

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-250
Issued: September 1981

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.

Opinion KBA E-250

Question: May an attorney who has been appointed Public Defender in County X to represent an indigent defendant, represent that same defendant for a fee in another criminal matter in County Y at the same time?

Answer: Qualified yes.

References: DR 1-102(A); Canon 9; DR 2-106; KRS 31.250(1); Kentucky Bar Assn v. Dungan, 586 S.W.2d 15 (Ky. 1979)

OPINION

This fact situation involves an attorney who was appointed in one county to represent an indigent client as a Public Defender. During the representation and prior to its completion, this same client was charged with yet another criminal offense in a different county. The family of the accused has now come to the lawyer seeking to retain the lawyer as private retained counsel in the latter case. It should be noted that the attorney is a Public Defender in the former county but is not a Public Defender in the latter county.

At the outset, it must be noted that the Public Defender is an important position of responsibility in the Commonwealth of Kentucky. This person aids the indigent in the criminal process and is to be commended for rendering this valuable service to the citizens throughout the Commonwealth. The small remuneration paid to the Public Defenders is however, paid by the Commonwealth of Kentucky.

It is the responsibility of the judiciary to appoint Public Defenders where a citizen is indigent.

DR 1-102(A) provides: A lawyer shall not:

- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.

Accordingly, it is the feeling of this Committee that a Public Defender owes an obligation to the Court of appointment to make sure that the appointed person is truly indigent.

Furthermore, Canon 9 states that a lawyer should avoid even the appearance of impropriety.

We do not believe the facts of this request directly fit within Kentucky Bar Assn v. Dungan, 586 S.W.2d 15 (Ky. 1979); nor, within KRS 31.250(1). However, we feel it is important to remind the participating attorneys in public advocacy of KRS 31.250(2) which provides as follows:

Any attorney participating in a public advocacy plan who receives or attempts to collect a fee from a needy person as prohibited by subsection (1) above shall be guilty of a Class D. felony.

The term “fee” as defined in KRS 31.250(1) includes “... cash, property, or other pecuniary benefits of any kind.”

Notwithstanding the above sections, it seems to the Committee that with certain restrictions it would be permissible to continue the above representation if the following conditions are complied with:

1. That the local rules with respect to the Public Defender are not violated. The lawyer should always check the local rules since they may very well preclude the representation in this regard.
2. The fee paid is paid from people other than the accused. This would include joint property situations.
3. That the fee charged in the second case is a reasonable fee in accordance with DR 2-106.
4. That the fee agreement is reduced to writing with an affidavit of who is paying the fee, as well as, how much the fee is and signed by the accused, the payers of the fee, and the lawyer. This affidavit and motion then must be transmitted to the judge in the county to which the lawyer was appointed Public Defender.

By completing the above four requirements the lawyer may continue the representation. In the absence of any one, the lawyer must decline the latter employment.

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.