

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-61

Issued: September 1972

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: May a Judge, elected or appointed, or a Trial Commissioner, ethically represent defendants in criminal cases in a court of criminal jurisdiction?

Answer 1: No.

Question 2: May any Commonwealth Attorney, County Attorney, Prosecuting Attorney of Police Court, or any assistant of any of them, ethically represent defendants in criminal cases in any court of criminal jurisdiction?

Answer 2: No.

Question 3: May a Probate Commissioner practice in the probate division, or in any case on appeal from that division, or in any case involving settlement of an estate or a fiduciary's account?

Answer 3: No.

Question 4: May a State Legislator represent persons charged with crime so long as he does not use his legislative position to try to modify or repeal any existing law for the benefit of the client?

Answer 4: Yes.

Question 5: Where a client or the public might be led to believe that attorney-associates have such close personal and professional relationship as to imply special advantage or unusual influence with the attorney-judicial-officer, should the association be permitted?

Answer 5: No.

References: Canon 6, 31; KRS 25.110, 25.170, 25.280, 26.140, 30.120, 30.130, 30.140, 30.150, 69.020, 69.070, 69.090, 69.210, 69.300, 69.430

OPINION

The Committee has been requested to adopt the following opinion relating to the same subject matter as E-57, *i.e.*, the practice of criminal law by partners, associates, firm members, employees or office space sharers with the following public officials:

- a. Judges, elected or appointed
- b. Justice of Peace or Magistrates
- c. Trial Commissioners
- d. Prosecutors, Assistant County and City Attorneys
- e. Probate Commissioners
- f. Aldermen and legislators
- g. Associates

1. May a Judge, elected or appointed, or a Trial Commissioner ethically represent defendants in criminal cases in any court of criminal jurisdiction?

In its opinion in *In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky. 1951), the Court of Appeals rendered an advisory opinion that squarely held “It is improper for a judge of a subordinate court to represent defendants in criminal cases in the county in which he serves as judge.”

In addition to the Court of Appeals opinion there are also statutory limitations on the practice of law by Judges in Kentucky. KRS 30.120 provides that a Circuit Judge shall not practice law and KRS 30.150 prohibits law practice by a County Judge in the County or Quarterly Court of his own County or in courts of inferior jurisdiction. A Police Judge in cities of the first class is required to devote his whole attention to the duties of his court, KRS 26.140. A Judge of any court is prohibited from forming a partnership for the practice of law with another attorney except the Police Judge of cities of the third, fourth, fifth and sixth class, KRS 30.130.

TRIAL COMMISSIONERS

Trial Commissioners may be appointed by the County Court to discharge such judicial duties as are assigned to them by the Judge and he must possess the same qualifications as a County Judge, KRS 25.280. Trial Commissioners may also be appointed by a Police Judge in a city of the first class and may exercise judicial functions in the same manner as the elected Judge, KRS 26.220. This section specifically prohibits the practice of any case in Police Court or in the Criminal Branch or the Circuit Court of the County in which the first class city is located by any Trial Commissioner or Police Judge pro tem appointed in the Police Court of a city of the first class.

A Trial Commissioner is a judicial officer and a Trial Commissioner who presides on a regular basis is subject to the limitations set out by the Court of Appeals in the Kenton County Bar Assn opinion.

PARTNERS AND MEMBERS OF FIRM

OF JUDGES AND TRIAL COMMISSIONERS

In the Kenton County Bar Assn opinion, the Court of Appeals applies the same limitations to partners or members of a firm as apply to the principal.

It is improper, therefore, for any Circuit Judge, County Judge, Police Judge, Magistrate or Trial Commissioner of any court presided over by any of the above to represent defendants in criminal cases in any court of criminal jurisdiction.

It is also improper for a partner member of a law firm of which any such Judge or Trial Commissioner is a member to represent defendants in criminal cases.

2. May any Commonwealth Attorney, County Attorney, Prosecuting Attorney of Police Courts, or any assistant of either, ethically represent defendants in criminal cases in any court of criminal jurisdiction?

