

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-242
Issued: May 1981

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 one attorney represent a criminal defendant, and another attorney in the same law office represent another criminal defendant, where the defendants are jointly charged but neither has affirmatively waived the right to separate counsel pursuant to RCr 8.30?

Answer 1: No.

Question 2: May one attorney in a single public defender or public advocacy office represent a criminal defendant, and another attorney in the same law office, who is also a public defender, represent another criminal defendant in a single case in which the defendants are jointly charged but neither has affirmatively waived the right to separate counsel pursuant to RCr 8.30?

Answer 2: No.

References: RCr 8.30; Canon 5; DR 5-105(A)(B)(C)(D); ABA Formal Opinion 345; Opinion KBA E-81

OPINION

It must first be recognized that it is not this Committee's function to state opinions concerning Rules of Criminal Procedure. However, RCr 8.30 incorporates within its terms the general requirement of Canon 5 that a lawyer should exercise independent professional judgment on behalf of a client and also incorporates specifically the requirements of DR 5-105.

DR 5-105(A) and (B) provide generally that a lawyer shall neither accept employment or continue multiple employment if it is likely to require his representation of differing interests. "The Code of Professional Responsibility defines 'differing interests' as including every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest" (ABA Formal Opinion 345). It is well recognized that the representation of co-defendants in a criminal matter carries with it a substantial risk of the existence of such differing interests.

DR 5-105(D) extends the prohibition of paragraphs (A) and (B) to the partner or associate of the firm. However, DR 5-105(C) states that after a determination of the adequacy of representation, the representation of differing interests may continue if after full disclosure of the possible effect of such representation, each client consents. It is this consent to multiple representation which is reflected in the waiver under RCr 8.30. Thus arise the ethical considerations presented to the Committee by these Questions.

The prohibition of the representation proposed in Question 1, considered in light of DR 5-105, seems axiomatic. The prohibition of the representation proposed in Question 2 would likewise seem self-evident were it not for the Bar's recognition of the special need to provide legal assistance to the indigent. This recognition had led to the acceptance of what might otherwise be prohibited conduct where necessary to provide representation for the indigent defendant (KBA E-81).

However, the Committee does not find in the Questions presented the compelling need of the indigent defendant which gave rise to such positions as found in KBA E-81. Through DR 5-105(C), all that is required is the determination that adequate representation may be provided to clients with differing interests and that the consent of the clients after the full disclosure of the possible effect of the representation be obtained.

A somewhat analogous question was considered in ABA Formal Opinion 345. There, the ABA Committee on Ethics and Professional Responsibility determined that it would be permissible for the members of the Board of Directors of a legal services program to represent clients where the opposing party was already represented by the staff attorney of the program. However, while recognizing the compelling need for participation by attorneys on the Boards of such programs, the Committee also noted the need for full disclosure of the differing interests in such circumstances.

It does not appear to the Committee that the requirements of DR 5-105 impose an undue burden or detriment to the representation of indigent clients under the circumstance presented. Absent a compelling reason to the contrary, a deviation from the Ethical Rules of the Profession should not be indulged.

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.