence legislation to "identify himself and his client, if identity of his client is not privileged . . ." The obvious intent of this

provision is to make the lawyer's interest clear to all parties concerned with the legislative process in the spirit of fair play.

In addition, DR 9-101(B) states that "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." While this Disciplinary Rule speaks in the past tense, we think the principle is even more clearly applicable in this situation, where the attorney is currently responsible for making the ultimate decision on behalf of the public in his own private case.

Finally, DR 8-101(A)(2) declares that "a lawyer who holds public office shall not . . . use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client." In this situation, the lawyer-legislator cannot help but influence the tribunal's actions since the tribunal's decisions can be effected only through action of the Legislature. EC 8-8 makes this duty even clearer: ". . . A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." The conflict here is obvious: the lawyer's responsibility to the public to be fiscally responsible collides head-on with the lawyer's responsibility to obtain as high an award as possible for his client.

In a similar matter the Michigan State Bar has ruled that a lawyer-legislator may not accept employment from a client whose cause is directly affected by action of the Legislature in a

manner more specific than as a member of the general public. See 38 Mich. S.B.J. 109 (May 1959) (Opinion 83, July 1944) and 38 Mich. S.B.J. 114 (May 1959) (Opinion 87, April 1945).

Directly on point, an attorney who, in his capacity as an elected official, serves as the employer of a judge may properly be prevented from practicing before the court in question. Young v. Champion, 142 Ga. 687, 236 S.E.2d 787 (1977). In his discretion, the judge may disqualify the attorney rather than recuse himself. Id. While we do not presume to advise judges of the propriety of judicial conduct in this case, deeming that issue to be a matter for the Judicial Inquiry Commission, we note that the Court of Claims is the only forum in West Virginia in which claims against the state may be heard; recusal would deprive the plaintiff of any and all opportunity to be heard.

We consider Young v. Champion to be dispositive of the case at hand. An attorney clearly should not have effective control of the tribunal in which his case is heard, and his participation in proceedings before the Court of Claims during his tenure as a legislator is improper.