

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-102
Issued: November 1974

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 the partner of a county attorney ethically represent defendants in criminal cases in other counties?

Answer 1: No.

Question 2: May a county attorney represent defendants in criminal cases in another state?

Answer 2: No.

References: DR 5-105

OPINION

A county attorney contemplates formation of a partnership with another attorney. Before doing so he wishes to determine whether it would be permissible for the other attorney to undertake representation of defendants in criminal cases in other counties and has sought the advice of our Committee. He further advises that the county in which he practices adjoins another state, from which he derives a substantial part of his private practice. In the past he has declined to represent defendants in criminal cases in the other state because of his position but would like to accept such employment if it is not unethical. He again requests our opinion.

In Opinion KBA E-31, we considered the right of a county attorney or other official charged with the prosecution of criminal offenses to represent defendants in criminal cases in courts other than those in which he regularly practiced as prosecutor, holding that such representation was unethical. Later, in Opinion KBA E-61 we applied the same rule to prosecuting attorneys in cities of the first class, noting that this limitation also applied to partners or other members of the attorney's firm. The basis for both decisions was the prohibition in former Canon 6 (now DR 5-105) against representing conflicting interests. In Opinion KBA E-81 we observed a limitation on this rule where small rural communities are involved. There, we concluded that a city prosecutor in cities of the fourth class and lower might undertake the defense of a criminal defendant if the matter did not arise in the lower court for which he is prosecutor. The rationale of this decision was the shortage of attorneys in such communities and the possibility that defendants might not otherwise receive representation.

The facts of this inquiry do not present the same considerations which led to our conclusion in Opinion KBA E-81. The proposed representation would occur in other counties and not the county in which the county attorney holds office. The size of his community and availability of attorneys is thus immaterial. In the absence of this element, the rule announced in Opinions KBA E-31 and E-61 unquestionably applies, and the partner of a county attorney may not ethically represent defendants in criminal cases in other counties.

The second question was considered by the ABA Committee in Formal Opinion 30 (dated March, 1931), where the Committee concluded that upon his election or appointment to office a prosecuting attorney should promptly withdraw from the defense of a person indicted in an adjoining state. Such representation was viewed as a violation of former Canon 6 and as conduct calculated to interfere with the administration of justice. The Committee agrees with this conclusion. As prosecutor, the county attorney in question undoubtedly has occasion to call upon public officials of the state adjoining his county for assistance and courtesies. His appearance as defense counsel in that state could and very possibly would result in withdrawal of such cooperation. In that event the administration of justice would suffer. It was precisely this possibility that Opinion 20 was intended to guard against. We have accordingly concluded that appearance by the county attorney as criminal defense counsel in the adjoining state would be improper.

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.