

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-291
Issued: May 1985

Question 1: May the partner or associate of an assistant county attorney represent a defendant in a criminal proceeding in a court other than the court in which the assistant county attorney practices, if the client consents to the representation after full disclosure?

Answer 1: No.

Question 2: May an assistant county attorney or his partner or associate represent a person on a civil matter who is simultaneously being prosecuted in the same county for an unrelated criminal offense?

Answer 2: No.

OPINION

A county attorney cannot act as defense counsel (KRS 15.740) and assistant county attorneys are subject to the same prohibition. KRS 69.300; KBA E-248, 211, 193. Partners and associates of the assistant county attorney are likewise forbidden to act as defense counsel. KBA E-275, 243, 167, 160. Consent of a client in a criminal action 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. The question is whether the public might “imply special advantage or unusual influence” accruing to the defendant from his representation by one associated with an assistant county attorney. KBA E-238. “The public demand for professional independence is great. The point is not whether impropriety exists but that any appearance of impropriety is to be avoided.” KBA E-275.

The prohibition against associates or partners of assistant county attorneys practicing criminal defense work anywhere in the state flows in part from the Unified and Integrated Prosecutor System of Kentucky. KRS 15.700, 15.770. See also KBA E-252, E-102.

The second question is directed to the representation of a person by the assistant county attorney or his associates or partners in a civil matter. While an assistant county attorney is permitted to engage in the private practice of law, he ought not be permitted to accept civil matters on behalf of persons being prosecuted by his office, even if the criminal case is unrelated to the civil matter. This would involve litigation against a present client, and would result in a division of loyalty even though the matters are not substantially related. DR 5-105; Cinema 5 Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2d Cir. 1976).

The committee has stated that an attorney for the Commonwealth or his associates should be very reluctant to take a civil case where there is a possibility of further criminal action (KBA E-210) and that the prosecutor should ask “whether the contemplated civil representation is likely to give the appearance of impropriety to the public” (KBA E-275). Under the rule of imputed disqualification contained in DR 5-105 the partners or associates of an assistant county attorney are similarly constrained. It is the opinion of the committee that for one associated with an assistant county attorney to represent a person who is being prosecuted by that county attorney’s office even on an unrelated matter would result in a division of loyalty. In addition, the public would no doubt question the zealously of such a prosecution against a private client.

On the other hand, the committee does not believe that the disqualification in this context extends statewide. Statewide disqualification in matters relating to criminal defense flows from a specific statute, KRS 15.70. Accordingly, the committee is of the opinion that an assistant county attorney or his partner or associate should not be disqualified from representing clients in civil matters simply because the client is being prosecuted somewhere else in the Commonwealth, or is taking a position adverse to the Commonwealth in some other forum.

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). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”