

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-415
Issued: May 2000

Overruled by E-444 (2018)

Question: May a part-time prosecutor represent a respondent in a matter involving a civil domestic violence order?

Answer: No.

References: Rules 1.7(b) & 1.9(a) of the Kentucky Rules of Professional Conduct (KRPC); KBA E-211 (1979); KBA E-275 (1983); KRS 15.733(2)(e); KRS 15.740; KRS. 237.110(11); KRS 403.715 to 403.785; KRS 431.005; KRS 532.025(2)(a)(8); 18 U.S.C. § 922(g)(8); 18 U.S.C. § 2262.

OPINION

In this Commonwealth, a prosecutor cannot represent defendants in criminal matters. Rule 1.7(b) of the Kentucky Rules of Professional Conduct (KRPC) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

Comment 4 to Rule 1.7 clarifies that if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement, or provide representation on the basis of the client's consent."

A prosecutor, because of his unique role in the criminal justice system, cannot, consistent with Rule 1.7(b), represent criminal defendants in criminal matters. A representation of such a defendant would be a representation that "may be materially limited" and one for which consent

could not be obtained to cleanse the representation. While KRPC Rule 1.7(b) thus prohibits a prosecutor from representing criminal defendants in criminal matters, this result is not a new result. Such has been the ethics rule in this Commonwealth for many years. See KBA E-211 (1979); KBA E-275 (1983).

In addition, KRS 15.740 states:

The commonwealth's attorney and county attorney shall not act as defense counsel in any criminal prosecution in any state or federal court in this Commonwealth, except in cases in which he is a party."

Thus, a prosecutor is prohibited from representing criminal defendants in criminal matters by statute as well as by ethics. If a domestic violence order proceeding were a criminal proceeding, the above precedent and analysis would apply to prohibit a prosecutor from representing a respondent in such a proceeding. For the statutes dealing with protection from domestic violence, see KRS 403.715 to 403.785. The procedure for issuance of a domestic violence order can be found in KRS 403.740, 403.745, and 403.750.

Even though a domestic violence order proceeding is a civil proceeding, KRPC 1.7(b) is violated if a prosecutor appears as counsel for the respondent. Given the nature of the domestic violence order proceeding, the attorney's representation of the respondent is without doubt a representation that "may be materially limited by the lawyer's responsibilities" as prosecutor. Further, such a conflict of interest is not one to which the attorney can ask the client, the respondent in the domestic violence order proceeding, to consent.

Likewise, the representation of the Commonwealth "may be materially limited by the lawyer's responsibilities" to a respondent. Again, such a conflict of interest is not one to which the attorney can ask the Commonwealth to consent. Finally, one must consider the view of the victim and the effect on the victim if a prosecutor, a representative of the government office to whom the victim must turn for redress of a violated domestic violence order, is the same attorney who represented the respondent in the domestic violence order proceeding itself.

While the domestic violence order technically remains a civil proceeding, the process creates a meeting between the civil and criminal arenas. A domestic violence order provides the victim with protections in the criminal system. The domestic violence order proceeding provides a civil remedy for what, by definition, constitutes a criminal act. In order to be eligible for a protective order, the victim must have sustained "domestic violence and abuse" which is defined to be physical injury, sexual abuse, or the infliction of fear of the imminence of such. See KRS 403.720(1).

Once the protective order is entered, the respondent has in effect entered into the criminal justice system. For example, the domestic violence order is placed into the Kentucky State Police computer registry so that officers can access information regarding the existence and validity of an order. The domestic violence order triggers the federal gun ban so that respondent,

in many cases, is no longer entitled to possess a weapon. See 18 U.S.C. § 922(g)(8). The order also triggers state gun law prohibitions so that the respondent cannot carry a concealed weapon. See KRS. 237.110(11).

The violation of a domestic violence order carries criminal consequences constituting a Class A misdemeanor. See KRS 403.763. A law enforcement officer is mandated to make a warrantless arrest for violations of protective orders. See KRS 403.760 and KRS 431.005. If the violation occurs and state lines are crossed, the violator has committed a federal crime punishable by one to five years in prison. See 18 U.S.C. § 2262.

The presence of a domestic violence order enhances several state crimes. For example, stalking escalates from a misdemeanor to a felony if a protective order is in place. See KRS 508.140. The domestic violence order acts as an aggravating factor, making the respondent eligible for the death penalty should the respondent murder the petitioner while the domestic violence order is in effect. See KRS 532.025(2)(a)(8).

The intertwined nature of the relationship between a domestic violence proceeding and the criminal justice system create a situation that makes representation of a respondent in such a proceeding by a prosecutor ethically impermissible. The domestic violence proceeding itself is intertwined systematically with the criminal justice process, but of further note is the situation of the respondent if there is an allegation of violation and thus a threat of criminal sanction. Such a respondent could not be represented by the prosecutor because that proceeding would indeed be criminal in nature and thus prohibited by ethics and law. Further, the prosecutor would be prevented from acting as prosecutor by Rule 1.9(a) which states:

A lawyer who has formerly represented a client in a matter shall not thereafter:
(A) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

Rule 1.10 would then impute disqualification to all members of the prosecutor's office. See also KRS 15.733(2)(e), which states:

Any prosecuting attorney shall disqualify himself in any proceeding in which he ... has served in private practice ... as a lawyer.

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.