

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-281
Issued: January 1984

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 a lawyer who represents a particular agency on a personal service contract at the same time represent an individual against that same state agency in a different, unrelated matter?

Answer 1: No.

Question 2: May a lawyer who is on a personal service contract with one state agency represent a client in an action against another state agency?

Answer 2: Qualified no.

References: EC 2-3, 5-1; DR 5-101(A), 5-105(A), 5-105(C), 5-105(D); KBA E-146, E-5, E-148, E-230, E-190, *In re Advisory Opinion of Kentucky Bar Association*, Ky., 613 S.W.2d 416 (1981); *O'Hara v. Kentucky Bar Association*, Ky., 535 S.W.2d 83 (1975); *In re Advisory Opinion*, Ky., 31 S.W. 11 (1962); KRS 11.080, 12.010, 12.265, 45.700(1)(a)& (c) 1 KAR 2.010 *Grievance Committee v. Rattner*, Conn., 203 A.2d 82 (1964); ABA 83, 86, 112, 218, 222, 224, 47; Canon 9.

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KRS 11.080 provides that the term “agency” includes (emphasis added) any department, program cabinet, institution, board, commission, office or agency of the state.

While KRS Chapter 12 delineates the administrative organizational structure of the government of the Commonwealth, the definition section of this chapter (12.010) does not address the term “agency”. Therefore, for purposes of this inquiry, it is necessary to draw upon the definition provided in KRS 11.080. Consequently, one may conclude upon examination of Chapter 12 that all such departments and cabinets and their respective administrative dependencies may each be characterized as “agencies” within the general scope of the definition provided in KRS 11.080. Thus, while many agencies operate within the larger agency for administrative purposes, e.g., the “Department” or “Program Cabinet”, etc. (see KRS 12.020 and 12.265), not all of the lesser agencies which collectively constitute a larger agency in the singular sense function on a day-to-day basis as a unit. In fact, many of the lesser agencies become autonomous with respect

to the other agencies within their respective Department or Cabinet. Such is the nature of bureaucracy.

This system of administrative organizations does not make it easy for the attorney to readily identify possible conflicts of interest or appearance of impropriety which may arise from occasional representation of a particular “agency” on a “personal service contract” basis, and representing a private client before another state agency or even that same agency in a non-related matter. (KRS 45.700(1)(c) defines “Personal Service Contract” as “...an agreement whereby an individual, firm, partnership, or corporation is to perform certain duties, professional or otherwise for a specified period of time for a price agreed upon, which are exempted from competitive bidding...”)

While there continues to be dispute as to whether the client is the state or the state-agency in the case of full-time salaried governmental attorneys, the very nature of the “personal service contract” (see 1 KAR 2:010) lends support to the opinion that the client is the particular state agency acting as the “contracting body” (see KRS 45.700(1)(a)) in the case of private attorneys providing legal services under a personal service contract, notwithstanding that the fee is to be paid from public funds of the Commonwealth.

Regarding the question of whether a lawyer who represents a particular state agency on a personal service contract may represent an individual against that same agency in an unrelated matter, the issue of conflict of interest instantly arises. This question involves those instances where the attorney is still under contract to the particular agency to provide services as per the terms of the contract and during that same period represent an individual against that agency.

Opinion KBA E-148 (July 1976) advised that “When a client employs a lawyer to handle a particular matter, the lawyer has a duty to see that his client understands the proper scope of the employment; and if he discovers that his client needs advice and services in other, unrelated matters, he may have a duty to call that fact to the client’s attention, EC 2-3. Nonetheless, in the absence of a continuing retainer, a private practitioner’s duties to his client are limited to those matters his client has employed him to handle. Representation of a client in one matter does not in and of itself create any lawyer-client relationship with respect to other, unrelated matters. *In re Advisory Opinion*, Ky., 361 S.W.2d 11 (1962), reversing Opinion KBA E-5 1962).

EC 5-1 advises that “(t)he professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of client and free of compromising influences and loyalties. Neither his personal interest, the interest of other clients (emphasis added), nor the desires of third persons should be permitted to dilute his loyalty to his client. While EC 5-1 is advisory in nature, DR 5-101(A) mandates that “(e)xcept with the consent of his client from full disclosure, a lawyer should not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably be affected by his own financial, business, property, or personal interest.”

