

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-241
Issued: May 1981

Overruled by E-444 (2018)

Question 1: May a Commonwealth Attorney represent a party other than the State in a State condemnation proceeding?

Answer 1: No.

Question 2: May a County Attorney represent a party other than the County in a State condemnation proceeding?

Answer 2: No.

References: Canon 5- DR 5-105(A), ABA EC 5-1, 9-2 Opinion KBA E-56, E-66, E-7 1, E-75, E-88; OAG 74-111, 76497; Ky Const § 97, § 99; KRS 69.010, 69.210

OPINION

To determine whether a conflict of interest exists when the Commonwealth or County Attorney represents a party other than the State or County in question, it is necessary to determine who the principal is in each situation and whether an actual or potential conflict arises. Under DR 5-105(A) a lawyer must decline proffered employment if the exercise of his independent professional judgment on behalf of a client is or is likely to be adversely affected by accepting the proffered employment. There must be a conflicting attorney-client relationship in existence at the time for there to be an actual conflict of interest (31 ALR3d 725). When the possibility of a conflict is remote, it is not an ethical violation to represent the party (KBA E-66). However, a lawyer's professional judgment on behalf of a client must be free of compromising influences.

The Constitution of Kentucky, in section 97, states that each Circuit Court will have a Commonwealth Attorney and it is considered a Constitutional Office. Under KRS 69.010, the duties of the Commonwealth Attorney include attending to civil cases in the Circuit Court except where there is a first or second class city in the Judicial Circuit, or in that Circuit including Franklin County. In the Circuits where the exceptions apply, KRS 69.210 provides that the County Attorney shall attend to all civil cases and proceedings. Thus, even though the County Attorney is a County Officer under the Constitution of Kentucky, section 99, he is also a Constitutional Officer which means the Legislature

may prescribe duties pertaining to State functions as well as County functions (OAG 76497). That means there will be circumstances in which the County Attorney would be able to represent a private party in condemnation proceeding and some situations where he cannot. Note the opinion in OAG 7111, where it said a County Attorney should not engage in negotiations nor condemnation cases relating to State Highway right-of-way arising in the Attorney's county; however, the opinion granted its approval for the County Attorney to represent private parties in such proceedings in other counties since the Attorney's statutory obligation was to his county alone. The principal in that situation is the county where the duty is owed, not all counties. The opinion in KBA 75 also denied the County Attorney the opportunity to represent private individuals in condemnation proceedings by the Commonwealth of Kentucky, Department of Highways, since the County Attorney has certain duties defined under the State's condemnation proceedings. However, the opinion did not speak to the issue of a County Attorney representing private parties in counties other than where the Attorney is elected as the County Attorney.

A Commonwealth or County Attorney can maintain a private practice; however, when it conflicts with his official duties, under DR 5-105 requirements he must decline the proffered employment (KBA 88). It is not unethical to accept employment on a private basis but any appearance of a conflict between the principal and the private interest must be avoided. If there is doubt whether the representation would be a conflict or not, it is safest to remember that no man can serve two masters (KBA E-56). An additional consideration for one who is in a position of public authority is that the public may not be able to draw the necessary fine distinction to determine whether an actual conflict exists or not, especially where the Commonwealth's interests are involved. Public confidence in the law and in lawyers must not be eroded by irresponsible or improper conduct by an attorney (ABA EC 9-2).

The Commonwealth Attorney should not represent a private interest in condemnation proceedings since he is an officer of the State, derives his authority from the State, is paid by the State, and is an employee of the State. It is axiomatic that a lawyer who is an employee will not take any action against the employer. Since the Commonwealth is a party to a condemnation action, the Commonwealth Attorney would have a conflict of interest in representing the other side since the Commonwealth is a party in the action. Note that if the Commonwealth were not involved in the proceeding, the Commonwealth Attorney could represent a private interest (KBA E-71).

The County Attorney is in somewhat a different situation. He is elected by the people of his county to serve the county in that office. The County Attorney is paid by the county for performing the functions before the Fiscal Court. The County Attorney also receives remuneration from the state for prosecutorial functions in the district court.

In addition, in the normal condemnation case the county is necessarily a party to the litigation since there needs to be a determination as to the taxes due on that property.

For the reasons stated with respect to the Commonwealth Attorney, it is the feeling of the Ethics Committee that the appearance of a conflict must be avoided. It is our feeling

that the County Attorney like the Commonwealth Attorney may not represent a private individual in a condemnation proceeding.

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.