L.E.I. 84-5

(November 30, 1984)

CONFLICTS OF PROSECUTORS AND ASSISTANT PROSECUTORS IN SAME PRIVATE LAW FIRM

As a result of our disposition of several recent disciplinary matters, the Legal Ethics Committee deems it desirable to issue an advisory opinion on whether the following situations entail appropriate practices by an assistant prosecuting attorney who engages in private civil practice:

(1) Representing a county or state agency in bringing a claim against a corporate debtor who is represented in a bankruptcy proceeding by another assistant prosecutor who is also his partner in a private law practice;

(2) Serving as a Workers' Compensation hearing examiner for claims in which (a) his fellow assistant prosecutors who are also his private law partners represent claimants, and (b) the prosecuting attorney and his fellow assistant prosecutors represent county agencies as employers;

West Virginia Code § 7-4-1 (1984 Replacement Volume) prescribes the duties of prosecuting attorneys. These duties include representing the following: the state in all criminal matters; the state or any department, commission or board thereof in any civil matter in the prosecutor's county in which they are interested; and county agencies such as the county commission and the board of education.

In keeping with this statutory mandate this Committee has consistently held that the state and its agencies are the continuous and primary client of the prosecuting attorney. His primary responsibility is the prosecution of the guilty and the protection of the innocent. Any private employment which is in any way inconsistent with or antagonistic to the prosecutor's statutorily imposed responsibility is improper and should be avoided.

While our system permits a prosecuting attorney and his assistants to engage in private civil practice, it creates many conflicts-of-interest problems for those who do. This may be especially true when a prosecutor and his assistants are also associated in private practice. Any disability of the prosecuting attorney would, of course, apply with equal force to his assistants. As we noted in L.E.I. 78-1, an assistant prosecuting attorney is under the same disability to represent private clients that the prosecuting attorney suffers.

The basic ethics code authority for opinions of this Committee on questions relating to the loyalties and duties of prosecuting attorneys is found under Canon 5 of the Code of Professional Responsibility of the West Virginia State Bar, West Virginia Code, Volume 1A, pp. 281-333 (1982 Replacement Volume). EC 5-14 warns that representation of differing interests often dilutes the lawyer's loyalty to his client and adversely affects his judgment on the client's behalf. EC 5-15 indicates that a lawyer should resolve any doubt as to a loyalty conflict by refusing the employment which presents actual or potential conflict. This

ethical consideration specifies that a lawyer should never represent in litigation multiple clients with differing interests. EC 5-16 indicates that, after full disclosure to his clients, the lawyer may accept or continue representation of potential differing interests in nonlitigious situations, but only if the clients consent.

DR 5-105(A) of the Code of Professional Responsibility provides: "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests. . . ."

DR 5-105(B) provides: "A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests. . . ."

DR 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

As we recognized in L.E.I. 78-2, the above disciplinary rules extend their prohibition beyond cases of actual present conflict to those in which the interests may with some reasonable degree of probability become conflicting.

We note at the outset of our discussion that the above disciplinary rules apply to conflicts of interest arising from representation of multiple clients by members of any private law firm. Conflicts-of-interest problems are compounded, however, when prosecutors and their assistants, who are required to represent the state, also associate to represent private clients.

Situations (1) and (2) described above would give rise to conflicts of interest for lawyers practicing together in the same private law firm, regardless of whether they were affiliated in the prosecuting attorney's office. In situation (1), it would be improper for one lawyer in a firm to represent a debtor in a bankruptcy proceeding and his law partner or associate to represent a creditor claiming against the bankruptcy estate. It is likewise improper for an assistant prosecutor to represent a county or state agency in bringing a claim against a debtor represented in a bankruptcy proceeding by his private law partner, regardless of their affiliation in the prosecuting attorney's office. Furthermore, the assistant prosecutor representing the corporate debtor should not have accepted or continued such private employment if he knew or should have known that the state and its agencies would have any claims against the bankruptcy estate, as it is the prosecutor's duty to represent the state in such claims.

Consistent with our analyses in L.E.I. 80-4 and 81-10, employment of an assistant prosecuting attorney by the state as a Workers' Compensation hearing examiner does not <u>per se</u> constitute

conflict-generating "representation" of the state. Furthermore, this Committee is of the opinion that representing claimants for Workers' Compensation benefits does not constitute a conflict with the prosecutor's public duties, nor is it antagonistic to his representation of the state. Workers' Compensation litigation is essentially litigation between the employer, who contributes to the Workers' Compensation Fund, and the employee-claimant. The state's interest is in no way involved. For the same reasons, it would not appear improper for an assistant prosecuting attorney to act as a Workers' Compensation hearing examiner.

Potential conflicts of interest arise, however, when an assistant prosecutor or any other lawyer acts as a hearing examiner in Workers' Compensation claims involving parties represented by any of his law partners or associates. Such a conflict of loyalty can be waived by private clients upon full disclosure of the potential conflicts and their ramifications. We so hold in light of the nature and extent of hearing examiners' involvement in claims before the West Virginia Workers' Compensation Fund. Unlike their counterparts in federal agencies such as the Department of Labor and the Social Security Administration, state Workers' Compensation hearing examiners make no decisions whatsoever regarding the merits of claims set for hearing before them. Although they may rule on evidentiary questions, their rulings in that regard are superseded if any party to the Workers' Compensation litigation requests that a motion or evidentiary objection be referred to the Commissioner for a final ruling.

Such waiver of conflicts of interest is not possible for the state and county agencies represented by the assistant prosecuting attorneys in situation (2)(b), however. Relying upon Formal Opinion 16 of the American Bar Association's Committee on Professional Ethics, we have long held that the public cannot consent to such conflicts. (See L.E.I. 81-10, citing Kizer, "Legal Ethics and the Prosecuting Attorney," 79 W. Va. L. Rev. 367, 373.) Therefore, in situation (2)(b), the remedy is for the Workers' Compensation Commissioner to assign hearings involving state or county agencies represented by the prosecutor to a hearing examiner other than one who is also an assistant prosecutor.