COMMONWEALTH ATTORNEYS AND ASSISTANTS

KRS 69.020 provides that a Commonwealth Attorney shall not act as a defense counsel in any criminal prosecution in this Commonwealth except in cases in which he was employed before his election or to which he is a party.

KRS 69.070 provides for the appointment of Assistant Commonwealth Attorneys in counties having a population of 200,000 or more. KRS 69.080 provides that Assistant Commonwealth Attorneys shall have the same powers and perform the same duties as the Commonwealth Attorney. KRS 69.090 provides that in the absence of the Commonwealth Attorney his assistants shall act in his stead.

PARTNERS OF COMMONWEALTH ATTORNEYS

KRS 30.140 provides that no law partner of a Commonwealth Attorney shall defend or aid in the defense of any person whom it is the duty of the official to prosecute.

The Attorney General has given an opinion that it would be clearly unethical for a law partner of a Commonwealth Attorney to accept employment to defend a person charged with a crime in the Quarterly Court, 1958 OAG 42,177.

COUNTY ATTORNEYS, ASSISTANTS AND PARTNERS OF COUNTY ATTORNEYS

KRS 69.210 provides that the County Attorney shall attend to all prosecutions in courts inferior to the Circuit Court except those having a prosecuting attorney.

KRS 30.140 provides that no law partner of a County Attorney shall defend or aid in the defense of any person whom it is the duty of such official to prosecute.

KRS 69.300 provides that the Assistant County Attorneys shall possess the same qualifications as County Attorneys and shall have the same powers and perform the same duties.

In the Kenton County Bar Assn opinion the court approved the many opinions of the Ethics Committee of the American Bar Association that “neither a law firm nor a partner thereof can properly accept employment which any member of the firm cannot properly accept.” This prohibition applies equally to Judges and any other attorney holding public office.

PROSECUTING ATTORNEYS FOR POLICE COURTS IN CITIES OF THE FIRST CLASS

KRS 69.430 provides for the election of a Prosecuting Attorney who shall have the duty in all matters coming before the Police Court to represent the Commonwealth or the City, and who shall appoint an assistant with the same qualifications.

ASSISTANT PROSECUTORS

The Court in the Kenton County Bar Assn opinion has dealt specifically with the propriety of an Assistant Prosecutor undertaking the defense of a client in a criminal case. The Court stated:

Question 4(b). Is it improper for an Assistant Prosecutor to Defend a Client in a Criminal Case?

Advisory Opinion: It is improper for an Assistant Prosecutor to Defend a Client in a Criminal Case.

KRS 30.140 restricts the practice of a law partner of a Commonwealth’s Attorney and KRS 69.020 provides that a Commonwealth’s Attorney shall not act as defense counsel in any criminal prosecution. The same policy would necessarily make it improper for an assistant prosecutor to engage in such practice. There would be an undesirable inconsistency of employment and a representation of conflicting interests, prohibited by Canon 6 of the Canons of Professional Ethics adopted by the Court of Appeals for the regulation of professional conduct.

The Court in the same case dealt with limitations on the practice of criminal law by partners of assistant prosecutors, and stated explicitly that such practice was prohibited. See this portion of the opinion set out in the discussion of Judges and partners of Judges.

It is improper, therefore, for any Commonwealth Attorney, County Attorney, Prosecuting Attorney of Police Courts in cities of the first class, or any assistant of either to represent defendants in criminal cases in any court of criminal jurisdiction.

3. May a Probate Commissioner practice in the probate division, or in any case on appeal from that division, or in any case involving settlement of an estate or a fiduciary’s account?

