

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-171
Issued: November 1977

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 the Office of the Attorney General of Kentucky participate in criminal proceedings against individuals who are or were codefendants with the Commonwealth of Kentucky in civil actions when the Commonwealth was represented by the Office of the Attorney General and both the civil and criminal actions spring from the same incident?

Answer: No.

References: Canon 9; EC 7-21; KRS 15.020, 15.205, 69.010

OPINION

The duties of the Attorney General of the Commonwealth of Kentucky are defined in KRS 15.020 and provide that he shall appear for the Commonwealth in all cases and proceedings in and before courts, tribunals or commissions in or out of the state in which the Commonwealth has an interest, except where it is made the duty of the Commonwealth's Attorney or County Attorney to represent the Commonwealth. Under KRS 69.010 it is the duty of the Commonwealth's Attorney to prosecute all violations of the criminal and penal law which are to be tried in the Circuit Court in that Commonwealth Attorney's judicial circuit. In addition, the Commonwealth Attorney is charged with the responsibility and duty to prosecute any preliminary proceedings of such violations, including preliminary hearings and the presentation of evidence to a grand jury concerning such violations. Therefore, it appears that the Commonwealth's Attorney has the primary responsibility of representing the Commonwealth in criminal proceedings of the type contemplated in the foregoing question.

Furthermore, our concern with the propriety of the proposed action, lies in the implication that the Commonwealth may be lending its authority to coerce or otherwise influence the outcome of separate proceedings, which have differing purposes if the Attorney General were to represent the Commonwealth in the civil as well as the criminal actions. We believe that the following language from EC 7-21 is applicable:

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while criminal process is designed for the protection of society as a whole. Threatening to use, or using the criminal process to coerce

adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

Although we recognize that the Office of the Attorney General would be acting in a public and not a private capacity in the proposed situation, we believe that the appearance of any professional impropriety should be avoided by the Attorney General to promote public confidence in our system and in the legal profession (Canon 9). We qualify our answer to this question, however, to the following extent: Pursuant to KRS 15.205, the Attorney General may direct a Commonwealth's Attorney from another district to participate in the criminal proceedings and we do not believe that such action would imply a conflict of interest or potential subversion of the civil and criminal process. Under such circumstances, however, it must be clear that there is a need for such assistance and that the designated Commonwealth's Attorney is acting solely under the control and at the direction of the Commonwealth's Attorney for the district in question. All concerned must scrupulously avoid any conduct that might give the appearance of a conflict of interest or unfair advantage to the Commonwealth as a defendant in the civil proceedings.

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.