

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-157
Issued: November 1976

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: An assistant Commonwealth's Attorney investigates and prepares a criminal case for trial, and conducts pretrial proceedings therein. After he has left office, may he accept a fee from the victim's family to continue the prosecution?

Answer: Qualified yes.

References: EC 5-21, 5-22, 5-23; DR 5-107(A)(B), 9-101 (B)

OPINION

DR 9-101(B) provides that a "lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee"

Only the Commonwealth may prosecute the defendant in this case. If the former assistant Commonwealth's Attorney continues the prosecution, he does so as an *ad hoc* public officer responsible to the Commonwealth's Attorney. His client is the Commonwealth, not the victim's family. We view the matter as a continuation of his public employment and therefore do not believe DR 9-101(B) applies.

This is a case where a lawyer is being compensated by persons other than his client. EC 5-21, 5-22, and 5-23 warn against such situations. The lawyer must make full disclosure to the Commonwealth's Attorney of the facts concerning his acceptance of compensation from the victim's family, DR 5-107(B). He must subject himself in every respect to the supervision and control of the Commonwealth's Attorney. He must make clear to the family that he represents the Commonwealth, not the family; and in this respect he must bear in mind that the respective interests of Commonwealth and family are not necessarily identical. He may not permit the family to direct his professional judgment in conducting the prosecution, DR 5-107(B).

The practice of permitting private practitioners, privately compensated, to conduct criminal prosecutions, is subject to obvious abuses. Although our opinion on the point has not been requested, we believe it appropriate to note that the Commonwealth's Attorney has some duties in this situation. He is completely responsible for the decision to continue the prosecution, for the conduct of it, and for the former assistant's compliance with DR5-107(B).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.