

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-199
Issued: January 1979

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 represent two or more Kentucky municipalities simultaneously?

Answer 1: Yes, but only on a contract basis.

Question 2: May partners or associates in the same law firm represent two or more Kentucky municipalities?

Answer 2: Yes, but only on a contract basis.

References: Opinion KBA E-88 (1974); DR 1-102, 5-105; Constitution § 165; KRS 61.080; City of Glasgow v. Burchett, 419 S.W.2d 544 (Ky. 1967); Howard v. Saylor, 204 S.W.2d 815 (Ky. 1947); OAG's 73-759, 71-523

OPINION

Question 1

Section 165 of the Kentucky Constitution and KRS 61.080 state that “no person shall, at the same time, fill two municipal offices, either in the same or different municipalities,”

Before Question I can be answered, it must be determined in which context the word “represent” is being used. If the positions the attorney fills are municipal or public offices, then he is clearly in violation of Constitution § 165 and KRS 61.080. DR 1-102 states, “A lawyer shall not:...engage in ... conduct that adversely reflects on his fitness to practice law.” Thus, an attorney who held two or more municipal offices in clear violation of KRS 61.080 would be engaged in conduct that would reflect adversely on his fitness to practice law. Thus the question to be asked is, “When does a municipal or public position become a public or municipal office?” In Howard v. Saylor, 204 S.W.2d 815, 817 (Ky. 1947), the following elements were delineated as necessary to establish a public office:

- (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature;
- (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;

- (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority;
- (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body;
- (5) it must have some permanency and continuity, and not be only temporary or occasional.

A city can hire private counsel on a contract basis to handle generally its legal matters and not officially appoint the counsel as the city attorney (OAG 73-759). In this case the attorney is considered only an employee and not a municipal officer (OAG 71-523). Thus, the attorney merely represents the city or cities on a contract basis. An attorney can be a city official in one city yet accept employment from another merely to advise the city in its legal matters and not hold incompatible offices within the meaning of Constitution § 165. Glasgow v. Burchett, 419 S.W.2d 544 (Ky. 1967). A county attorney may properly represent a city in the same county on a contract basis (Opinion KBA 88 (March 1974)). Hence, an attorney city official may represent a different city on a contract basis and not be incompatible within the meaning of Constitution § 165. Certainly, an attorney may represent two or more municipalities simultaneously on a contract basis and not be a city official of any of the cities. However, in representing a city on a contract basis the attorney must be careful not to have the nature of his work fall within the elements of a public office. If representing two or more of these cities would impair the judgment because of conflicting interests between the cities, it is the attorney's duty to decline proffered employment or withdraw (DR 5-105).

Question 2

The answer to Question 1 disposes of Question 2, since if it is not a conflict of interest to the lawyer, it is not within the purview of DR 5-105(D).

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.