

**KENTUCKY BAR ASSOCIATION**  
**Ethics Opinion KBA E-412**  
Issued: March 2000

*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 Rule 1.7, which was amended, and Comment 4 which has been deleted. 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 1:** May a partner of a prosecutor represent criminal defendants?

**Answer:** No.

**Question 2:** May a partner of a prosecutor represent criminal defendants in a different county than that in which the prosecutor acts as prosecutor?

**Answer:** No.

**Question 3:** May a partner of a prosecutor represent criminal defendants if funds that the prosecutor receives from his prosecutorial duties and funds that the partner receives from his defense practice are not co-mingled?

**Answer:** No.

**Question 4:** May a partner of a prosecutor represent criminal defendants if no advertising is done on behalf of the firm stating that the partner is an prosecutor?

**Answer:** No.

**References:** KRPC 1.7, 1.10; KRS 15.740; In re Kentucky Bar Association Amended Advisory Opinion E-291, 710 S.W.2d 852 (Ky. 1986); KBA E-373 (1994); KBA E-275 (1983); KBA E-243 (1981); KBA E-211 (1979).

**OPINION**

It has long been the rule in this Commonwealth that a prosecutor cannot represent defendants in criminal matters. This prohibition has been a matter of law, in the form of KRS 15.740 ("The 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, except in cases in which he is a party."). The rule has also been a matter of ethics. *See* KBA E-211 (1979) (Assistant Commonwealth Attorney cannot act as defense counsel in a criminal case). *See also*

KBA E-275 (1983).

It has been recognized as well that a partner of a prosecutor cannot ethically represent defendants in criminal matters. *See In re Kentucky Bar Association Amended Advisory Opinion E-291*, 710 S.W.2d 852 (Ky. 1986) (partner of county attorney cannot act as defense counsel even in court different from the one in which county attorney prosecutes); KBA E-373 (1994) (restating that a partner of a prosecutor may not represent criminal defendants); (E-243 (1981) (lawyer who shares office space with county attorney cannot defend criminal cases in any county). *See also* KBA E-275 (1983). Though KBA E-373 was issued after the present Kentucky Rules of Professional Conduct (KRPC) came into effect, the opinion was aimed at a different question and provided no analysis that was specific to the controlling rules. Thus, clarification in light of the KRPC is in order.

To address the question regarding the partner, one must first analyze the situation of the prosecutor, setting aside for the purposes of the analysis that the prosecutor is prohibited by statute from representing criminal defendants. Rule 1.7(b) of the Kentucky Rules of Professional Conduct (KRPC) states:

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 interest unless:

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

Comment 4 to Rule 1.7 clarifies that if "a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement, or provide representation on the basis of the client's consent."

As a matter of ethics, Rule 1.7(b) prohibits a prosecutor, because of the unique role such an attorney has in the criminal justice system, from representing defendants in criminal matters. Such a representation would be one that "may be materially limited" and one in which consent to the representation could not be obtained. In addition, of course, such an attorney could not do so because of the statutory prohibition.

The question of whether the partner of the prosecutor could represent defendants in criminal matters is governed by Rule 1.10 of the KRPC. Rule 1.10(a) states:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rules 1.7, 1.8(c), 1.9 or 2.2.

Thus, since the prosecutor is prohibited from representing criminal defendants by KRPC Rule 1.7, the prosecutor's partner is prohibited as well. KRPC Rule 1.10(d) states:

A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Given the nature of the divided allegiance and the history of this issue in the Commonwealth of Kentucky, the partner of the prosecutor cannot ask a client to consent to such a representation. This is true regardless of whether the representation is in the same county in which the partner is a prosecutor or whether the representation is in a county far distant from the county in which the partner is a prosecutor.

Question 3 asks whether the lack of fee-sharing would affect the analysis. The answer is that the analysis is the same as long as the two lawyers are “associated in a firm.” KRPC 1.10(a). Comment 1 to KRPC 1.10 notes that the determination of whether two lawyers are a “firm” is fact-specific and notes that even lawyers who share office space can be considered a “firm” “if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm.” Thus, the lack of fee sharing on criminal matters does not change the analysis regarding disqualification as long as the lawyers are “associated in a firm.”

Question 4 asks whether advertising or the lack thereof affects the disqualification analysis. Advertising or the lack of it in general is relevant to the extent it sheds light on whether the attorneys are holding themselves out as a firm and therefore are deemed to be “associated in a firm.” Such an analysis would be the same regardless of whether the member of the firm is specifically identified as a prosecutor or rather simply noted by name as a member of the firm.

---

***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.*