

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-353
Issued: March 1993

Question 1: Should a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) at the same time represent another client against the Transportation Cabinet?

Answer 1: No

Question 2: Should a partner or associate in a law firm represent a client against the Transportation Cabinet when another member of the firm represents the Transportation Cabinet?

Answer 2: No

Question 3: May a lawyer who represents the Transportation Cabinet (under contract, retainer, or otherwise) represent a client against “another” agency of the Commonwealth of Kentucky (i.e., the Revenue Cabinet)?

Answer 3: Yes

Question 4: May a partner or associate in that law firm represent a client against “another” agency of the Commonwealth of Kentucky?

Answer: Yes

References: Rule of Professional Conduct 1.7 (and Comments (2), (4), (7), (14)), Rule of Professional Conduct 1.10, KBA E-200 (1979), KBA E-281 (1984). See also, Underwood, Part-Time Prosecutors and Conflicts of Interest, 81 Ky.L.J. 1, 54-55 (1992-93).

OPINION

The questions come from a lawyer in private practice, who is also a member of the Executive Branch Ethics Commission. The requestor emphasizes that he is concerned with “attorneys who are in private practice □ (and who) represent various departments of state government and at the same time (would) take action against the Commonwealth of Kentucky.” In light of this emphasis, the Committee need not consider the conflicts of “full-time” state employees or of part-time prosecutors. Regarding the former *see* KBA E-200 (1979).

The Committee’s answers are based on the assumption that the representation involves litigation. *Compare* Rule 1.7, Comment (10). As Comment (10) to Rule 1.7 notes, “(c)onflicts of interest in contexts other than litigation sometimes may be difficult to assess.” Clients may more

readily consent to conflicts in a non-litigation setting, and categorical answers cannot be given for every situation that might present itself.

The request contains an additional interrogatory, to-wit: “if the answer to any of the questions involves waiver of conflicts of interest, please address the nature and the extent of the consultation and consent. Of particular importance is who can give the consent... ?”

The issue of who may consent will be reserved for latter discussion. Consultation and Consent are discussed in the “Terminology” section of the Rules, and in Comment (4) to Rule 1.7. According to the definitions contained in the “Terminology,” “consultation... denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.” Comment (4) contains the useful caveat that “when 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.”

Turning to the specific questions, we note that in KBA E-281 (1984), ABA/BNA Law.Man.Prof.Con. 801:3909, decided under the Code, the Committee opined that a private lawyer representing a state agency on a personal service contract could not represent a private client against that same agency in a different, unrelated matter. This view is consistent with the Rules, and to this extent we see no reason to depart from E-281. See Rule 1.7(a) and Comments (2) and (7) (“Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated”). *See also* ABA Informal Op. 1495 (1982) (answer same under Code and Rules). Accordingly the answer to Question 1 is “No”.

The answer to Question 2 is “No” under Rule 1.10(a) (Imputed Disqualification: General Rule). If a lawyer is prohibited from representing a client against an agency because the lawyer is representing the agency in regard to another matter, then no other lawyer that is associated with him or her in a firm may represent the client against the agency. Opinion E-281 reached the same conclusion under DR 5-105(D).

Regarding Questions 3 and 4, we note that E-281 went on to state, in essence, that a lawyer representing a state agency on a personal service contract may represent a private client against a different state agency with the consent of all parties after full disclosure. This view was predicated on the sensible view that that particular agency could be viewed as the client (and not the “Commonwealth” and through it every other state agency, although the lawyer’s fee might come from public funds).

Opinion E-281 referred to the consent of “all the parties.” However, it is clear from the reading of the opinion that the “parties” referred to by the Committee are the agency with which the lawyer has a personal service contract (the “client” agency), and the lawyer’s private client (the private client seeking representation against some “other” state agency). The Committee did not suggest for a moment that the lawyer should have any obligation to obtain the consent of the state agency that he or she wants to sue on behalf of the private client. There would be no reason to give that agency any power to select opposing counsel since it is a “non-client.”

We are of the view that E-281 is, in this regard, consistent with the Rules. Specifically, this scenario fits nicely under Rule 1.7(b). We also agree with the observation in E-281 that the Chief Cabinet Officer is the logical “consenting authority,” and that his or her consent would best be memorialized in writing. However, it is technically not our function to delineate lines of authority for state government, and we leave that to others.

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.”