

Formal Ethics Opinion
KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-444
Issued: November 17, 2017

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rule and comments, SCR 3.130 (available at <http://www.kybar.org/237>), before relying on this opinion.

This proposed opinion relies on the Rules of Professional Conduct and Supreme Court cases. The opinion would overrule the following opinions: E-159, E-167, E-194, E-200, E-215, E-238, E-241, E-243, E-262, E-415, and E-421. To the extent inconsistent with this opinion, the following opinions are modified: E-37, E-44, E-76, E-210, E-275, and E-322.

Preliminary Statement

Over the years, the Ethics Committee has opined on many occasions about the ethics of part-time prosecutors' civil practice. This opinion does not attempt to synthesize those opinions; it rather interprets the applicable Kentucky Rules of Professional Conduct in light of the statutes and the cases.

In this opinion Kentucky's Rules of Professional Conduct found in SCR 3.130 are referred to by the number of the rule.

The Statutes

- 1) County attorneys and their assistants and some assistant Commonwealth attorneys may practice law other than as public officials. KRS 15.760(3), 15.765(4), 15.770.
- 2) Prosecutors may not represent defendants in criminal cases. KRS 15.740.
- 3) Commonwealth attorneys and county attorneys are part of Kentucky's unified prosecutorial system (KRS 15.700), and the Attorney General may assign them duties outside their judicial circuits and counties (KRS 15.735, 69.013 and 69.060).
- 4) The legislature assigns duties to county attorneys (KRS 15.725 and other statutes). They represent their counties generally (KRS 69.010) and represent the Commonwealth in matters, civil and criminal, assigned to them by the legislature. Many county attorneys, by contract, represent the Cabinet for Health and Family Services in domestic cases for the purpose of establishing and enforcing child support orders. KRS 205.712 (o)(7).
- 5) The legislature assigns duties to Commonwealth attorneys (KRS 69.010 and other statutes). They represent the Commonwealth in matters, civil and criminal, assigned to them.

6) This opinion does not purport to analyze the statutes assigning responsibility to prosecutors; prosecutors with a part-time civil practice should be familiar with their statutory obligations.

Cases

In re Kentucky Bar Association Amended Advisory Opinion, E-291, 710 S.W.2d 852 (Ky. 1986); KBA v. Lovelace, 778 S.W.2d 651 (Ky. 1989)

Opinion

1) Partners and associates of part-time prosecutors may not represent defendants in criminal cases.

By statute, prosecutors are not permitted to defend criminal cases anywhere in Kentucky. This appears to be a personal interest conflict (Rule 1.7, notes 10 and 11) that should not be imputed to the prosecutor's partners and associates (Rule 1.10(a)). However, in *In re Kentucky Bar Association Advisory Opinion* E-291, 710 S.W.2d 852 (Ky.1986), decided under the old code, the Supreme Court held that the prosecutor's prohibition is imputed to partners and associates. Until and unless the Supreme Court revisits this issue, the prosecutor's partners and associates may not defend criminal cases anywhere in Kentucky.

2) Lawyers sharing offices with a prosecutor may not represent defendants in criminal cases if it would appear to the public that the office sharers are a firm or if the office sharers do not have internal procedures to safeguard confidential information.

Most opinions (KBA E-243 for example) treat office-sharers the same as associates. However, comment 2 to Rule 1.0 and other opinions –KBA E-61, KBA E-244, and KBA E-417 -- are authority for a “facts and circumstances” test that would address two concerns: 1) public perception – would the public assume the office-sharers are a firm or have a professional relationship other than as office-sharers; and 2) do internal procedures protect client confidences. Signage on the door should simply list the lawyers, the receptionist should answer the phone by the number or as, “Lawyers offices,” and, most importantly, internal procedures should safeguard confidential information. It would be proper to share a receptionist, meeting room, library, and computer equipment, but it would not be proper to share a secretary or paralegal. The internal procedures should prevent each office-sharer from accessing paper and electronic files of the other office-sharers. KBA E-244 and KBA E-417, Rule 1.0(k) and comment 9 to Rule 1.0 (screening).

3) Prosecutors (and their partners and associates) may not represent a client in civil litigation against the Commonwealth if the prosecutor's office is required to protect the Commonwealth's interest.

The legislature assigns duties to county attorneys and Commonwealth attorneys that limit prosecutors' permissible civil practice (condemnation for example – KRS 177.082). In

considering the ethics of a proposed course of action, prosecutors should look first to the applicable statutes.

