

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-262
Issued: May 1982

Overruled by E-444 (2018)

Question 1: May County or Commonwealth's Attorneys or their associates represent licensees in disciplinary actions before the States's licensing boards or commissions?

Answer 1: No.

Question 2: May they represent the licensee against the board or commission in district, circuit or the appellate courts?

Answer 2: No.

References: DR 5-105(A); KRS 15.020, 15.700 to 15.770, 69.010, 69.210; 315.230(2); KBA E-71, E-200, E-241

OPINION

The questions presented to the Committee deal essentially with the same problem whether an attorney can serve one master against another (KBA E-200). Under the Unified and Integrated Prosecutor System KRS 15.700-15.770, Commonwealth's Attorneys and their assistants are compensated with state funds through the budget of the Prosecutors Advisory Council, as are County Attorneys and their assistants for prosecutorial functions in the district court. The Council, of which the Attorney General is Chairman, is charged with administering the unified prosecutorial system and is composed of the Attorney General, three Commonwealth's Attorneys, three County Attorneys and two non-attorney citizens. Pursuant to KRS 15.020 the Attorney General is also counsel for many of the state licensing boards and commissions.

According to KRS 15.725, "(t)he Commonwealth's Attorney shall attend each circuit court held in his judicial circuit" and shall "have the duty to prosecute all violations of the criminal and penal laws which are to be tried in the circuit court in his judicial circuit." The statute further provides that "(t)he County Attorney shall attend the district court in his county and prosecute all violations of criminal and penal laws within the jurisdiction of said district court."

The offices of the Commonwealth's and County Attorneys are also subject to Chapter 69 of the Kentucky Revised Statutes. KRS 69.010 provides that it is the duty of the Commonwealth's Attorney to "attend to all civil cases and proceedings in which the Commonwealth is interested in the circuit courts of his judicial circuits." The statute also provides that "the Commonwealth's attorney shall not be required to represent the Commonwealth in any civil proceedings" in Franklin County or in a judicial circuit containing a first or second class city or an urban county government.

Pursuant to KRS 69.210, "(t)he county attorney shall attend the fiscal court and conduct all business in that court touching the rights or interest of the county, and defend and conduct all civil actions in which the county is interested before any of the courts of the Commonwealth." The statute further states that a county attorney serving in a county which is part of a judicial circuit containing a first or second class city or urban-county government "shall attend all civil cases and proceedings in his county in which the Commonwealth is interested."

The private practice of County or Commonwealth's Attorney and their assistants is addressed under the unified and integrated prosecutor system. KRS 15.740 states that "(t)he Commonwealth's attorney and county attorney shall not act as defense counsel in any criminal prosecution in any state or federal court in this Commonwealth...." Further, KRS 15.755(3) provides that "(i)n each judicial circuit containing a city of the first or second class or an urban-county government, the Commonwealth's attorney shall not engage in the private practice of law. All other Commonwealth's attorneys shall not be prohibited from engaging in the private practice of law." Additionally, KRS 15.760(3) provides that "(t)he full-time assistant Commonwealth's attorney shall not be allowed to engage in the private practice of law." As to the county attorneys, neither they nor their assistants are prohibited from practicing privately (KRS 15.765(4), 15.770(3)). Pursuant to these statutes, it is clear which prosecutors are legally permitted to practice privately. However, they still may be confronted with a conflict of interest.

Licensing boards and commissions are created by statute for the purpose of carrying out the state's interests and performing functions of the state. As disciplinary actions before the state's licensing boards and commissions are essentially adversarial-type proceedings, they are analogous to situations in which the attorney represents a private client in the courtroom.

Commonwealth's attorneys are compensated by the state (KRS 15.755) and therefore are employees of the state. According to DR 5-105(A), a lawyer must decline preferred employment "if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interest." This Committee has held on several occasions that a lawyer who is an employee of the state can not represent private interests against the employer or where the state is involved. See KBA E-71, E-200, E-241. Since Commonwealth's attorneys and their assistants are state employees, they cannot ethically represent private clients against the state in disciplinary actions before state licensing boards and commissions.

County Attorneys and their assistants are in a somewhat different situation. As discussed above, they receive remuneration from the state for prosecutorial functions in district courts (KRS 15.765). Therefore, it is the opinion of this Committee that County Attorneys and their assistants are prohibited from representing licensees in such disciplinary actions.

In answer to the second question, Commonwealth's and County Attorneys and their assistants are not only employees of the state, but they also represent the state in the district and circuit courts. In view of the fact that the Commonwealth's and County Attorney could not ethically represent a client in a disciplinary action before the state's licensing boards and commissions, it would be incongruous to allow them to represent a client against the same board or commission in district, circuit or appellate courts. Additionally, if a statute expressly requires them to represent the board of commission, they could not represent the private clients. See KRS 315.230(2).6

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.