

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-160
Issued: January 1977

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 1: May an assistant county attorney defend criminal cases in the quarterly, county, circuit, and (after December 31, 1977) district courts of the county in which he is appointed to serve?

Answer 1: No.

Question 2: May his law partners defend criminal cases in the quarterly, county, and (after December 31, 1977) district courts of the county in which he is appointed to serve?

Answer 2: No.

References: Ky Const § 109 to 124; KRS 69.210, 69.275, 69.276; DR 5-105(A)(D)

OPINION

The particular county involved contains less than 150,000 population and no second-class city, but does contain a fourth-class city. Thus an assistant county attorney might be appointed pursuant to KRS 69.275 or 69.276. Under KRS 69.275, he acts only in the absence of the county attorney or when the county attorney is unable to perform his duties. Under KRS 69.276, he acts whenever the county attorney tells him to act.

It is the county attorney's duty to prosecute all criminal cases in the quarterly and county courts, KRS 69.210(2). Under KRS 62.210(3), he is, in effect, a deputy Commonwealth's attorney. Obviously neither a county attorney nor an assistant appointed pursuant to KRS 69.276 may defend criminal cases in the quarterly, county, or circuit courts of the county in which they are elected or appointed to act, DR 5-105(A).

The applicant states that the assistant will "handle the legal affairs of the county when the county attorney is out of town or otherwise unable to handle his duties." We assume that he will be appointed pursuant to KRS 69.275 rather than KRS 69.276. We do not believe this makes any difference. Although an assistant appointed pursuant to KRS 69.275 is paid on a services-rendered basis rather than a salary (as under KRS 69.276), we nonetheless feel that acceptance of such an appointment is similar to acceptance of a retainer in that the appointee obligates himself to perform services for the county and the Commonwealth when and as

needed. This requires the appointee to decline private employment which he knows must necessarily be adverse to the county or the Commonwealth, DR 5-105(A).

Because the assistant county attorney may not defend criminal cases in quarterly, county, and circuit courts in his own county, neither may his partners, DR 5-105(D).

The applicant asks if the “new Court system” will change our answers to the questions put. There is nothing in Sections 109 to 124 of the Kentucky Constitution which requires any substantial change in the statutes defining the duties of the county attorney and his assistants. Of course, we cannot guess whether the 1976 Special Session of the General Assembly will or will not substantially change the duties of the county attorney and his assistants. If they do not, our answers will apply to defense of criminal cases in district courts after December 31, 1977.

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.