

LEI 90-01, Propriety of West Virginia Prosecuting Attorneys  
Prosecuting County Public Officials

West Virginia County Prosecutors who are called upon to investigate and/or prosecute county officials who hold offices which the prosecutor has the statutory duty to represent have expressed concern about potential conflicts of interest in such prosecutions.

West Virginia Code Section 7-4-1 defines the duties of prosecuting attorneys. That Code Section states, in relevant part, as follows:

It shall also be the duty of the Prosecuting Attorney to attend to civil suits in such county in which the State or any department, commission, or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.

It is the position of the Committee on Legal Ethics that West Virginia county prosecutors are charged, under West Virginia Code 7-4-1, with representing the offices of various county officials; not the elected county officials in their personal capacity. Therefore, as a technical matter, it is proper to proceed with the prosecution of such elected officials, should wrongdoing on the part of such officials come to the attention of the county prosecutor.

However, it is also recognized by the Committee that prosecuting attorneys sometimes develop a relationship with the persons who hold an elected office with which the prosecutor is charged with representing. In such cases it may be impossible for the prosecutor to investigate or prosecute that particular official in an unbiased manner. Rule 1.7 (a)(1) of the Rules of Professional Conduct states:

A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless:

- (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client . . .

That is a subjective determination that individual prosecutors must make. Should a prosecutor determine that he or she could not, in an unbiased manner, prosecute a county official whose office the prosecutor is charged to represent, the prosecutor should seek recusal and request that the Court appoint a special prosecutor to handle the matter.

Several cases from around the country support the Committee's position in this matter. See e.g. State of Arizona vs. Brooks, 126 Ariz. 395 616 P.2d 70 (1980); Ward vs. Superior Court of State for City of Los Angeles, 70 Cal.App.3rd 23, 128 Cal.Rptr. 532 (1977); U.S. vs. Troutman, 814 F.2d 1428 (10th Cir. 1987).

If the prosecuting attorney in question has obtained any information through the representation of the office of a particular county official relating to an investigation or prosecution of that official, the prosecuting attorney should seek recusal, People vs. Johnson, 105 Cal.App.3d 887, 164 Cal.Rptr. 746, 750 (1980). Rule 1.6 of the Rules of Professional Conduct requires such recusal.

Conclusion: The Legal Ethics Committee holds that it is not a conflict of interest per se for West Virginia county prosecuting attorneys to investigate and/or prosecute county officials. The prosecutor is charged with representing only the office, not the individual occupying the office. If, however, the prosecutor's earlier representation of that office has provided the prosecutor with information which the prosecutor would be called upon to use in an investigation or prosecution of such official, the prosecutor must seek recusal. Similarly, if the prosecutor has developed a relationship with the official which would make it impossible to proceed in an unbiased manner, the prosecutor should seek recusal.



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