

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-211
Issued: March 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: May an assistant Commonwealth attorney act as defense counsel in a criminal case?

Answer: No.

References: Opinion KBA E-61, E-193; Canon 5, 9; KRS 15.740. 69.020; *In re Kenton County Bar Assn*, 236 S.W.2d 906 (KY 1951); ABA Formal Opinion 16, 30, 55, 118, 136, 142, 262.

OPINION

KRS 69.00 provides that a Commonwealth attorney shall not act as defense counsel in a criminal prosecution in this Commonwealth except in cases in which he was employed prior to his election or to which he is a party. The 1976 General Assembly repealed this section effective January 1, 1978. While repealing KRS 69.020, the legislature adopted KRS 15.740 which became effective January 1, 1978, which provides that the Commonwealth's attorney shall not act as defense counsel in any criminal prosecution in any state or federal court in this Commonwealth except in cases in which he is a party.

This Committee has, on many occasions, addressed the issue of the Commonwealth attorney's representations of criminal cases. See Opinion KBA E-61, in the case of *In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky 1951), held that a Commonwealth attorney shall not act as defense counsel in a criminal prosecution.

Recently we issued Opinion KBA E-193 which states that an assistant Commonwealth attorney could not defend criminal cases in a county other than a county of appointment to assistant Commonwealth attorney. This opinion rested largely with Opinion KBA E-61.

The ABA has issued many opinions on this area as follows: ABA Formal Opinion 16 advises that one member of the firm may not prosecute while the other member defends a criminal case; ABA Formal Opinion 30, a prosecutor in one state may not ethically defend a criminal case in another state; ABA Formal Opinion 55, a city attorney may represent defendants in criminal courts other than the one in which he prosecutes; ABA Formal Opinion 118, prosecutor may not accept employment to obtain a pardon or parole for one convicted of a crime in another county; ABA Formal Opinion 136, the attorney who represented a defendant before election may not

represent that person after election; ABA Formal Opinion 142, an assistant prosecutor or his partner may not defend the client in criminal case; ABA Formal Opinion 262, a state prosecuting attorney may not represent a criminal defendant before federal courts.

Canon 5 provides that a lawyer should exercise independent professional judgment on behalf of a client. To this Committee it is impossible for a prosecutor to defend cases in a court and retain his independent professional judgment while acting one time as prosecuting attorney and another as defense counsel. Further, Canon 9 provides that a lawyer should avoid giving the mere appearance of impropriety. It is the Committee's feeling that even if the lawyer could get around Canon 5 the impropriety of the lawyer acting both as prosecutor and defense counsel should preclude the lawyer from acting. It is our feeling that the public confidence in the lawyers may be eroded by a lawyer acting as both prosecutor and defense counsel, even in other counties or federal courts.

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.