

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-349
Issued: September 1991

Question: May a City Attorney who does not perform any prosecutorial duties and whose contract or job description does not require him to represent or advise the police department of his or her city engage in the defense of criminal cases that involve the city police?

Answer: No.

References: KBA E-196; Tenn. Op. 81-F-23.

OPINION

The traditional view (No) was expressed in KBA E-196. Accord: Tenn. Op. 81-F-23. There have been numerous occasions of late in which we have been asked to re-evaluate this rule in light of the fact that city attorneys no longer have prosecutorial duties, and in light of special contractual arrangements and waivers entered into in particular cases. KBA E-196 held that the absence of prosecutorial duties was not controlling, because the city attorney as defense counsel might have to question or challenge the police, or police procedures or policies. Nevertheless, a number of serving city attorneys or office seekers have entered into or proposed special contractual arrangements and waivers in an effort to avoid the operation of the rule. In other words, we have been asked to overturn KBA E-196 or carve out exceptions on a case by case basis. Most of these requests come in the form of emergency requests for telephone ethics opinions.

It has been pointed out by advocates of the current and restrictive rule that there are still conflicts of interest or risks of abuse in this context, in spite of these special contractual provisions. For example, the city may be a potential target of a 1983 action arising from the same facts of the case that the lawyer is attempting to defend in his private capacity. In other circumstances the lawyer may be perceived as “advising” or otherwise steering the police, who may be inclined to listen to the lawyer because of his or her role as city attorney.

For the foregoing reasons, it is the opinion of the committee and the Board that the “bright line” approach of rule KBA E-196 be maintained, and that exceptions not be made on a case by case basis.

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). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”