

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-151
Issued: July 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: May a lawyer in private practice, who represents the personal representative of a murder victim in a wrongful death action against the alleged murderer, assist the Commonwealth's attorney in the murder trial without withdrawing from his employment in the wrongful death action?

Answer: Qualified yes.

References: DR 9-101(A)(B); Old Canon 36; Allied Realty v. Exchange National Bank, 408 F.2d 1099 (8th Cir 1969); United States v. Standard Oil, 136 F.Supp. 345 (S.D. New York 1955); ABA Formal Opinion 49 (1931), 342 (1975); ABA Informal Opinion 1066 (1968); Opinion KBA E-64 (1973)

OPINION

If the private practitioner merely assists the Commonwealth's attorney and the latter maintains complete control over the preparation for trial and the trial of the murder case, the private practitioner need not withdraw from the wrongful death action.

DR 9-101(B) states "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." Obviously, DR 9-101(B) would also bar continuation of private employment in a matter in which the lawyer assumes substantial responsibility as a public employee.

Old ABA Canon 36 was the predecessor of DR 9-101(B) and its judicial analogue, DR 9-101(A). Old Canon 36 was applied to *ad hoc* officers such as special masters and prosecutors, Allied Realty v. Exchange National Bank, 408 F.2d 1099 (8th Cir 1969); ABA Informal Opinion 1066 (1968); ABA Formal Opinion 49 (1931) It is not our intention to depart from this general rule. However, each of these precedents differs in two respects from the case now put to us. In each of the precedents, private employment was accepted after the public service had been undertaken, and there was no element of control by some other public officer.

If public officers are permitted to accept private employment in matters in which they had responsibility as public officers, they will be tempted to use public office as a means of building, or gaining an advantage in, subsequent private practice. The purpose of DR 9-101(B) is to remove

such temptations from reach, United States v. Standard Oil, 136 F.Supp. 345 (S.D. New York 1955); ABA Formal Opinion 342 (1975) (62 Am Bar Assn Jour 517, April 1976). In the case presented, the private practitioner has already been employed in the wrongful death action, and therefore his employment as a special prosecutor can not be used to help build his private practice. If the Commonwealth's attorney controls preparation and trial of the murder case, the special prosecutor will not be in a position to influence the wrongful death action by the manner in which the murder case is handled. Thus the reasons for applying DR 9-101(B) are not present here.

Opinion KBA E-64 (1973) is not contra. There, we decided that an associate of the Commonwealth's attorney might not accept employment in a civil matter related to criminal charges it was the Commonwealth's attorney's duty to prosecute. There, the vice was that the Commonwealth's attorney had an interest in his associate's success in the civil action, and such interest might have affected the way in which he handled the related criminal charges. Here, the Commonwealth's attorney has no interest in the outcome of the wrongful death action.

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.