

OPINIONS OF THE LEGAL ETHICS COMMITTEE

L.E.I. 85-1
(February 1, 1985)

The Chairman of the State Bar's Committee on Employment Law has submitted to the Committee on Legal Ethics an inquiry concerning possible ethical problems facing persons identified by the State Bar as willing to serve as hearing examiners to implement the recent decision of the West Virginia Supreme Court of Appeals in Allen v. West Virginia Human Rights Commission, et al., No. 16,303 (Dec. 6, 1984). Specifically, guidance is requested as to those limitations and disqualifications which the Code of Professional Responsibility requires of those who serve as hearing examiners in cases before the West Virginia Human Rights Commission.

The Committee on Legal Ethics shares the concern of the Supreme Court of Appeals for the rights of those parties involved in the numerous cases now pending before the Human Rights Commission, and the Committee has concluded that, with proper safeguards, attorneys may serve as hearing examiners for the Human Rights Commission although they, and members of their firms, also simultaneously represent parties before the Commission. Of course, certain ethical safeguards should be established to protect the parties whose cases are to be heard.

Provisions of the ethics code to be considered in answering the present inquiry are DR 9-101(A) and (C), DR 4-101(B)(3) and DR 5-105. DR 9-101(A) obviously addresses situations in which

judicial service and the practice of law are sequential and not simultaneous, but such rule also applies a fortiori to those situations in which practicing attorneys also act as hearing examiners. A lawyer sitting as a hearing examiner should not, of course, hear his own case nor that of a client of his firm. In L.E.I. 84-5 (Nov. 30, 1984), this Committee held that lawyers may act as hearing examiners for the Workers' Compensation Fund while they and those formally joined with them in the practice of law bring or defend claims before the Workers' Compensation Commissioner. However, a hearing examiner cannot allow a partner, associate or other member of his firm to present a matter before him. This decision was based upon the "firm taint" provisions of DR 5-105(D) and upon the spirit of DR 5-105 which, in subsections (A), (B) and (C), requires that the high duty of loyalty owed by an attorney to firm clients may not be diluted without informed consent from all involved and if both interests may be served, from an objective standpoint, without dilution of the attorney's ability to serve and advise each client fully and faithfully. Much the same consideration exists in the present inquiry: A lawyer accepting assignment as a hearing examiner must be sure that such service will not dilute his firm's effectiveness for, or loyalty to, its client. DR 4-101(B)(3) also forbids the use of any client secret or confidence to benefit a third person, unless the client consents after disclosure. This is true even though the benefit might not be publicly revealed as arising from secrets or confidences of a client. DR 9-101(A) also indicates, when read

in conjunction with DR 5-105(D), that neither a lawyer nor a member of his firm may accept or continue private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity. Also, DR 9-101(C) requires that hearing examiners must be careful to instruct their own clients that their service as hearing examiners will afford neither the attorneys nor their clients any opportunity for improper influence or advantage with the Human Rights Commission.

It is noted that Canon 3(C) of the Judicial Code of Ethics, reflecting the considerations previously discussed herein, requires a judge to disqualify himself with regard to all cases he or his firm handled in his prior practice. While the definition of judicial officers to whom the Judicial Code of Ethics applies found in the "Compliance with the Judicial Code of Ethics" section of the Judicial Code clearly excludes hearing examiners from the effect of its provisions, the important policy considerations behind Judicial Canon 3(C)(1) reflect and reinforce those previously discussed from the ethics code for West Virginia attorneys.

Weighing the various ethics code provisions mentioned herein in light of the rights of our citizens to have their human rights cases promptly and competently handled, the Committee concludes that an attorney ethically may serve as a part-time or temporary hearing examiner for the Human Rights Commission if reasonable effort is first expended to establish the following safeguards with regard to such service:

- (1) A hearing examiner shall not agree to hear a case in which he, or any member of his law firm, has been previously involved;
- (2) A hearing examiner shall not agree to hear a case in which another attorney in his firm is involved as counsel for a party;
- (3) A hearing examiner shall not agree to hear any case in which a client of his firm is a party;
- (4) A hearing examiner shall not knowingly agree to hear a case the decision of which would involve a major contested legal issue in which his law firm has a present interest and, in that regard, service on cases legally dissimilar from those handled by his firm should be requested. Should a hearing examiner, after deciding to accept a case, discover that he or she does have a conflict, immediate disqualification shall ensue unless all parties concerned, after full disclosure, agree in writing that the hearing examiner may continue to act;
- (5) A hearing examiner shall use care not to state or imply to any personal client or to any client of his firm that his service as a hearing examiner provides an opportunity to influence the Human Rights Commission improperly.

Proper observance of the listed safeguards will assure not only the ethical participation of attorneys in the proceedings of the Human Rights Commission but will also increase both the actual and apparent fairness of the hearing process. Each attorney serving as a hearing examiner in the circumstances outlined in this ethics inquiry will have materially assisted the legal profession in fulfilling its duty to make legal counsel available to West Virginians, and in improving the legal system as provided in Canons 2 and 8 of our Code of Professional Responsibility.