

LEGAL ETHICS INQUIRY 80-4

(January 16, 1981)

MAY A STATE EMPLOYEE WHO IS AN ATTORNEY SUE
THE STATE FOR A PRIVATE CITIZEN AND
RECOVER HIS LEGAL FEE FROM THE STATE?

A member of the Attorney General's staff has presented the following inquiry to the Committee: "Is it unethical for a lawyer employed full-time by the State to represent private parties in actions against the State and to collect legal fees and expenses from the State in addition to his own salary"?

ETHICS CODE AUTHORITIES: DR 5-105(B) and Canon 9, West Virginia Code of Professional Responsibility.

The Committee has often held that a lawyer who has a duty, by employment, office or otherwise, to represent the State or any of its political subdivisions must not represent private or public claimants against the State. Advisory Opinion No. 3 (November 25, 1952) [Attorney General]. Such employment has been discouraged even when there might not be a conflict, in fact, but a danger of public suspicion or misunderstanding existed. Advisory Opinion No. 2 (November 25, 1952) [Prosecuting Attorney]; Legal Ethics Inquiry #77-3 (W. Va. B.J.), Spring, 1978, Vol. 4, No. 1 [Municipal Judge]; Advisory Opinion No. 7 (January 30, 1953) [Partners of Divorce Commissioner]. See also Kizer, Legal Ethics and the Prosecuting Attorney, W. Va. L. Rev., Vol. 79, pp. 367-80.

When a lawyer represents the State, in any capacity, it is improper for him to accept employment by a person who wishes to sue the State. DR 5-105(B).

The nature of the present inquiry, however, renders these authorities of little use because the inquiry did not state that the lawyer/employee has a statutory or contractual duty to represent the State of West Virginia. We must assume, then, that the lawyer who is the subject of the inquiry has no statutory, constitutional or contractual duty to represent the State of West Virginia. Such being the case, there would be no per se conflict arising from his mere employment by the State and his representation of private clients wishing to pursue claims against the State.

Notwithstanding the foregoing, a full-time state employee's representation of private parties against departments and agencies of the State of West Virginia bears the appearance of impropriety, as forbidden generally by Canon 9 of the Code of Professional Responsibility, in the view of the Committee and should be avoided.