4) Prosecutors may represent clients in civil cases against the Commonwealth in matters unrelated to their duties to the Commonwealth.

Ethics opinions (KBA E-200, KBA E-241, and KBA E-262) say a prosecutor may not be adverse to the Commonwealth even though the civil matter is one in which the prosecutor does not represent the Commonwealth. Example: In her civil practice a prosecutor is asked to represent a client who was injured by a state truck. In the past, the Committee opined that a conflict exists even though the prosecutor has no state responsibility in the matter. This opinion reaches a contrary conclusion.

The rationale for the prior ethics opinions is two-fold: 1) that, because the Commonwealth pays them, the attorneys are Commonwealth employees and an attorney/employee may not represent a client against an employer; and 2) that, because of their statutory duties (condemnation for example) attorneys have a present client relationship with the Commonwealth and are conflicted by Rule 1.7(a) (representation of one client directly adverse to another client).

Neither rationale is persuasive. As to the employer/employee rationale, county attorneys and Commonwealth attorneys are elected and hire assistants; the employers are the elected officials and the employees are the assistants. The fact the state pays prosecutors cannot be determinative; the state pays public advocates' salaries and there is no question but that public advocates take positions adverse to the Commonwealth. Furthermore, if prosecutors are permitted to have a private practice, it follows that they are not "employees" of the state while so engaged.

As for the current client rationale, in his definitive journal article, Rick Underwood questions the soundness of this rationale: "Does it make sense to say that at all times and for all purposes the state is the client of the prosecutor?" *Underwood, Part-time prosecutors and conflicts of interest: A survey and recommendations*, 81 KLJ 1, 52-53 (1993). The rule against suing a present client on a matter unrelated to the representation of the client is based on the obligation of loyalty. Comment 6 to Rule 1.7 provides;

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. . . . The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.

To apply the current client rationale, based on loyalty, requires asking whether the "state" would "likely feel betrayed" by a prosecutor representing a client in a civil matter *unrelated* to the prosecutor's responsibility to the state. If the answer is "no," the prosecutor should be allowed to represent the client. The Committee believes that the Commonwealth would not "feel betrayed" by a part-time prosecutor representing a private party against the state in a matter unrelated to the prosecutor's public duty.

Opinions finding conflicts often are based on the now-rejected “appearance of impropriety.” E-241 is an example: the Attorney General opined that a county attorney could represent a landowner in a condemnation matter in a neighboring county because the county attorney’s statutory obligation was to his county alone; the Ethics Committee, however, rejected the Attorney General’s opinion and opined that Commonwealth Attorneys and county attorneys may not represent a private party in a condemnation case anywhere in the state because “the appearance of a conflict must be avoided.”

The Committee opines that, in civil cases, prosecutors may ethically represent private clients against the state in matters unrelated to the prosecutor’s responsibility to the state.

5) No waiver of conflict in criminal cases.

Associates and partners of prosecutors may not defend criminal cases anywhere in the state. This is a conflict that may not be waived. A prosecutor is charged with a public duty, and such a duty cannot be waived. “Consent of a client in a criminal case cannot eliminate the problem because the prohibition against a county attorney and his associates and partners acting as defense counsel is for the protection of the public.” KBA E-291.

6) As an ethical matter, waiver may be possible in some civil cases.

The issue arises in cases in which a prosecutor represents a party in a civil matter in which the state or county is a party. If the prosecutor’s office has no public duty, there is no problem. If the prosecutor’s office represents the public entity in the matter Rule 1.7 (4) allows the prosecutor to represent both parties (unless the matter is in litigation and the clients have adverse claims) if the prosecutor reasonably believes he or she can provide competent representation to both and the clients give informed consent. This might allow, for example, a county attorney to negotiate a county’s claim against the attorney’s client or the client’s sale of land to the county – with informed consent by both parties. It is not unethical for a public body to waive a conflict in a civil case with informed consent. Rule 1.11 (d). It would be up to the governmental agency to decide whether and how to give informed consent confirmed in writing.

7) A prosecutor should decline to represent a client in a civil case “when there is any reasonable probability that a criminal prosecution might arise from the circumstances of the case.” *Lovelace v. Commonwealth*, 778 S.W.2d 651, 653 (Ky. 1989).

“Reasonable probability” (*Lovelace’s* term) equates to “significant risk” (Rule 1.7(a)(2)’s term). It doesn’t matter who would be the subject of the criminal prosecution – In *Lovelace*, the person prosecuted was a driver who killed the prosecutor’s client; the result would be the same if the prosecutor represented the driver. The prosecutor may accept a civil case if the potential criminal charge is pending or anticipated in another county and the prosecutor is not involved in the criminal case.