PROBATE COURT COMMISSIONERS AND THEIR PARTNERS AND ASSOCIATES

Statutory authority for appointment

The office of “Probate Commissioner” is nowhere defined by statute. The County Court (presided over by the County Judge) has jurisdiction over probate matters (KRS 25.110, 30.150) and he is charged with the responsibility of making settlements with fiduciaries (KRS 25.170). He may appoint a judge pro tem, and upon proper showing, a special judge to hear individual cases (KRS 25.140). He may appoint a “special commissioner” to make settlements with fiduciaries (KRS 25.170). And he may appoint:

a trial commissioner or commissioners who shall discharge such judicial duties as are assigned to him by the judge. (KRS 25.280)

Each such Commissioner must possess the same qualifications as the County Judge, and he must report his acts to the Court for approval or disapproval (KRS 25.280). In Brown v. Hoblitzell, Ky., 307 S.W.2d 739, the Court said:

The trial commissioner statute is broad in scope and enables the County Judge to assign any judicial duty for performance by the commissioner.

The approval by the County Judge constituted his acceptance of responsibility for the acts of the trial commissioner.

Under the above statutes the appointment of Probate Commissioners can be justified (1) as special commissioners to make settlements with fiduciaries (KRS 25.170) and (2) as trial commissioners to hear and decide probate matters subject to the County Judge’s approval (KRS 25.280). In Jefferson County the first function is largely administrative. However, the second function is essentially judicial.

Restrictions on practice

There is no direct statutory prohibition against practice by Probate Commissioners either in their role as special commissioners for settlements or trial commissioners. But to the extent that they exercise judicial functions in probate matters they may be considered subject to the same restrictions as apply to the County Judge. Those restrictions consist of express statutory prohibitions, advisory opinions in the Kenton County Bar Assn case and other collateral authorities. It should be emphasized that the absence of any direct statutory restriction is not conclusive, for, as said in the Kenton County case, “the legislature cannot render ethical that which is inherently unethical.”

STATUTORY REFERENCES:

KRS 30.150. No county judge shall (1) prepare pleadings for use in his county or quarterly court, (2) practice law in any court having jurisdiction inferior to his county or quarterly court, (3)

act as attorney in any case on appeal from his county or quarterly court, or (4) act as attorney in any suit in his county involving the settlement of a decedent's estate or a fiduciary's accounts.

IN RE KENTON COUNTY BAR ASSN

Advisory Opinions:

It is improper for a judge of a subordinate court to represent defendants in criminal cases in the county in which he serves as judge, for by such acts “he utilizes or seems to utilize his judicial position to further his professional success.”

It is improper for a lawyer to practice in a court where he regularly presides as judge pro tem or special judge. Practice by one who acts as special judge only in particular cases or for a short period of time is permissible, but by frequently presiding over the court “he may be identified in the minds of some people with the judicial position [and therefore disqualifies himself from further practice in that court until that impression has been removed.”

It is improper for a partner of a judge to practice in the court over which the judge presides. The same restrictions apply to members or employees of his firm.

OTHER COLLATERAL REFERENCES:

One holding a judicial position should not practice in the court in which he is a judge, even when presided over by another judge. Canon 31, Canons of Judicial Ethics.

An attorney who shares a law office with a police judge although the two are not partners, may not represent persons arraigned before the police judge. Formal Opinion 104, Canon 6, Canons of Professional Ethics.

CONCLUSIONS:

A Probate Commissioner should not practice in the probate division, or in any case on appeal from that division, or in any case involving settlement of an estate or a fiduciary's accounts. In these areas he has public responsibilities both in reviewing settlements and performing judicial functions in probate and other matters handled by the probate division. Such matters include condemnation suits and alcoholic beverage cases initially heard in the probate division.

A Probate Commissioner may practice in other inferior courts, or in quarterly courts or in the circuit courts but only in such matters as are not initially subject to the jurisdiction of the probate division. This conclusion is made with considerable reservation. In our county the Probate Commissioners often perform the same judicial duties as the County Judge and his judge *pro tem*. While the County Judge may practice in circuit courts, he is prohibited by statute from practicing in inferior courts or the quarterly courts. By implication both the judge pro tem and Probate Commissioners performing judicial duties may be considered subject to the same prohibitions.

