

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-193
Issued: September 1978

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 an Assistant County Attorney defend a criminal case in a county other than the county of appointment to Assistant County Attorney?

Answer 1: No.

Question 2: May an Assistant Commonwealth Attorney defend a criminal case in a county other than the county of appointment to Assistant Commonwealth Attorney?

Answer 2: No.

Question 3: May a County Attorney represent a client in another county in a request for a zone change?

Answer 3: Yes.

References: Opinion KBA E-31, E-61; KRS 30.140, 69.020, 69.070 to 69.090, 69.210, 69.300; 1958 OAG 42, 177

OPINION

It appears that these questions have already been answered in Opinion KBA E-61 which stated that a Commonwealth Attorney, Prosecuting Attorney of a police court, or any assistant of any of them could not ethically represent defendants in criminal cases in any court of criminal jurisdiction. The Assistant County Attorney or the Assistant Commonwealth Attorney stands in the same shoes as the County Attorney or Commonwealth Attorney.

KRS 69.020 provides that a Commonwealth Attorney shall not act as a 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 party

KRS 69.070 provides for the appointment of Assistant Commonwealth Attorneys in counties having a population of 200,000 or more. KRS 69.080 provides that Assistant Commonwealth Attorneys shall have the same powers and perform the same duties as the

Commonwealth Attorney. KRS 69.090 provides that in the absence of the Commonwealth Attorney his assistants shall act in his stead.

KRS 30.140 provides that no law partner of a Commonwealth Attorney shall defend or aid in the defense of any person whom it is the duty of the official to prosecute. The Attorney General has given an opinion that it would be clearly unethical for a law partner of a Commonwealth Attorney to accept employment to defend a person charged with a crime in the Quarterly Court, 1958 OAG 42,177.

KRS 69.210 provides that the County Attorney shall attend to all prosecutions in courts inferior to the Circuit Court except those having a prosecuting attorney.

KRS 30.140 provides that no law partner of a County Attorney shall defend or aid in the defense of any person whom it is the duty of such official to prosecute.

KRS 69.300 provides that the Assistant County Attorneys shall possess the same qualifications as County Attorneys and shall have the same powers and perform the same duties.

The test to be applied to assistants to the County Attorney and the Commonwealth Attorney is whether or not the lawyer representing criminal defendants by his affiliation with an elected prosecutor implies a special advantage or unusual influence in a criminal case. The attorney in this situation should stay away from any position which would establish an apparent conflict of interests. Although there is no statute which specifically prohibits County Attorneys from acting as defense counsel in the courts which they are elected to prosecute criminal defendants, we believe that the County Attorney stands in the same position as a Commonwealth Attorney and that he or his assistant should not act as defense counsel in any criminal prosecution in the Commonwealth. See KRS 69.020 and Opinion KBA E-31.

The situation involving a County Attorney representing a client in another county in a request for a zone change is considered a civil action. There are no statutory limitations on County Attorneys representing individual clients in civil actions in adjoining counties. Of course, a County Attorney cannot represent a zoning board in his own county and also represent an individual client who has a controversy with the zoning board; nor should a County Attorney associate himself with a nonresident attorney who represents a client before the zoning board.

We see nothing wrong with a County Attorney referring individual clients to a County Attorney in an adjoining county to represent that client before the referring attorney's county zoning board; however, there should not be any conflict of interest or association of fees between the two County Attorneys in this situation.

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.