

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-275
Issued: July 1983

Modified by E-444 (2018)

Question: May a part-time Attorney for the Commonwealth engage in the private practice of law in civil cases?

Answer: Qualified yes.

References: KRS 15.715, 177.82; ABA F.O. 33, 49, 150; KBA E-43, 47, 56, 61, 64, 66, 75, 76, 88, 146, 190, 193, 194, 210, 214, 215, 230, 237, 238, 241, 248; DR 5-105(D), 9-101(B); EC 7-13; Canon 9; Wise, Legal Ethics; In re Advisory Opinion of Kentucky Bar Association, Ky., 613 S.W.2d 416 (1981).

OPINION

The question of a prosecutor's disqualification in civil litigation is not a novel issue to this Committee, for it has rendered numerous opinions covering varying factual pattern in recent years. The importance of the issue is perhaps underscored by the frequency of its request for interpretation. This undertaking, therefore, will seek to analyze and synthesize the vast body of rulings formally adopted by the Board of Governors of the Kentucky Bar Association relating to the disqualification of Commonwealth and County Attorneys in civil litigation. (hereafter referred to as the Attorney for the Commonwealth.)

The Kentucky General Assembly has promulgated KRS 15.715 *et seq.*, known as the Unified and Integrated Prosecutor System. The statutes embodied in those provision are fundamental to the discussion that follows. The prosecutorial scheme provided therein defines the limitations placed on certain Commonwealth and County Attorney in maintaining a private practice.

Professor Wise, in his seminal treatise Legal Ethics, noted the problem that may arise where counsel represents dual parties with adverse interest:

if there is the slightest doubt as to whether a proposed representation involves a conflict of interest between two clients... or may encompass the use of special knowledge or information obtained through service of another client or while in public office... the doubt can best be resolved by Matthew VI, 24: "No man can serve two masters." The profession of law makes the

attorney a trustee for the client, an unsolicited beneficiary who has placed his property and sometimes his life in the care of his attorney. The responsibility is great and is both a legal and moral one. It cannot be delegated and demands undivided loyalty and fidelity.

Another general guide often used to address the resolution of this question is Canon 9 of the Code of Professional Responsibility which provides:

A lawyer should avoid even the appearance of professional impropriety.

Before dealing with the merits of the central issue of this writing, it may perhaps be wise to determine the class of persons to which the developed rules are to apply. In other words, will a conflict for the Commonwealth Attorney or County Attorney also be a conflict for all the Assistant(s) Commonwealth Attorney or County Attorney?

ABA Formal Opinion 33 and ABA Formal Opinion 49 held that all members of a firm are precluded from accepting professional employment when another member of that firm cannot properly accept the client. Simply stated, a conflict for one is a conflict for all. DR 5-105(D). In KBA E-61, the Ethics Committee discussed employment limitations imposed upon judges, “associates”, trial commissioners, as well as the prosecuting attorney. The preclusion of employment extends to a lawyer who shares office space with another, regardless of whether the relationship approaches a true partnership.

Further, in KBA E-61, the Committee considered the propriety of an attorney sharing office space and expenses with another attorney, one of which is a public official, and the other seeking to represent a client whose interests are adverse to the former. The Committee, in unequivocal terms, stated the test for disqualification as follows:

is whether clients or the public might be led to believe that lawyers so affiliated have such a close personal and professional relationship as to imply special advantage or unusual influence. In other words, does an apparent conflict of interest exist? Clearly, if attorneys hold themselves out to the public as a firm or partnership, such as by the use of a firm name, they must be categorized as partners and are subject to the limitations and prohibitions applicable to a firm. It further appears to the Committee that an attorney sharing office space and expenses with another attorney who is also a public official should be prohibited from representing any client with an interest adverse to the duties of the public official, whether he be judge, prosecutor or assistant to such public official. That is, that he should not appear on behalf of a client in a court presided over by his office affiliate nor should he undertake the defense of one charged with an offense which it is the duty of such public official to prosecute.

