

L.E.I. 81-9

(June 18, 1982)

**SPECIAL PROSECUTING ATTORNEY'S
REPRESENTATION OF OTHER CLIENTS**

The opinion of the Committee has been asked upon the following inquiry:

On January 1, 1981, X took office as prosecuting attorney and brought with him to that office as assistant prosecuting attorneys S and T. Messrs. X, S and T withdrew from the 17 cases in which they represented criminal defendants. Other counsel were provided, with client approval, as replacement defense counsel by Circuit Judge Z, who agreed with the new prosecutors that to allow the new prosecuting attorney or his assistants to prosecute those defendants whom they had once represented would create an appearance of impropriety, subjecting the system to severe criticism.

Thus, the circuit judge felt it necessary to appoint special prosecuting attorneys to prosecute the former clients of X, S and T. Judge Z eliminated from consideration the appointment of the previous prosecuting attorney as special prosecutor for substantial reasons. Geographical considerations make appointment of a special prosecutor from an adjoining circuit impractical.

The circuit court judge procured two experienced bar members, O and R, to accept the appointment as special prosecutors. He did not wish to require them to withdraw from further criminal defense work because he did not think it fair to appoint them to work as special prosecuting attorneys at the low rate of pay available

and, at the same time, to require them to give up their criminal defense practice. Their clients' speedy trial rights also require that their cases be considered promptly. Judge Z suggests that any appearance of impropriety could be alleviated by the court's close monitoring of such an arrangement. Judge Z and the special prosecutors, O and R, now ask the Committee for guidelines as to their representation of their private clients while serving as special prosecutors.

Appointing special prosecutors to office, while allowing them to retain a criminal defense practice, could, absent safeguards, create an actual conflict of interest, danger of public criticism, and subject the prosecutor's exercise of discretion to question.

Pursuant to Judge Z's proposed arrangement, a conflict might be perceived to exist between the special prosecutor's duty to his client and his statutory obligation to the public. A lawyer has a duty to exercise independent professional judgment on behalf of his client, free of personal interests, those of other clients, or those of a third party. (DR 5-101 and DR 5-105) Loyalty to a client may be compromised when a lawyer has more than "one master," namely, a private client and the state. This conflict is expressed, as to full-time prosecutors, in Rule IV(C) of the Trial Court Rules. Previous ethics opinions of the Committee indicate the dangers of such a conflict. L.E.I. 78-1 (Spring, 1978) (assistant prosecutor suit against Board of Regents); L.E.I. 78-2 (Spring, 1978) (prosecutor may not handle civil traffic accident

case after review of traffic charges); and AO2 (November 25, 1952) (prosecutor cannot handle personal injury claims relating to criminal investigations).

The prosecuting officer has a duty to seek justice diligently while treating the accused with fairness. (EC 7-13, DR 7-103) In our state, the prosecutor acts under a discretion committed to him for the public good to vindicate this interest. Temptation could exist whereby the prosecutor may unconsciously become overzealous in his prosecution to obtain benefits for his own client, or he may prosecute without zeal because he favors the defense. Either of these practices is inconsistent with his prosecutorial duties and would seriously undermine the public's faith in the prosecutor's ability to fulfill his obligation to the state; consequently, some safeguard should be established to insure that the special prosecutor is acting with both zeal and fairness.

In a system in which the special prosecutor retains a criminal defense practice, safeguards must be taken to assure to those represented and prosecuted by the special prosecutor that their rights are not violated and that the clients of the special prosecutor receive no greater benefit nor suffer any harm from their defense counsel's temporary duty as a prosecutor. To avoid the danger of charges by the defendant that the prosecution was aided by inside information that the defendant provided to his defense counsel, the defendant-clients of the special prosecutors should agree to their lawyers' service as special prosecutors, while also being informed that no special benefit will be given

them as clients of the special prosecutors. A prosecutor cannot profit by information gained in the course of performance of his official duties; public policy forbids. Aldridge v. Capps, 58 Okla. 678, 156 P. 624.

The Committee is aware of the authority in State ex rel. Sowa v. Sommerville, 280 S.E.2d 85 (W. Va. 1981), that prohibits an assistant prosecutor from defending clients in criminal cases, but in this unique set of circumstances, the possibility of the appearance of a conflict of interest exists with regard to any lawyer the circuit judge may choose to appoint as special prosecutor. Even though the possibility of the appearance of impropriety would ordinarily exist in a situation of this type, the Committee feels that since the special prosecutors are serving for such a limited duration and with a limited caseload and, most importantly, since the special prosecutors are serving under strict court monitoring, a narrow exception to the general rule regarding conflict of interest limited to the facts unique to this matter is permissible. Allowing here a narrow exception would reconcile the potential conflict of interest and appearance of impropriety with defendants' constitutional right to a speedy trial and the public's interest in having offenses prosecuted and finally determined. Several safeguards should be utilized to prevent abuse of this narrow exception.

First, the arrangements regarding the special prosecutor's retention of private clients should be closely monitored on a case-to-case basis by the court, and the special prosecutor must

not be allowed to defend criminal cases before the same venire before which they have acted as prosecutor.

Second, it is crucial that each client of the special prosecutors, O and R, be made aware of any possible divergent interests and that no special benefit or harm will result from the service of O and R, so that each may freely evaluate his original choice to retain O or R as his defense counsel. Moreover, a notice should be given the prosecutor and assistants, under court supervision, identifying the special prosecutor's clients and advising that the special prosecutor is entitled to no more consideration or information than any other defense counsel.

Only after these safeguards have been provided and only in the limited circumstances established by the factual background stated in this opinion should the exception to the general rule regarding prosecutorial representation of private clients be allowed.