

# ADVISORY ETHICS OPINION 79-12

## SYNOPSIS:

An elected State's Attorney may not serve on the Vermont Public Service Board.

## OPINION:

In light of the provisions of 21 V.S.A. 217 relating to PSB hearings which provide that:

The attorney general or the state's attorney of the county where the hearing is held shall represent the state at such hearing when the matters involved result directly from a proposed increase in rates, tolls or charges, or the issuing of stocks, bonds, notes or other evidence of indebtedness for which the approval of the Board is required by law.

The issues are resolved in a two step inquiry. It is first necessary to address the question of whether there are any circumstances in which a member of the PSB can act as an advocate for a party before the Board.

Any party before the Board whose interests in the proceedings may be contested by an attorney who serves on the Board in other cases would certainly feel prejudiced by advocating against a Board member. The Code of Professional Responsibility requires that "All litigants and lawyers should have access to tribunals on an equal basis."<sup>1</sup> The circumstance described above also requires the application of Canon 9. The admonishment of Canon 9 to avoid even the appearance of impropriety should be applied here. As we have noted in a previous opinion involving similar issues "where the question of influence can so clearly be raised the provisions of that Canon must be applicable."

If it is ethically improper for an incumbent Board member to act as an advocate before that Board then the focus shifts. We must now ask whether an elected official can selectively avoid certain statutorily imposed duties because in some circumstances he would rather serve the public in another capacity. Notwithstanding the fact that the statute provides that the responsibility for representing the public is concurrent with the attorney general, it was clearly within the contemplation of the legislature that on some occasions the public's interest may be best served by the local state's attorney rather than the attorney general. EC 8-8 is, we believe, dispositive of this issue:

A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

While it is desirable and commendable that lawyers serve as public officers, as noted in EC 8-8 personal and public interests must not be placed in conflict. By accepting an appointive post whose duties preclude the public official from carrying out his responsibilities as an elected official, the lawyer places his personal or professional interests in conflict.

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<sup>1</sup> EC 7-35.