Strikingly clear, ABA DR 5-105(D) provides:

If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Thus, in the context of the scope of this writing, it is uniformly the law in all jurisdictions which have substantially adopted the ABA Code of Professional Responsibility that a conflict which precludes the employment of a prosecutor to advance civil litigation also precludes the employment of the assistant(s) for the same reasons.

That rule of law being well developed, the following discussion become applicable not only to the prosecutor primarily responsible for advancing criminal actions but also to all assistants associated with the prosecutorial agency.

Kentucky ethics opinions have time and again embellished:

EVERY TIME A LAWYER ACCEPTS EMPLOYMENT IN A CASE OR CONTROVERSY THERE IS NECESSARILY ANOTHER CLIENT'S INTEREST THAT THE LAWYER MAY NOT ACCEPT EMPLOYMENT. *See* KBA E-190, 230 and 248.

By becoming a candidate for Commonwealth or County Attorney, or accepting employment as an assistant in either of these prosecutorial offices, the lawyer must consider the number and types of cases that will be precluded in the private law practice, if any.

In KBA E-64, the Ethics Committee considered whether an associate of a Commonwealth Attorney can represent a plaintiff in a civil action against defendants who have been charged with crimes arising out of the same subject matter over which the Commonwealth Attorney has a duty to prosecute. Specifically, the Assistant Commonwealth Attorney sought counsel of the Ethics Committee as to whether he could represent a group of plaintiffs in a pending civil action relating to overweight coal trucks. However, the Commonwealth Attorney was under a duty to prosecute the same operators of the allegedly overweight coal trucks in a criminal action. Recognizing the potential temptation of the Commonwealth Attorney to "over prosecute" the criminal action insofar as he has a vested interest in the outcome, the Committee refused to consent to the dual representation. The primary purpose of the prosecutor is well stated in EC 7-13:

The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict...
(Emphasis ours.)

Similarly, ABA Formal Opinion 150 states in part:

The prosecuting attorney is the attorney for the state, and it is his primary duty not to convict but to see that justice is done.

It is quite easy, therefore, to conceptualize how the role of the prosecutor could become clouded with an underlying zeal for unwarranted results. This is obviously a result repugnant to the Code and the interests of the policies which the Ethics Committee seeks to advance. It is not surprising then that the Committee looked to the general language of Canon 9 and DR 9-101(B) to preclude an associate of the Commonwealth Attorney from representing the plaintiff in the civil action.

In KBA E-43, we held that a county attorney may represent a party to certain civil litigation:

Inasmuch as the Commonwealth of Kentucky does not prohibit the civil practice of law unrelated to the criminal practice by county attorneys, there is no inhibition, ethical or otherwise, against the county attorney representing any party to civil litigation unconnected with criminal litigation, be it the representation of a labor union or an employer. (Emphasis added.)

The central question one must ask to resolve prosecutor disqualification issues is: **IS THE CIVIL LITIGATION CONNECTED WITH POSSIBLE CRIMINAL LITIGATION?** If not, obviously the prosecutor, if allowed a private practice, may take the civil case. If it is connected to possible criminal litigation, the inquiry must continue and the opinions discussed herein may be of benefit in resolving the issue.

A series of opinions spanning eight years defined the parameters of a county attorney's ethical obligation to refuse certain civil litigation. *See* KBA E-47, 56, 76, 88, 215. While the factual situations necessarily command differing results, the fundamental analysis utilized in all the opinions is consistent. A brief overview of the individual cases may be of benefit in understanding the uniform rationale employed in solving disqualification problem.

In KBA E-47, a County Attorney, prior to his election as County Attorney was employed by a defendant charged with murder. Said defendant also faced civil liability on the same facts in a wrongful death action. After his election, which was evidently prior to the defendant's trial, the attorney voluntarily withdrew from the case. The defendant thereafter obtained other counsel which represented him through two trials, both resulted in hung juries. Through a change in venue the third trial was moved to a county over which the County Attorney had no jurisdiction and the defendant has requested his representation, civilly and criminally. The question posed to the Committee, therefore, is whether the County Attorney may ethically re-enter either case and represent his former client.