Partners, associates and members of the firm of a Probate Commissioner regularly sitting on the probate bench should be subject to the same restrictions on practice as apply to the Commissioner himself. This may appear harsh, but in such capacity the Commissioner is acting as

a judge and if his partners or associates are permitted to practice in “his court” there certainly is the appearance of possible impropriety.

COMMENT:

The problem with respect to Probate Commissioners is created by their dual capacity in Jefferson County. By sitting on the probate bench from time to time they take on the appearance of judges and therefore should be subject to the same restrictions as apply to other judicial offices. Their duties should be confined to reviewing settlements and making recommendations only the County Judge, judge *pro tem* or a special judge should sit in probate matters. Then Special Commissioners could continue to practice without question of impropriety in all other courts, and their partners and associates could practice in the probate division. However, the Commissioners themselves should not practice in probate, or on appeal from probate, or in other cases involving the settlement of estates or of fiduciary accounts.

4. May a State Legislator represent persons charged with crimes so long as he does not use his legislative position to try to modify or repeal any existing law for the benefit of the client?

ALDERMEN AND LEGISLATORS

The Committee finds no Kentucky authorities limiting the practice of law by a member of the Board of Aldermen. The Ethics Committee of the American Bar Association, however, has in informal Opinion 1126, dated October 10, 1969, concluded that a State Legislator does not violate any of the Canons of Professional Ethics in the representation of persons charged with crimes so long as he does not use his legislative position to try to modify or repeal any existing law for the benefit of the client.

5. Where a client or the public might be led to believe that attorney-associates have such close personal and professional relationships as to imply special advantage or unusual influence with the attorney-judicial-officer, should the association be permitted?

ASSOCIATES

The Committee has had a great deal of discussion and something less than a unanimous opinion concerning the limitations on the practice of criminal law by “associates” of public officials who are not partners and have no affiliation beyond the sharing of office space and secretarial help. Several of the authorities, particular ABA Opinions, make reference to “associates” without defining the word “associate.” It seems clear that the ABA has used the word solely for the situations where an individual lawyer or partnership employs or associates with him one or more additional lawyers who perform legal services for the clients of the individual lawyer or the firm. One so employed does not share responsibility or liability but is an employee. Clearly, an associate in this use of the word is subject to all of the same limitations and prohibitions imposed by the usual considerations of conflicts of interest as a partner. We note that the Kentucky Court in the Kenton County Bar Association case refers to “law firm” and “partner thereof,” however, the word “associate” is neither used nor defined.

The Committee recognizes the principle applied in several ABA Opinions that an attorney should decline employment which might permit laymen to conclude that the attorney is utilizing his relationship to any public official to further his professional success or professional interest.

The Kentucky Court of Appeals has not dealt with the limitations on the practice of law by lawyers sharing offices and expenses but each of which has his own clients.

It appears to the Committee that the test to be applied 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.

The Committee, however, recognizes that it is usual and customary in this community for attorneys to engage in the separate practice of law with other attorneys with whom they have no association beyond the sharing of offices and expenses. Unless it is for most compelling reasons, such economic arrangements among lawyers should not be interfered with or rendered unworkable. It would, therefore, seem unnecessarily restrictive to interpret the applicable Canons of Ethics and opinions construing them so as to prohibit an attorney so affiliated with a public official from all practice of criminal law in the courts of Jefferson County.

We find no Kentucky authorities which are helpful in arriving at an opinion insofar as attorneys in such office arrangements are concerned. In Formal Opinion 104, the American Bar Association Ethics Committee dealt with limitations on an attorney sharing a law office with a Police Judge. That opinion provides:

We are of the opinion that a lawyer who occupies the same suite of offices with a police justice and is associated with him in the practice of law, sharing office expenses, although not in partnership, is nevertheless so related professionally to the police justice-that he should not accept retainers in criminal matters, originating before his office associate as such magistrate.

While this opinion deals only with the propriety of an attorney's employment by a client who has appeared before his office "associate" and not with employment in criminal cases generally, the Committee feels that it represents the most restrictive interpretation which should be applied to an attorney with such limited relationship with a Judge or other public official.

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.