

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-294
Issued: November 1984

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: Is it ethical for a Commonwealth Attorney to represent a party in a contested custody matter where no criminal warrants have been issued?

Answer 1: Yes.

Question 2: Is it ethical for a Commonwealth Attorney to continue representation of a party in a contested custody matter where the opposing party on the advice of counsel has sought, but been refused, a criminal complaint relative to custody?

Answer 2: Qualified yes.

References: KBA E-210; KBA E-257; KBA E-153; ILL. Op. 503; SCR 3.530 DR 7-102(A)(1); DR 7-105(A); CR 11.

OPINION

While your request arises from past conduct, you state that this situation may arise again, and you seek guidance regarding your conduct in future cases.

In KBA E-210 we concluded that an assistant Commonwealth attorney or his associates may participate in divorce actions in which children are involved, while observing that:

An assistant Commonwealth Attorney or his associates should be very reluctant to take a civil case where there is a possibility of further criminal action. However, if there is only a remote possibility of subsequent criminal proceedings the assistant Commonwealth Attorney may take the case, since the attorney could later excuse himself if the remote possibility develops into a reality.

Conflicts might arise if one spouse were to take out a criminal complaint against the other. KBA E-257. In addition, the prosecutor who has represented a party in a divorce action may not participate in a subsequent prosecution of the adverse party under KRS 530.050 for non-support of the children of the marriage. KBA E-153. However, neither of these opinions appear to rule out the prosecutor's undertaking of representation in divorce or custody cases as an initial matter. We believe these opinions are sound, although they may provide more flexibility than the opinions of

some other state committees. *See, e.g.*, Illinois Opinion 503 (1975) (precluding state's attorney's representation of a party in a divorce or custody proceeding).

Regarding your second inquiry, we noted in KBA E-257 that:

If [a] criminal complaint is taken out against a client whom the Attorney for the Commonwealth represents in the civil case, the Attorney for the Commonwealth must disqualify himself from the prosecution of the criminal action and withdraw from the civil action as soon as practical without taking further action on behalf of the client in the civil action.

We continue to believe that this is a salutary rule, but note that automatic withdrawal need not occur in every case. For example, in your letter to the committee you state that in a recent case your client had been awarded temporary custody by the Circuit Court, and a hearing had been set on the matter of permanent custody. Your opponent then sought a criminal complaint involving "custodial interference" from the County Attorney, who refused it, noting that the matter been docketed, and after making an initial investigation of the merits of the complaint. If you did not in any official capacity participate in processing the complaint, it would be appropriate to challenge the propriety of disqualification in proceedings before the Court. An across-the-board rule that would deny you the opportunity to be heard on the alleged conflict would encourage tactical abuse. Indeed, you note in your letter that the Court denied your opponent's motion to disqualify.

With regard to ethics opinions, as opposed to unauthorized practice opinions, we may only respond to an attorney's inquiry regarding the "propriety of any professional act contemplated by him (or her)." Consistent with this language the committee ordinarily does not answer questions concerning the conduct of third parties or conduct which has taken place, nor questions of law. Moreover, the resolution of disagreements between attorneys and the legal analysis of the powers of state officials are beyond the jurisdiction of the committee.

In the future, if counsel believes that a motion to disqualify is frivolous, recourse may be had before the disciplinary authorities or before the Court. *See*, DR 7-102(A)(1); DR 7-105(A) and CR 11 (as amended, January 1, 1984).

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.