The Committee opined that the County Attorney's representation of said defendant in either case would be impermissible. The Committee reasoned that a County Attorney is precluded from representing a defendant "in any court in the Commonwealth including the Federal Courts." Citing Professor Wise's Legal Ethics, the opinion further precluded the prosecutor from representing his former client in the civil litigation.

Following similar rationale, the Ethics Committee, in E-56, precluded a County Attorney from representing a resident of a nursing home in a civil action against the home. The County Attorney, by virtue of his office, was automatically designated president of a holding corporation which issued bonds for the home's construction. The relationship between the holding corporation and the home was actually quite minimal, however, the Committee was not persuaded by the remoteness of the connection. The Committee reasoned that future events such as a substantial claim against the home might involve a "very genuine conflict of interest." Moreover, the inability of the lay public to ascertain the "fine distinctions" of the County Attorney's duties was a consideration. This opinion is particularly interesting in that the problem stems not from the prosecutorial duties of the County Attorney, but from the administrative duties of his office.

In E-75, the Committee considered whether a County Attorney, in his private practice, could represent a group of landowners who anticipated condemnation proceedings. The Answer was clearly "no". By virtue of KRS 177.082, as codified in 1973, the County Attorney had a statutory obligation to represent the Department of Highway in prosecuting condemnation actions. While the statutory duties of the position may change over time, this decision emphasizes the need to search for conflicts that may arise through the performance of administrative, as well as prosecutorial duties.

Similarly, this Committee has held that an Assistant County Attorney, in his private practice, is precluded from advancing a civil action seeking child support payments from the obligated party where the Commonwealth also has a pending motion for recovery of monies for the same purpose. The Committee has "no hesitation in holding the civil employment relationship permissible. The County Attorney and, therefore, the Assistant County Attorney as well, have a statutory duty to do what he is seeking permission to do. Thus, there is certainly no problem with his performing the service. The inquiry need go further, however, as the Assistant County Attorney also seeks to exact a fee for his services.

The opinion states, in unequivocal terms, the clear violation of the letter and spirit of the Code of Professional Responsibility that would result by holding otherwise:

Clearly, a county attorney may not exact a fee for performing the statutory duties of his office. This prohibition applies with equal validity to his assistant. The basis for this conclusion is evident. It seems inconceivable that a client would knowingly pay to receive a service which an attorney is by law required to perform and for which he has already received compensation by virtue of his office. To charge in such circumstances runs counter to basic notions of honesty and fair dealing.

Again, the statutory duties of the position must be considered to determine whether a prior legislative obligation to perform the task prohibits the task from becoming a part of one's private practice.

While a majority of the opinions appear to prohibit contemplated employment relationships, E-88 permitted a County Attorney to represent a city in the same county on a

contract basis. Looking to DR 5-105, the Ethics Committee found such a relationship to be acceptable so long as his representation of the city did not impair his professional independent judgment in representing the county. The clear inference to be drawn from this opinion is that at such time that the interests of the legislative bodies become conflicting, the County Attorney has a conflict.

The child support issue was raised again in E-215 when the Committee considered whether an Assistant County Attorney may represent a defendant in a civil action to collect delinquent support payments. Based on the criminal statutory scheme that provides for prosecution of the matter being civilly litigated herein, the employment relationship is prohibited. If the plaintiff in the civil action were to advance a criminal action based on the same facts, the County Attorney would obviously be placed in the onerous position of representing clients with adverse interests. Because of the statutory mandate which the County Attorney has accepted with his position, he is required to decline the civil employment.

KBA E-146 discusses the question of disqualification relating to a prosecutor who terminates his employment relationship with the Commonwealth to enter private practice. In E-146, a former Assistant Commonwealth's Attorney, now in private practice, sought to defend against a criminal charge for a crime that occurred while he was in the prosecutor's office. However, no formal charge was issued until after said attorney entered private practice. Moreover, while in office, he had no access to any confidential information concerning the criminal charge. The Committee relied on DR 9-101(B) which states:

- (a) lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Based upon the facts of this case, the former prosecutor void of any prior "substantial responsibility" for this action while in office, the Code does not prohibit the employment relationship.

