

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-71

Issued: September 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 a Commonwealth's attorney ethically represent public utility companies?

Answer: Yes, with certain limitations.

References: Canon 6, 9, 16; DR 5-105; KRS 69.010, 69.020

OPINION

To determine whether or not there is any ethical impropriety in a situation wherein a Commonwealth's attorney is asked to represent certain public utility companies. We have concluded there is no ethical impropriety *per se* in this kind of situation, for the following reasons:

Canon 6 of the older Canons provides in part as follows:

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

In the Code of Professional Responsibility, in correlation, DR 5-105, states in part as follows:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately

represent the interest of each and if each consents to the representation after full disclosure on the exercise of his independent professional judgment on behalf of each.

KRS 69.010 states that the Commonwealth's attorney shall attend each circuit court in his district, and prosecute all violations of criminal and penal laws. Furthermore, except in Franklin County, he shall attend to all civil cases and proceedings in which the Commonwealth is interested in the circuit court.

It is clear that the Commonwealth's attorney shall not act as 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 part (KRS 69.020). As to civil matters, there is little doubt that Commonwealth attorneys are prohibited from defending divorce cases, certainly where questions of custody and support are involved. Kentucky statutes indicate that it is public policy of this state to have divorce proceedings carefully scrutinized. Such a policy contemplates that prosecuting attorneys shall remain free to appear in such proceedings in the name of and in behalf of the state (ABA Formal Opinion 261). This is illustrative of the foresight necessary to avoid possible conflicts of interests.

Canon 6 condemns as unprofessional the representation of conflicting interests except by express consent of all concerned after a full disclosure of the facts. However, the consent clause in Canon 6 could not operate in the case of a public officer (Canon 16). Thus if there appears to be any conflict or may be any conflict of interests between the public officer's principal (the State) and private interest which are represented, the employment by the latter is unprofessional.

Also, Opinions have ascertained that the public officer being an attorney should not accept employment by a private interest where it might appear to the public his position would give him greater influence in any tribunal. The Standing Committee on Ethics of the American Bar Association has stated, "We have heretofore stated in Opinion 30, that it is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice." (ABA Formal Opinion 34). An attorney should not only avoid all impropriety but should likewise avoid the appearance of impropriety (Canon 9).

The Washington State Bar Association in Opinion 59, December, 1959, ruled:

The prosecuting attorney of a county may simultaneously be employed as an attorney for a public utility district located in the same county. In the event of actual controversy between the two bodies, the attorney should withdraw from representation of one.

There appears to be no statutory or ethical prohibition of Commonwealth attorneys representing private interests where the Commonwealth is not in any way involved.

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.