8) “If, after accepting employment in a civil matter, a criminal prosecution arises from the circumstances of the case, the prosecuting attorney must withdraw from the civil proceeding and disqualify himself from handling the [criminal] case.”

KBA v. Lovelace, 778 S.W. 2d 653-54. Other attorneys in the prosecutor’s office may handle the criminal case.

9) A prosecutor should not represent a client on a civil matter who is being prosecuted by the prosecutor’s office, even on an unrelated matter.

In *In re Kentucky Bar Association Amended Advisory Opinion E-291*, 710 S.W.2d 852 (Ky. 1986), the Court applied the rule that an attorney may not represent one client against another client in an unrelated matter without informed consent(Rule 1.7a(1)); the prosecutor may not ask for informed consent because waiver of conflict is not permitted in criminal cases.

10) A prosecutor may accept employment in a civil matter even though the client is being prosecuted (or prosecution is anticipated) in an unrelated matter in another county or district.

In this situation the “current client” rule allows representation. The Commonwealth is represented by the local prosecutor, not by the prosecutor with the civil client. The Unified Prosecutorial system does not mean imputation of conflicts to all prosecutors in the state; conflicts are imputed within the office of a county attorney or Commonwealth attorney; they are not imputed to prosecutors in other districts or counties

11) Family law cases.

Part-time prosecutors often represent clients in family law cases. These cases may involve: 1) child support issues; and 2) allegations of domestic abuse, criminal conduct, and 3) potential flagrant non-support prosecutions. Domestic violence and dependency, neglect, abuse cases are somewhat related.

A) When the case is the prosecutor’s county or district

Child support: An assistant county attorney should be able to seek or resist child support unless the county attorney’s office represents the state on behalf of the children and seeks a child support order. At that point a prosecutor representing a client against whom an order is sought (“respondent” for purposes of this opinion) would be on “opposite sides of the v” from another prosecutor in the office. The prosecutor must withdraw from the civil case. If the prosecutor represents the other party (“petitioner” for purposes of this opinion), the question is whether there is a “significant risk” that seeking child support might affect other matters in controversy (custody and support for example). If so, the prosecutor may not represent the petitioner. E-215 opined that a prosecutor could not represent a client against whom an action was filed for back child support. The rationale for the opinion is in part the *possibility* of a criminal proceeding for

flagrant non-support. That opinion, as well as others in which the conflict is speculative, is not followed.

Allegations of domestic abuse, child abuse made in a divorce case. An assistant county attorney is not required to withdraw from representation of a divorce client for the client's alleged domestic abuse or abuse or neglect of a child until and unless the county attorney acts, or should act, in the case to enforce the criminal law, enforce a court order, or otherwise act to protect a party or the children of the marriage. At that point the prosecutor would be on "opposite sides of the v." from someone in the prosecutor's office and must withdraw from the civil representation. Mere allegations of criminal conduct or abuse should not be enough to require withdrawal. *C.f. KBA v. Twehus*, 849 S.W 2d 549 (Ky. 1993) (withdrawal required when a juvenile court petition was filed).

DVOs and Abuse/Neglect cases. If the prosecutor's office acts (or should act) adversely to the private client (for example by enforcing a domestic relations order) the prosecutor must withdraw from the matter. Otherwise the prosecutor may represent a party or serve as guardian ad litem.

B) When the case is not in the prosecutor's county or district

Child support: The prosecutor should be able to represent either party if the case is brought in a neighboring county. The county attorney for that county holds the contract with the state and represents the state on behalf of the children. The prosecutor representing the private party has no responsibility to the state in the matter.

Allegations of domestic abuse, child abuse made in a divorce case. The prosecutor may represent either party; the prosecutor with the civil client is not a member of the office of the county attorney who might intervene in the matter to protect a party or children. Intervention by the county attorney would not result in the prosecutor being on "opposite sides of the v." with a member of the prosecutor's office. Of course, the prosecutor with the civil client may not represent the client on related civil charges.

DVOs and Abuse/Neglect cases. The prosecutor may represent either party or act as guardian ad litem. The analysis is the same as in the divorce settling. The prosecutor with the civil client may represent the client or serve as guardian ad litem. The prosecutor may not represent the client on related criminal charges.

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. This Rule provides that formal opinions are advisory only.