

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-200
Issued: January 1979

Overruled by E-444 (2018)

Question 1: May an attorney employed full time by a government agency represent a client in a matter unrelated to his employment before another governmental agency?

Answer 1: No.

Question 2: May he represent another employee of a different department before a disciplinary hearing?

Answer 2: No.

Question 3: May he represent a client charged with a crime in a circuit court?

Answer 3: No.

References: ABA Canon 5, 7; EC 5-1, 5-18; DR 5-105; *In re Kenton County Bar Assn.*, 236 S.W.2d 906 (1951); *Tucker v. Kentucky Bar Assn.*, 550 S.W.2d 467 (Ky. 1977)

OPINION

These questions represent essentially the same problem; whether an attorney can serve one master against another. It has been traditionally recognized that he cannot.

The facts behind these questions involve an attorney employed by the State Department of Transportation involved primarily in driver's license hearings and matters for the department itself. He requests an opinion upon the ethics of his representation of a client against another government agency (e.g. Department of Insurance), an employee of another governmental department in a disciplinary hearing, and a defendant in a criminal action in circuit court.

The answer to the first question lies squarely within the Canon 5 of the ABA Code of Professional Responsibility. Although a direct conflict of interest in subject matter may not exist in a particular case, in every case in which the attorney might represent a client

before another state agency, that attorney could not slip himself out from under the umbrella of his employment. Certainly the fact that he is employed by the same entity which employs the adverse party would consist of “compromising influences and loyalties” under EC 5-1.

The exception under DR 5-105(C) allowing the attorney to represent multiple parties which may affect his free judgment is scarcely sufficient in this instance. First, the attorney’s governmental position is a continuous employment giving rise to innumerable conflicts of this nature, and second, it would be procedurally awkward to confer with all parties involved (*i.e.*, the governor, the commissioners of the agencies) in each case which might arise. (Certainly other state-employed attorneys would seek to engage in this type of practice, and highly placed governmental officials would find themselves plagued with conferences from attorneys seeking exceptions.)

It would also seem that the number of consultations necessary to secure governmental consent would emphasize the attorney’s peculiar position and this could not add to his professional security. No matter what the extent of loyalty or relation of the attorney to the private client, the concern for one’s own livelihood is strong. There is a possibility that he might come to act more as an arbitrator than an advocate for either side.

Thus, his professional judgment would not be free and he could represent neither the private client nor the government agency with the zealously required by Canon 7.

In answer to the second question concerning the attorney’s representation of a government employee of another department before a disciplinary hearing, EC 5-18 is persuasive and states thus: “A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity.” Under this section a lawyer may represent such persons only if there is no differing interests present.

As a state employee disciplinary hearing is an advisory type proceeding, the situation would be essentially the same as if the attorney were representing a private client in the courtroom. Differing interests would be present by necessity, and the attorney could not ethically represent the employee.

The third question is slightly more complicated by appellate court decisions. The Court of Appeals in *In re Kenton County Bar Assn*, 236 S.W.2d 906 (1951), determined that the possibility of a conflict of interest where an attorney held a public office and represented a criminal defendant, depended upon the nature of the office. It ruled that even a judge of a subordinate court ethically may represent criminal defendants in counties other than the one in which he sat as judge.

However, if it can be said that a legal employee of the Department of Transportation owes an allegiance to the Commonwealth of Kentucky similar to that of a prosecuting attorney or police officer, such that the representation of a criminal defendant would be inconsistent with that allegiance, the question of any other impropriety is

irrelevant (Tucker v. Kentucky Bar Assn., 550 S.W.2d 467 (Ky. 1977)); the attorney simply could not ethically violate his oath.

In view of the fact that the attorney could not ethically represent a client in a civil action or even in a disciplinary hearing against the state, his employer, it would be incongruous to allow him to represent a criminal defendant before the same employer. The same ethical considerations must apply here as well.

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.