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PROSECUTING ATTORNEY REPRESENTING CLAIMANT  
BEFORE WORKMEN'S COMPENSATION COMMISSION

LEGAL ETHICS INQUIRY 77-9

By letter you asked whether it would be improper for a member of the prosecuting attorney's staff to represent a claimant in proceedings against the Workmen's Compensation Commission.

It is not clear from your letter whether you refer to a claim against the Workmen's Compensation Commission as such or whether you refer to the representation of a claimant for disability benefits before the Commissioner.

The duties of a prosecuting attorney are set forth in W. Va. Code § 7-4-1 (1976 Replacement Volume) as follows:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the State in the county in which he is elected and qualified, and when he has information of the violation of any penal law committed within such county, he shall institute and prosecute all necessary and proper proceedings against the offender, and may in such case issue or cause to be issued a summons for any witness he may deem material. Every public officer shall give him information of the violation of any penal law committed within his county. 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 shall be the duty of the prosecuting attorney to keep his office open in the charge of a responsible person during the hours polls are open on general, primary and special county-wide election days, and the prosecuting attorney, or his assistant, if any, shall be available for the purpose of advising election officials. It shall be the further duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, in the county in which he is elected, any legal duties required to be performed by the attorney general, and which are not inconsistent with the duties of the prosecuting attorney as the legal representative of such county. It shall also be the duty of the prosecuting attorney, when requested by the attorney general, to perform or to assist the attorney general in performing, any legal duties required to be performed by the attorney general, in any county other than that in which such prosecuting attorney is elected, and for the performance of any such duties in any county other than that in which such prosecuting attorney is elected he shall be paid his actual expenses.

The prosecuting attorney represents the state within his county. The state is his primary client, and his primary responsibility is the prosecution of the guilty and the protection of the innocent. Any representation which interferes with the prosecutor's statutorily imposed responsibility is improper and should be avoided. While our system permits the prosecutor and his assistants to engage in private practice, it creates many problems of conflicts of interest for those who attempt it. As pointed out by the Committee on Professional Ethics of the American Bar Association:

The attempted double role is fraught with many conceivable inconsistencies and antagonisms. Public duty and fealty to private client, involving subordination of the interest of one

or the other, may embarrassingly challenge the conscience of the lawyer who attempts to serve both.

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. . . .

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. Even the possibility of conflict should deter a lawyer in public office from engaging in a civil action which may conflict with his statutorily imposed duty of representing the state and its various interests.

It has been this Committee's position that a prosecuting attorney may engage in private civil practice, but a lawyer who attempts to act in both capacities should not accept any private employment which is in any way inconsistent with or antagonistic to

his public employment. We are committed to the principle that a prosecuting attorney cannot properly represent a private client against those interests of the state and of the county which he may be called upon under the statute to represent. Hence, it would be improper for the prosecutor or a member of his staff to prosecute an action on behalf of a private client against the Workmen's Compensation Commissioner.

This is not to say, however, that a prosecutor and his associates are prohibited from representing a claimant for disability benefits from the Workmen's Compensation Fund. The Workmen's Compensation Commissioner is essentially the administrator of a statutorily created fund for the payment of disability benefits to persons injured in industrial accidents in employment. The interest of the state is not in most cases involved. The claimant is usually represented by private counsel of his own choosing, and the employer is likewise represented by counsel of his choice. Payments from the Fund do not affect the state but, rather, affect the required contribution of the employer. So long as the client is an employee of a private business or public utility and is not an employee of the state or any political subdivision thereof, such as a county or a board of education, we see no impropriety in a prosecutor or a member of his staff representing a claimant before the Workmen's Compensation Commissioner. However, if the claimant is an employee of the state or of any of its agencies or political subdivisions, such as a county or a board of education, it would be improper for the prosecutor or a member of his staff

to represent the claimant. In such a case the real party in interest is the public employer and the case thus becomes one of a private client against the state, the county, or a board of education.