

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-257
Issued: May 1982

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 Attorney for the Commonwealth prosecute a criminal action against a defendant that was a party to a civil action in which the Attorney for the Commonwealth represented one of the parties at the time the criminal complaint was filed?

Answer 1: Qualified yes.

Question 2: May an Attorney for the Commonwealth represent a wife in a civil action attempting to collect back child support against a husband after the termination of a nonsupport action in favor of the husband prosecuted by the Attorney for the Commonwealth?

Answer 2: Yes.

Question 3: May the spouse of the Attorney for the Commonwealth that is in a separate law office represent an individual in a civil matter where the Attorney for the Commonwealth is prosecuting the individual in a criminal matter?

Answer 3: No.

References: Canon 9; SCR 3.130; DR 7-105, 9-101(B); KBA E-164, E-190, E-206, E-212, E-215, E-230, E-244; Advisory Opinion of Kentucky Bar Assn, 613 S.W.2d 416 (Ky. 1981), O'Hara v. Kentucky Bar Assn, 535 S.W.2d 83 (Ky. 1975); EC 9-6

OPINION

In the past the Ethics Committee has been called on to issue many opinions with respect to County Attorneys and Commonwealth Attorneys. (Hereafter both referred to as Attorney for the Commonwealth.) The major reason for this is the fact that these positions are presently part time positions in which the Attorney for the Commonwealth has a private practice of law. These Questions like many others basically involve the Appearance of Professional Impropriety (Canon 9) as well as, tending to bring the Bench and Bar into disrepute (SCR 3.130).

Underlining the above is the fact that there may be inherent conflict of interest in that the Attorney for the Commonwealth is in a position to use the leverage of the office of the Attorney for the Commonwealth in order to influence an adversary by being in the position to threaten or promise certain action in criminal matters in return for a favorable agreement on behalf of a client in a civil matter. This is clearly a problem since DR 7- 105 provides, “A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”

Further, the Attorney for the Commonwealth is bound by DR 9-101(B) which provides, “A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee” This Committee has in KBA E-212 stated that if an attorney, formerly in the employment of the government agency leaves that employment he may not accept private employment in a matter pending in the agency if he performed “any act” with respect to the matter on behalf of the agency. The Ethics Committee feels that there is no difference between a former employee of the governmental agency and a present Attorney for the Commonwealth.

It must be remembered at all times, and particularly with the Attorney for the Commonwealth that “every time a lawyer accepts employment in a case or controversy there is necessarily another client(s) interest that the lawyer may not accept employment.” See KBA 190 KBA E-230, followed, Advisory Opinion of Kentucky Bar Assn, 613 S.W.2d 416 (Ky. 1981). As stated in this case, the court relied upon O’Hara v. Kentucky Bar Assn, 535 S.W.2d 83 (Ky. 1975) and stated, “The point is not whether impropriety exists, but that any appearance of impropriety is to be avoided....”

Question 1

This Question primarily occurs where the Attorney for the Commonwealth is representing a person in a civil action and a party to that civil action brings a criminal complaint against the other party. This situation generally arises in a pending divorce case where one spouse takes out a criminal complaint against the other spouse.

If the criminal complaint is taken out by the spouse who is represented by the Attorney for the Commonwealth, the Attorney for the Commonwealth may prosecute the criminal action against the other spouse. However, the Attorney for the Commonwealth must withdraw as soon as practical from the civil action.

If the criminal complaint is taken out against a client whom the Attorney for the Commonwealth represents in the civil case, the Attorney for the Commonwealth must disqualify himself from the prosecution of the criminal action and must withdraw from the civil action as soon as practical without taking further action on behalf of the client in the civil action.

This situation is not unlike KBA E-164 in which we held that an associate of a Commonwealth Attorney may not represent a plaintiff in this civil action against the defendants who have been charged with criminal action arising out of the same subject matter. Obviously, DR 4-105 precluded representation of an associate in the law firm from participating. With respect to those who share office space with the Attorney for the Commonwealth they are well advised to see KBA E-244.

It should be noted also that this rule applies whether there be one Attorney for the Commonwealth or there be eighty. The fact is not whether the impropriety exists but whether there is the appearance of impropriety.

Question 2

In KBA E-215 we held that a part-time Assistant County Attorney could not represent the defendant in a civil action to collect delinquent dependency support payments.

However, the non-support action (criminal action) and back child support (civil action) are both actions on behalf of the children of the Commonwealth of Kentucky and are similar actions. There is no conflict in any regards to the representation of the plaintiff in the civil action.

It should be noted that this question turns upon the word “termination” of the criminal action. In no case may an Attorney for the Commonwealth have at the same time pending a criminal case of non-support and a civil case attempting to collect back child support. The appearance of impropriety of doing this is too great. However, once the criminal action has terminated the civil action is still allowable.

Question 3

This Committee in KBA E-206 held that an attorney employed by one firm could represent a client where the opposing counsel is represented by a different law firm or legal organization. In that opinion we stated, “In any event, under EC 9, both husband and wife must avoid not only ‘impropriety but the appearance of impropriety.’” If the attorney determines that by taking a case he or she would not inspire the confidence, respect, and trust of his/her client and of the public, then the attorney should withdraw.

If the client of the spouse in a civil matter later becomes a defendant in the criminal action, the spouse should withdraw as attorney of record and the Attorney for the Commonwealth should also disqualify himself from prosecuting the action. It is the Committee’s feeling that the marital relationship, the attorney-client relationship and the appearance of impropriety is so great so as to require disqualification of both lawyers in this situation.

It should be once again noted that where one member of the firm or the Attorney for the Commonwealth's office is required to decline employment, all members of the firm or the office of the Attorney for the Commonwealth are required to decline 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.