

L.E.I. 85-4

(January 10, 1986)

**POSSIBLE CONFLICTS OF LOYALTY
IN HUMAN RIGHTS COMMISSION PROCEEDINGS**

By letter of August 2, 1985, counsel for the West Virginia Human Rights Commission has presented two closely-related questions to the Committee on Legal Ethics regarding duties of state-paid lawyers to the Human Rights Commission (hereinafter "H.R.C.") and others during H.R.C. proceedings. The questions presented to the Committee are:

Do attorneys hired and paid by the West Virginia Human Rights Commission (State) have potentially differing interests from that of a complainant (plaintiff) seeking individual relief in the complaint? (This refers to Canon 5 and EC 5-15, -16 and -17 therein.)

- a. May the Commission's attorneys still represent the interests of the complainant and the Commission (State) simultaneously at a public hearing after first advising the complainant that in the event a conflict arises, withdrawal of representation of the complainant may become necessary and thereupon have a disruptive effect upon the case? (This refers specifically to Canon 5 and EC 5-14, -15 and -16.)
- b. May the state-paid attorneys be relieved of their responsibility in representing the interest of the Commission in light of Canon 5 and EC 5-21, -22 and -23 thereunder by agreement with the Commission?

This question has been previously submitted to the Supreme Court of Appeals by parties to the ongoing litigation styled Allen, et al. v. State of West Virginia Human Rights Commission, et al., 324 S.E.2d 99 (W. Va. 1984). The Court has suggested that the question first be considered by the Committee on Legal Ethics. While the Court's decision in Allen is very helpful, the lack of specific guidance in the statutes necessarily involved in consideration of the question presented cause some considerable difficulty in reaching a confident resolution of such question.

In the Allen decision, the Supreme Court of Appeals substantially bolstered the ability of the H.R.C. to carry out its statutory mandate by holding that "any officer, department or agency of state government has a mandatory duty under West Virginia Code § 5-11-7 (1979 Replacement Vol.) to assist the H.R.C. upon request in its hearings, programs and projects." Syl. Pt. 11, Allen, supra at 102. The Court further held that "the Attorney General has a mandatory duty, under West Virginia Code § 5-11-7 (1979 Replacement Vol.), to furnish all legal services required by the Human Rights Commission." Syl. Pt. 12, Allen, supra at 102. Apparently, the H.R.C. has, since approximately May of 1985, determined to request that the Attorney General handle presentation of an increasing proportion of the complainants' side of cases at the hearing stage, seeking, in the future, to reserve its limited number of staff lawyers for new duties. This situation has accelerated the presentation of the present ethics inquiry. The Attorney General also has the statutory duty to represent the

H.R.C. in post-hearing proceedings, whether or not the H.R.C. fully agrees with the view of the complainant.

The statutory scheme is unclear, however, as to the nature and extent of the duty of the state-paid lawyer to the complainant at any point other than the hearing stage. It seems clear to the Committee that once the investigative and probable cause stages have been passed, the statutory law of this State requires the state-paid lawyer to become the advocate for the complainant, but only because under the statutory scheme the interests of the complainant and the H.R.C. are then identical. Unless a mutually-agreeable settlement of the claim occurs after the probable cause finding, there is a nondiscretionary duty for the H.R.C. to hold a hearing and to provide the complainant a lawyer to present the claim. W. Va. Code § 5-11-10; Currey v. West Virginia Human Rights Commission, 273 S.E.2d 77 (W. Va. 1980). In that sense, consideration of the various "loyalty conflict" provisions under Canon 5 of our ethics code is unnecessary. At that point of the proceedings the Commission is authorized to direct its own lawyers or those of the Attorney General's staff to advocate zealously the position of the complainant as its own, and there should be no direction or regulation of the professional judgment of the state-paid advocate at this point by the H.R.C. [DR 5-107(B)] Accordingly, the first portion of the inquiry is answered by the Committee by saying that state-paid lawyers who might later have a duty to represent interests in conflict with those of the complainant are required by law to represent the complainant and

the Commission at the public hearing. This is an arrangement of obvious necessity, if arguably dangerous in isolated cases, due to the overwhelming backlog of cases for which the H.R.C. is now responsible.

Absent clear statutory expression of a duty on the part of the H.R.C. to provide counsel to complainants at stages of proceedings other than the hearing stage, it also becomes necessary, as a matter of basic fairness, for state-paid lawyers who simultaneously represent the H.R.C. and complainants to tell the complainants at the first contact that the scope of their representation of complaints is limited to representation at the hearing and so long as the H.R.C. supports their claim but that their primary client, by law, is the H.R.C.

A response to the second portion of the question presented, relating to Commission relief of state-paid lawyers from a duty of representation of the Commission, is very difficult to give. Generally, this Committee has held that governmental conflicts cannot be waived absent clear statutory or constitutional authority to do so. However, the Committee in its opinions has also realized that public policy in West Virginia, as expressed by the Supreme Court of Appeals in State ex rel. Sowa v. Sommerville, 280 S.E.2d 85 (W. Va. 1981), favors realization of important individual rights in preference to an inflexible application of ethics rules relating to loyalty conflicts of lawyers representing the State. In light of the express language in W. Va. Code § 5-11-7 regarding state-paid lawyers' duty to represent the H.R.C.

as an entity and in the absence of any statutory provision clearly indicating that the State or the H.R.C. has a duty to provide private counsel to complainants or providing expressly or implicitly that the H.R.C. may waive conflicts, it is not clear to the Committee that the H.R.C. has the authority to release the state-paid lawyers from their duty of representing it. This is a matter of statutory interpretation outside the authority of the Committee. Consequently, the Committee may only state the obvious in response to the last portion of the inquiry presented: If the Commission has authority, under law or public policy, to release conflicted state-paid counsel from their duty of loyalty to the H.R.C., they may certainly do so; if the H.R.C. lacks such authority, then state-paid counsel must regard the H.R.C. as their primary client and must deal with others involved in H.R.C. proceedings, including complainants, accordingly.