Within the past several years, this Committee has reiterated the basic principles established above. In KBA E-193 we held that an Assistant Commonwealth Attorney and an Assistant County Attorney may not defend criminal cases in the Commonwealth. However, we held that they could represent a client in another county in a zoning matter. In KBA E-194 we held that a lawyer that shares office space with a part-time Commonwealth Attorney could not practice criminal law in either district or circuit court. This rule would likewise apply to an Assistant County Attorney.

In KBA E-210 we allowed an Assistant Commonwealth Attorney to participate in divorce cases where children are involved as long as the appearance of impropriety was avoided and there was no conflict of interest. Likewise, we reaffirmed the Kentucky Court of Appeals opinion in KBA E-66 which allowed a Commonwealth Attorney to practice before the Worker's Compensation Board. These opinions would also be applicable to the County Attorney. In KBA E-211 we stated that an Assistant Commonwealth Attorney

could not act as defense counsel on a criminal case. This also would include a County Attorney.

In KBA E-214 we held that an Assistant Commonwealth Attorney or Assistant County Attorney could not serve as a Trial Commissioner. In KBA E-215 we held that an Assistant County Attorney could not represent the defendant in a civil action to collect delinquent dependency support payments. This opinion would also be applicable to the Assistant Commonwealth Attorney.

In a related area, in KBA E-230 we held that an Attorney that represents the Fraternal Order of Police may not practice criminal law in the same jurisdiction. This case was affirmed in *In re Advisory Opinion of Kentucky Bar Association*, Ky., 613 S.W.2d 416 (1981). The court specifically mentioned in this opinion the following:

THE PUBLIC DEMAND FOR PROFESSIONAL
INDEPENDENCE IS GREAT. THE POINT IS NOT WHETHER
IMPROPRIETY EXISTS, BUT THAT AN APPEARANCE OF
IMPROPRIETY IS TO BE AVOIDED...

In KBA E-238 we held that a person who shares office space with an Assistant County Attorney may not represent juveniles in Juvenile Court.

In KBA E-241 we held that neither the Commonwealth Attorney nor the County Attorney could represent a party other than the State in a state condemnation proceeding. In KBA E-243 we reiterated that a person who shares office space with a County Attorney may not accept employment adverse to the county nor represent individuals charged with crimes.

In KBA E-248 we held that an Assistant County Attorney who does strictly civil work may not represent individuals in criminal cases.

In KBA 237 we held that an Attorney for the Commonwealth who is representing a person in a civil action and the other party brings a criminal complaint against the other party, the Attorney for the Commonwealth must withdraw from the civil action as soon as possible. In back support cases, we held that as long as the criminal action was terminated that a part-time County Attorney could proceed with a civil case to collect back child support. In this opinion we also discussed the husband and wife situation where one is an Attorney for the Commonwealth.

In KBA E-242 we held that an Attorney for the Commonwealth may not represent licensee in disciplinary actions before a state licensing board or commissioners nor in the courts.

CONCLUSION

Kentucky ethics opinions have frequently embellished:

Every time a lawyer accepts employment in a case or controversy there is necessarily another client's interest that the lawyer may not accept employment.

Professor Wise, Legal Ethics, quoted Matthew VI, 24, to articulate the clear conflict: "No man can serve two masters."

The ability of a County or Commonwealth Attorney to practice privately is governed considerably by the unified and integrated prosecutor system, promulgated as KRS 17.715 *et seq.*, and in the opinions to date by the Ethics Committee.

In any analysis of this area, the Attorney for the Commonwealth must ask and answer four questions before determining prosecutorial conflict:

1. Is the contemplated civil representation related in any way to possible criminal litigation for which an Attorney for the Commonwealth would be responsible?
2. Is the contemplated civil representation related in any way to the statutory duty of said prosecutor to represent the Commonwealth in companion litigation?
3. Is the contemplated civil representation likely to give the appearance of impropriety to the public?
4. If the prosecutor has terminated his employment in the prosecutor's office, and thereafter seeks to represent a client, civilly or criminally, one must question whether the case is one in which the former prosecutor had substantial responsibility, or performed any act for while employed in the prosecutor's office.

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.