

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-407

Issued: March 1999

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rules 1.6, 1.7, 1.9, and 1.11 and the Comments, which were amended. 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: May an attorney employee of the Department of Public Advocacy negotiate for future employment with prosecutorial entities?

Answer: No, a public advocate may not negotiate employment with any person who is a party or attorney for a party in a matter in which the lawyer is participating “personally and substantially.” In addition, a public advocate must obtain client consent to any future employment negotiation if the advocate has information protected by KRPC 1.6 or 1.9(b) or if 1.7(b) otherwise indicates that consent is necessary.

References: Kentucky Rule of Professional Conduct (KRPC) 1.11 (SCR 3.130(1.11)); KRPC 1.7(b); KRPC 1.10; KRPC 1.6; KRPC 1.9(b); KBA E-399 (Nov. 1998); ABA Op. 96-400 (1996); S.C. Op. 96-22 (1996); S. C. Op. 93-01 (1993) Utah Op. 98-09 (1998); Utah Op. 95-08 (1996); Commonwealth v. Westbrook, 400 A.2d 160 (Pa. 1979); People v. Spreitzer, 525 N.E. 2d 30 (Ill. 1988); Graves v. State, 619 A.2d 123 (Md. Ct. App. 1993); Charles W. Wolfram, Modern Legal Ethics sec. 8.10.3, at p. 474 (1986); ABA/BNA Lawyers Manual of Professional Conduct 51:2008-09 and 91:4010-11.

OPINION

The general issue of successive government and private employment is governed by Kentucky Rule of Professional Conduct (KRPC) 1.11 (SCR 3.130(1.11)). Comment (4) to KRPC 1.11 states that the rule applies to government employment followed by government employment by a different agency and so it would apply to an attorney’s successive employment by the Department of Public Advocacy and a state or federal prosecutorial entity. See Charles W. Wolfram, Modern Legal Ethics sec. 8.10.3, at p. 474 (1986).

Section (c) of KRPC 1.11 states:

Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

“Matter” is defined in 1.11(d) as

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

An attorney employee of the Department of Public Advocacy cannot negotiate for employment with any private or governmental agency involved in any matter in which the attorney is participating “personally and substantially.” This is an absolute prohibition with no proviso for cure by agency consent. *See* ABA/BNA Lawyers Manual of Professional Conduct 91:4010-11. Though the situation of the public advocate is a more complicated one than a typical employee lawyer of a governmental entity because the public advocate has clients other than the government entity employer, KRPC 1.11(c) by its own words applies to “a lawyer serving as a public officer or employee.” *See* Utah Op. 98-09 (1998) (finding 1.11 applicable to the state Office of the Guardian Ad Litem whose statutory mandate is defined and limited to representing minors before the court).

Because public advocates represent individual clients, the general conflict rule, KRPC 1.7(b) must also be considered. *See* Utah Op. 98-09 (1998) (finding that Rule 1.11 and the other conflicts rules applied to the Office of the Guardian Ad Litem). The public defender’s client is the defendant. Comment 2 to KRPC 1.11 generally agrees. It states:

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Rule 1.7(b) states in pertinent part:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation.

Kentucky Bar Association Formal Opinion E-399 (Nov. 1998) states that the application of 1.7(b) to the question of a private attorney negotiating for future employment requires that “the lawyer who is actually involved in the representation of one of the adverse clients or who has actual knowledge protected by Rules 1.6 and 1.9(b) should not participate in such negotiations without the consent of the lawyer’s client obtained after appropriate consultation.” Rule 1.6 states the lawyer’s general duty to not disclose information relating to the representation and 1.9(b) states that a lawyer must not “use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.”

In the public advocate context, KRPC 1.7(b) and KBA E-399 require that a public advocate not negotiate for employment with an entity adverse to a client that the public advocate is actually representing absent client consent. This set of situations should be identical to the set of situations in which the public advocate would be participating “personally and substantially” and thus would be entirely prohibited by KRPC 1.11(c).

KRPC 1.7(b) and KBA E-399 also require that any public advocate with information protected by 1.6 or 1.9(b) must obtain client consent to the employment negotiation. KBA E-399 also states that there may be situations in which the attorney has no protected information and is not actually involved in the representation and yet 1.7(b) analysis might dictate that client consent be obtained. That statement applies to public advocates as well.

In summary, KRPC 1.11(c) prohibits a public advocate from negotiating for employment with any person employed by an office involved as a party or as an attorney in a matter in which the lawyer is participating “personally and substantially.” Even though the public advocate does not participate personally and substantially, KRPC 1.7(b) dictates that the public advocate obtain client consent in certain other situations as described above.

The prohibition created by KRPC 1.11(c) applies to the lawyer involved “personally and substantially” but does not affect other public advocates. There is no imputation of disqualification. Conflicts under KRPC 1.7(b) are imputed to all lawyers with whom the conflicted lawyer is “associated in a firm.” KRPC 1.10. Comment 1 to KRPC 1.10 states that “firm” includes “lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization.” Comment 3 to Rule 1.10 states:

[l]awyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of

independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

A public advocate's situation can be analogized to a legal service organization. *See* Utah Op. 95-08 (1996) (applying the concept of imputation to the office of the guardian ad litem) and Utah Op. 98-09 (1998) (affirming that stance). *But see* ABA Op. 96-400 (1996) (suggesting that imputed disqualification should not apply to the situation of an attorney in a private firm who must withdraw from the representation because of negotiations for future employment with opposing counsel).

The determination of whether public advocates are to be treated as a firm for purposes of imputed disqualification must be fact specific. *See* S. C. Op. 96-22 (1996) (the South Carolina Committee noted that "a public defender's office may be equated to a law firm," but that the analysis would be fact specific); Commonwealth v. Westbrook, 400 A.2d 160 (Pa. 1979) (lawyers in same defender office treated as firm); People v. Spreitzer, 525 N.E. 2d 30 (Ill. 1988) (not a firm); Graves v. State, 619 A.2d 123 (Md. Ct. App. 1993) (not treated as single firm per se). *See also* ABA/BNA Lawyers Manual of Professional Conduct 51:2008-09. For example, in South Carolina Op. 93-01 (1993), a part-time public defender working in a public defender corporation was appointed to represent a post conviction relief applicant. The basis of the post conviction relief claim was the conduct of another public defender employed by the same corporation. In determining whether the public defenders should be treated as a firm for purposes of imputed disqualification, the South Carolina Committee stated:

where separate offices are maintained by each public defender, there would not be a single public defender's office for purposes of imputing disqualification under Rule 1.10.

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.