

Kentucky Bar Association
Ethics Opinion KBA E-350
Issued: July 1992

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Past Kentucky Bar Association ethics opinions and court decisions counsel that a prosecutor (and his partners and associates) should not try defendants with whom the prosecutor is embroiled in civil litigation. Did the adoption of the Kentucky Rules of Professional Conduct “overturn” these ethics opinions and decisions?

Answer: No.

References: KBA Ops. E-64 (1973) and E-151; KBA Op. E-275 (1983); Kentucky Bar Ass’n v. Lovelace, 778 S.W.2d 651 (Ky.1989); ABA Formal Op. 342 (1975); ABA Formal Op. 135 (1935); *In re Truder*, 37 N.M.69, 17P.2d 951 (N.M.1932) and Blanton v. Barrick, 258 N.W.2d 306 (Iowa 1977); Restatement of the Law Governing Lawyers secs. 214 and 216; Cf. Standard for the Prosecution Function 3-2.3(b)(1979); C. Wolfram, Modern Legal Ethics, 455 (1986); J. Douglas, Ethical Issues In Prosecution, (National College of District Attorneys 1988); Summit v. Mudd, 679 S.W.2d 225 (Ky. 1984); Dick v. Scroggy, 882 F.2d 192 (6th Cir.1989).

OPINION

Needless to say, the ethics committee is not an appellate court, and does not review decisions or make law. The law, including the law relating to professional conduct, is what the court says it is. This opinion is written to answer suggestions that the adoption of the Rules of Professional Conduct (effective January 1, 1990) somehow overturned past committee opinions and court cases.

It is the opinion of the committee and the KBA Board of Governors (the board reviews Formal Opinions of the committee pursuant to SCR 3.530) that the Rules have no such effect.

There is simply no avoiding the fact that a system of justice relying on part-time prosecutors will lead to conflicts of interest. However, it is not a desirable “solution” that time-honored rules be modified to make it easier for prosecutors to take civil cases they want to take. The following observation is drawn from a book written by and for prosecutors by J. Douglas, styled “Ethical Issues In Prosecution” (National College of District Attorneys 1988): “Generally it is axiomatic a prosecutor should never try a defendant with whom he is embroiled in civil litigation.”

This statement is fully supported by cases from Kentucky and other jurisdictions, our past ethics opinions, and the comments of treatise writers. We have collected some of these authorities in the “references” section of this opinion.

The purposes served by the conflicts rules have been variously stated. It has been said that the public prosecutor should not be tempted to “overprosecute due to his or her private interests.” KBA E-64; KBA E-151; ABA Formal Op. 342. The prosecutor should not be permitted to leverage the defendant (or the prosecuting witnesses) for private gain, since that would be an abuse of office, as well as an abuse of the defendant. *See In re Truder* (part-time prosecutor and assistant instituted voluntary manslaughter proceeding and attempted to represent estate of victim in civil action arising from same case); *Blanton v. Barrick* (prosecutor representing wife in divorce and custody case signed a preliminary information against husband for child stealing); *Kentucky Bar Ass’n v. Lovelace*. It has also been pointed out that a public officer or employee should not appear to be generating business from the public office. *See* generally Rule 1.11 and DR 9-101(B); ABA Formal Op. 135.

A prosecutor’s conflicts are imputed to his or her partners and associates in private practice. *See* Rule 1.10. *See also* DR 5-105(D) and KBA E-64. It is no “solution” that the prosecutor has passed the civil representation off to another member of his or her private firm. *Summit v. Mudd* is not to the contrary. That case held that a former defense lawyer who moved to an urban prosecutor’s office, and who was personally disqualified from prosecuting his or her former client, did not pass the taint of disqualification onto other members of the prosecutor’s office. That case does not authorize “hand-offs” in the context of a prosecutor’s private law firm, nor does it authorize “screening” generally.

In *Kentucky Bar Ass’n v. Lovelace*, the court stated that a prosecutor must decline employment in any civil action when there is a reasonable probability that any criminal prosecution might arise from the circumstances of the case. This view is consistent with the above authorities as well as the committee’s opinion in KBA E-275. We note that in the past, prosecutors have tended to take cases in this context, and then request ethics opinions. The thought seems to be that representation is proper until such time as the committee responds to the particular scenario. However, “resolving conflicts of interest is primarily the responsibility of the lawyer undertaking the representation.” Comment (14) to Rule 1.7.

The court also suggested that “if after accepting employment in a civil matter, a criminal prosecution arises from the circumstances of the case the prosecuting attorney must withdraw from the civil proceeding and disqualify himself or herself from handling the prosecution.” *Lovelace* at 653-54. The committee expresses no views as to the necessity of disqualification of counsel or the operation of the special prosecutors system. The committee also notes that an ethical violation will not necessarily result in reversal of a conviction on complaint by an aggrieved party. *See, e.g., Dick v. Scroggy*. These are not matters within the scope of SCR 3.530.

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.