

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-137
Issued: January 1976

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 lawyer, who is a captain in a county police department and legal adviser to the department, defend criminal cases outside his own county?

Answer 1: No.

Question 2: May he represent parties to disputes arising from motor vehicle accidents?

Answer 2: Qualified yes.

References: *In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky. 1951); *In re Advisory Opinion of Kentucky Bar Assn*, 526 S.W.2d 306 (Ky. 1974); DR 2-103(A), 2-104, 5-105(A)(B), 9-101(B), EC 5-15, 5-17, 8-8; Opinion KBA E-31, E-47, E-61, E-64, E-81, E-111; ABA Formal Opinion 135 (1935)

OPINION

In Opinion KBA E-111(March 1975) we decided that a police officer, also a lawyer, might properly engage in general practice of law provided that he might not practice criminal law and personal injury cases arising out of automobile accidents. The lawyer/officer has asked us to reconsider E-111 and remove the restrictions there placed on his practice.

Practice of Criminal Law

With a narrow exception set out in Opinion KBA E-81 not applicable here, a prosecuting attorney may not defend a criminal case in any court anywhere, Opinions KBA E-31, E-47, E-81. We do not believe the validity of these opinions are affected by *In re Advisory Opinion of Kentucky Bar Assn*, 526 S.W.2d 306 (Ky. 1974), which deals with conflict of interest. For reasons set out below, we believe that holding must be limited to its facts. Further, however, the KBA opinions cited above are not based entirely on a conflict-of-interest theory. They are also based on the interest in maintaining public confidence in the impartiality and objectivity of law enforcement agencies.

We believe the same rule which applies to prosecuting attorneys should apply to police officers who are lawyers. Where a lawyer's practice is restricted by his public office, his partners must observe the same restrictions, *In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky. 1951);

Opinions KBA E-61, E-64. Accordingly, we conclude that the lawyer-officer and his partners and associates may not defend criminal cases in any court anywhere.

Motor Vehicle Accident Cases

Applicant's proposal to represent parties in motor vehicle cases presents problems in three areas: (1) conflict of interest; (2) "feeding"; and (3) abuse of official position.

(1) Conflict of interest

Criminal charges of various kinds frequently grow out of motor vehicle accidents. Because of his rank, we do not suppose that the applicant has any direct responsibility for investigation of such accidents. However, in his capacity as legal adviser to the county police department, he would be responsible to advise the department concerning potential criminal charges growing out of accidents occurring in his county.

It goes without saying that a lawyer/officer could not represent a party in a motor vehicle case with respect to which he had already advised the department, DR 9-101(B). The problem would arise in cases about which the department might seek advice from the lawyer/officer after he had undertaken to represent one of the parties. He would then have to disqualify himself to perform his official duty, DR 5-105(A), (B); EC 5-15. The lawyer/ officer urges on us the position that he has no conflict of interest if, at the time he accepts employment in a vehicle case, he has not in fact been asked by the department for advice with respect to that case, and he cites this language from In re Advisory Opinion of Kentucky Bar Assn, 526 SW(2d) 306 (Ky 1974), at 307: "To have a conflict of interest there must be conflicting attorney-client relationships in existence at the time...."

The lawyer/officer has a general duty to the department to advise them in particular matters as they arise. We are not prepared to say that a public officer, permitted to practice law, must decline all private employment which might at some future time compromise his ability to perform his public duty. However, we know that he may not disqualify himself to perform public duty indiscriminately. He must consider the probability that particular private employment will or will not result in later disqualification and he must consider the frequency with which an area of private employment may result in disqualification, EC 5-17, 8-8; ABA Formal Opinion 135 (1935). In Advisory Opinion, cited above, the Court held there was not conflict between private employment and public duty because the particular duty there involved would very probably never exist. We believe that if the lawyer/officer is permitted to represent parties in vehicle accident cases occurring in the territorial jurisdiction of his department, there is a substantial probability that he might be asked to advise the department in connection with a matter in which he has already accepted private employment.

(2) "Feeding"

If the lawyer/officer is permitted to represent parties in vehicle accident cases arising within the territorial jurisdiction of his department, he will put himself in a position to use his office to build his private practice in violation of DR 2-103(A), 104. He would not be in such a position were this area of practice denied him altogether. In general, the Code of Professional Responsibility warns against, but does not condemn, conduct which merely creates an opportunity for impropriety. His conduct should not even give the appearance of impropriety.

(3) Use of official position

The problem on this point is similar to the “feeding” problem, except it involves the lawyer/officer’s conduct of a vehicle accident practice instead of getting the practice to start with. We doubt the lawyer/officer’s position would give him access to information relevant to a vehicle accident case not ultimately discoverable by any lawyer. However, his status as a police officer and his rank and position in the department could be used to obtain cooperation of witnesses and to utilize investigative resources unavailable to other lawyers, and even to color expert testimony in favor of his clients. Again, however, the fact that he could abuse his office in this manner does not mean that he will in fact do so.

To summarize to this point, if the lawyer/officer is permitted to accept private employment in vehicle accident cases occurring in the territorial jurisdiction of his department, there will be some conflict between his private employment and his public duty, but we cannot say that it would occur with unacceptable frequency; he will be in a position to “feed” his private practice from his public employment, but we do not know that he would in fact do so; and he will be in a position to obtain investigative advantages unavailable to other lawyers, but we do not know that he would in fact do so.

If the proposed representation raised only one of these potential problems, we would probably have to conclude that it would be proper. Here, however, three different areas of potential abuse are presented and the combination is too much. We conclude that the lawyer/officer, his partners, and associates may not represent parties in vehicle accident cases arising within the territorial jurisdiction of the lawyer/officer’s department.

The lawyer/officer, his partners and associates may represent parties in vehicle accident cases arising outside the territorial jurisdiction of the lawyer/officer’s department provided: (1) They may not accept employment in any matter with respect to which applicant has acted in any official capacity in cooperation with any other police department or branch of the constabulary, local, state, or federal; (2) they may not represent to any prospective client or to anyone with whom they come in contact in investigating, preparing, or trying a motor vehicle accident case that the lawyer/officer is a police officer or adviser to a police department, except to the extent required by DR 5-105; (3) they may not use personnel, files, or facilities of applicant’s department except to the extent that, and on the same basis as, the same may be available to any other lawyer; and (4) they may not use members of the lawyer/officer’s department as expert witnesses.

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.