Opinion BA E-148 observed that “(i)t is apparent that a private practitioner has no conflict of interest with respect to an adverse party unless it is conflict based on concurrent or former representation of the non-adverse in a matter substantially related to the present adverse

employment.” The Supreme Court of Connecticut has held that a firm cannot accept any action against a person whom they are presently representing even though there is no relationship between the two cases. The Connecticut court cited an opinion of the Committee on Professional Ethics of the New York County Lawyer’s Association which stated in part “While under the circumstances... there may be no actual conflict of interest... maintenance of public confidences in the Bar requires an attorney who has accepted representation of a client to decline, while representing such client, any employment from such an adverse party in any matter even though wholly unrelated to the original retainer.” citing to Question and Answer No. 350, N.Y. County L.Ass’n., Question and Answer No. 450 (June 21, 1956). Grievance Committee v. Rattner, Conn., 203 A.2d 82 84 (1964).

While this Committee concurs with the spirit of the Connecticut and New York opinions, it also recognized that DR 5-105(A) mandates that “(a) lawyer shall decline proffered employment if the exercise of his independent professional judgment will be or is likely to be adversely affected by the acceptance of the proffered employment except to the extent permitted under DR 5-105(C).” The latter requires that such acceptance is permissible so long as “...it is obvious that he can adequately represent the interest of each and if each consents to the representation on the exercise of his independent professional judgment on behalf of each. (Emphasis ours.) These provisions in the Code of Professional Responsibility are consistent with earlier holdings in past ABA Opinions prohibiting such representation unless the attorney obtains express consent of all concerned (emphasis added) given after a full disclosure of the facts. See ABA Opinion 247 (1942), also 224 (1941), 222 (1941), 218 (1941), 112 (1934), 83 (1932) and 86 (1932).

The Supreme Court of Kentucky and this Ethics Committee has consistently held that the “...public demand for professional independence is great.” See In re Advisory Opinion of Kentucky Bar Association, Ky., 613 S.W.2d 416 (1981). The Court in O’Hara v. Kentucky Bar Association, Ky., 535 S.W.2d 83 (1975) states “the point is not whether impropriety exists, but that any appearance of impropriety is to be avoided...” This Committee has held likewise in KBA E-230 and more specifically in KBA E-190 in which we stated “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.”

As we view this situation the lawyer simply has a choice. The lawyer may accept a personal service contract from a particular state agency of the Commonwealth or not. If the lawyer or law firm chooses to accept that personal service contract, the lawyer and the law firm are necessarily precluded from taking action against that same state agency. We do not believe that full consent and disclosure of the parties will allow multiple representation within DR 5-105(C) because it is not obvious that the lawyer can adequately represent the interest of each.

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It is our opinion that there is in fact a difference in a lawyer being placed on a personal service contract with one state agency and representing a client against another state agency. We believe that the requirements of DR 5-105(C) are met and with full disclosure and consent of all of the parties.

This Committee in reviewing personal service contracts is at best uncertain as to who that disclosure and consent should be given to in the state agency. It is our opinion that where there are many departments within a particular Cabinet, it should at least be the head of that particular Cabinet. Thus the Cabinet Officer of the agency may evaluate the appearance of impropriety of the case and be alerted to any possible conflicts of interests before consenting to the lawyer's representation.

It is our opinion that full disclosure to both the Cabinet Head in which the lawyer or law firm has a personal service contract and the client who takes the lawyer's representation in an action against another state agency must necessarily be in writing, and receive written consent.

It should be noted that EC 5-19 provides:

A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of the lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from the representation of that client.

This Committee has considered the possibility of the appearance of impropriety under Canon 9 if the political reality of personal service contracts and the need for them within the Commonwealth of Kentucky. The Committee has concluded that with full disclosure and consent in writing of all the parties that the appearance of impropriety will not be violated.

Furthermore, any partner or associate in the lawyer's firm is precluded from accepting or continuing in the employment. DR 5-105(D).

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.