

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-64
Issued: March 1973

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: May an associate of a Commonwealth attorney represent a plaintiff in a civil action against defendants who have been charged with crimes arising out of the same subject matter, and which the Commonwealth attorney has a duty to prosecute?

Answer: No.

References: Canon 9; DR 9-101(B)

OPINION

The Ethics Committee has received an inquiry from a Kentucky attorney who is an associate of a Commonwealth attorney, seeking the advice of our Committee as to whether or not he can ethically represent certain plaintiffs in a pending civil action against operators of allegedly overweight coal trucks, when, at the same time, there are pending criminal charges against the same operators, which the Commonwealth attorney is under a duty to prosecute.

In our efforts to uphold the regard and esteem of the legal profession the Ethics Committee has before it at all times the underlying principal which is stated succinctly in Canon 9 of the Code of Professional Responsibility: "A lawyer should avoid even the appearance of professional impropriety."

DR 9-101(B) is even more specific: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The question at hand is not a query over whether the Commonwealth attorney may participate in the civil action, but, rather, whether or not an associate of his may proceed in such an action. Obviously, the Commonwealth attorney may not represent the plaintiffs in the civil action. In previous Opinions of our Committee and the Standing Committee on Professional Ethics of the American Bar Association we have pointed out the temptation to "over prosecute" in criminal actions wherein the prosecuting attorney has a vested interest in the outcome, because of his being retained to represent the plaintiffs in a civil action involving the same subject matter. For example, we have frowned upon a Commonwealth attorney handling a civil action for past-due child support payments, because he has a powerful lever at his command to force those

payments by the threat of criminal prosecution. We think the same reasoning applies in the inquiry before us.

ABA Formal Opinion 33 (dated March 2, 1931) and ABA Formal Opinion 49 (dated December 12, 1931) both hold that the relationships of parties in a law firm are such that neither the law firm nor any member or associate thereof may properly accept any professional employment which any member of the firm cannot properly accept. Our Committee also dealt with similar problems involving judges, trial commissioners, and prosecuting attorneys in our Formal Opinion E-61. In the same opinion, we dealt with the problems of associates of the same officials at considerable length, and quoted ABA Formal Opinion 104, which provides, in part:

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.

It seems to our Committee that the same sort of reasoning should apply to the facts in the instant inquiry. Certainly, there is every reason to believe that the lay public would view this situation as creating “the appearance of professional impropriety.”

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.