

ETHICS ADVISORY PANEL  
Opinion #92-69, Request #296  
Issued March 31, 1993

The inquiring attorneys are several full-time State employees who, as part of their employment, are assigned to sit as hearing examiners in certain administrative proceedings. Claimants appearing before the inquiring attorneys in their capacity as hearing officers may have been involved, most likely as witnesses for the State, in prior related proceedings in which one of the inquiring attorneys acted as an advocate for the State. In the subsequent administrative proceedings, the claimant may be viewed as having an interest adverse to the State. The inquiring attorneys state that the nature and volume of these cases and the number of similarly situated State attorneys handling these matters, both as advocates and then as hearing officers, recall any information that would affect his or her impartiality in that specific instance.

The Panel does not opine as to the rights of claimants in the subject administrative proceedings to a fair hearing or as to other issues that may be raised by the hearing officer's prior contact with the claimant in the administrative hearing. The inquiring attorneys imply that there is a potential but not a probability that a particular inquiring attorney will be faced as a hearing officer with a claimant already known to the attorney. Even if the inquiring attorney had prior contact with the claimant, the inquiring attorney may not have any recollection of any specific information concerning the claimant or the circumstances of the earlier related proceeding.

The inquiring attorneys point to no specific Rule of Professional Conduct that might be violated by this duality of function and the possibility of a hearing officer's having prior knowledge of relevant facts. This is not a situation where the inquiring attorney acted as an attorney for one party and then as attorney for a different party who was involved in the prior matter. Compare Rule 1.9(b). The Panel believes, however, by analogy to Rule 1.11(c), that an attorney in this situation should recuse himself as a hearing officer if he is confronted with a claimant about whom the attorney recalls confidential information from one attorney's prior involvement as the State's attorney in a related proceeding. Also by analogy to Rule 1.11(c), the actual knowledge of one of the inquiring attorneys is not imputed to the other State attorneys who do not actually share that knowledge even though that may be in the same governmental department or legal office.

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Whether or not the matters are substantially related, the attorney could not use information arising from the attorney's prior representation of B, including information as to the prior incomplete sale, to the disadvantage of B unless such use is permitted by an express exception in Rule 1.9(b).