

KETNUCKY BAR ASSOCIATION
Ethics Opinion KBA E-421
Issued: March 2003

Subject: **Representation of a Landowner by a Part-time Commonwealth Attorney (or Member of His or Her Firm) in a Condemnation Action by the State.**

Question: May a part-time Commonwealth Attorney, or a member of his or her firm, represent a landowner in a condemnation action by the state.

Answer: No

References: SCR 3.130 (1.7); SCR 3.130 (1.10); KBA E-61 (1972); KBA E-64 (1973); KBA E-193 (1978); KBA E-194 (1978); KBA E-211 (1979); KBA E-241 (1981); KBA E-275 (1983); KBA E-350 (1992); KBA E-373 (1994); KBA E-373 (1994); KBA E-412 (UNDATED).

OPINION

Over the course of the last thirty years, the Ethics Committee has written more than twenty formal ethics opinions on various conflict issues related to private practice by Commonwealth Attorneys. In early opinions, we concluded that a Commonwealth Attorney (or assistant) may not represent a criminal defendant in any court of criminal jurisdiction. KBA E-61 (1972); KBA E-193 (1978); KBA E-211 (1979). This ethical prohibition is reinforced by KRS 15.740, which provides that a Commonwealth Attorney “shall not act as defense counsel in any criminal prosecution in any state or federal court in this commonwealth.” Similarly, a Commonwealth Attorney may not represent a client in a civil case involving the same subject matter as a criminal prosecution. KBA E-64 (1973). In addition, the rules of imputed disqualification normally will prevent members of the Commonwealth Attorney’s firm from accepting representations that the Commonwealth Attorney can not accept. As this Committee has observed, “neither the law firm nor any member or associate thereof may properly accept any professional employment which any member of the firm cannot properly accept.” KBA E-64 (1973). *See also*, KBA E-61 (1972); KBA E-275 (1983); KBA E-373 (1994). Imputed disqualification also has been extended to “affiliated lawyers,” which in this context includes those merely sharing office space with a part-time Commonwealth Attorney. KBA E-194 (1978). *See also*, KBA E-412 (undated).

These absolute rules prohibiting criminal representations do not extend to civil practice by part-time Commonwealth Attorneys. KRS 15.755 provides that part-time Commonwealth Attorneys in less populated counties may engage in private practice of civil cases. However, even assuming a part-time Commonwealth Attorney may legally practice law under this statute, the question still remains as to whether official

responsibilities create a conflict barring his or her representation of private clients in condemnation cases.

In KBA E-241 (1981), this Committee addressed the question of whether a Commonwealth Attorney may represent a private party in a condemnation proceeding involving the state – it answered the question in the negative. The Committee acknowledged that a Commonwealth Attorney has the right to maintain a private practice, but went on to note that proffered employment that conflicts with the lawyer’s official duties must be declined.

It is not unethical to accept employment on a private basis but any appearance of a conflict between the principal and the private interest must be avoided. If there is doubt whether the representation would be a conflict or not, it is safest to remember that no man can serve two masters (KBA E-56). An additional consideration for one who is in a position of public authority is that the public may not be able to draw the necessary fine distinctions to determine whether an actual conflict exists or not, especially where the Commonwealth’s interest are involved. Public confidence in the law and in lawyers must not be eroded by irresponsible or improper conduct by an attorney (ABA EC 9-2).

It has been suggested to the Committee that it must reevaluate this opinion because a later opinion, KBA E-275 (1983), established a new test for determining when a Commonwealth attorney may ethically represent a civil client, including one involved in a condemnation proceeding with the state. It is true that KBA E-275 suggests some general questions to be asked whenever a Commonwealth Attorney accepts a civil case,¹ but nothing in the text of the opinion indicates the Committee’s intention to overrule its earlier opinion specifically addressing condemnations. In the words of the Committee, the opinion was designed to “analyze and synthesize the vast body of rulings formally adopted by the Board of Governors of the Kentucky Bar Association relating to the disqualification of Commonwealth and County Attorneys in civil litigation.” It described

¹ The questions are as follows:

1. Is the contemplated civil representation related in any way to possible criminal litigation for which an Attorney for the Commonwealth would be responsible?
2. Is the contemplated civil representation related in any way to the statutory duty of said prosecutor to represent the Commonwealth in companion litigation?
3. Is the contemplated civil representation likely to give the appearance of impropriety to the public?
4. If the prosecutor has terminated his employment in the prosecutor’s office, and thereafter seeks to represent a client, civilly or criminally, one must question whether the case is one in which the former prosecutor had substantial responsibility, or performed any act for [sic] while employed in the prosecutor’s office.

the condemnation opinion decided two years earlier supportively, without any negative comment.

Although KBA E-241 (1981) and KBA E-275 (1983) may inform our thinking, our goal is to evaluate this issue in light of the Rules of Professional Conduct and other applicable rules currently in effect.

Today, conflicts of interest are governed generally by SCR 3.130 (1.7). This rule provides:

- (a) A lawyer shall not represent a client if the representation of that client will be direct adverse to another client, unless:
 - (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) Each client consents after consultation.
- (b) 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.

In order to address the possible conflict of interest, it is necessary to understand the responsibilities of the Commonwealth Attorney. He or she is a constitutional officer, whose duties are established by statute. Under the Commonwealth's Unified and Integrated Prosecutor System, KRS 15.700 et. seq., the Commonwealth Attorney is responsible for prosecuting all violations of the criminal and penal law within the jurisdiction of the Circuit Court and for presenting evidence to the grand jury. In addition, except in Franklin County, KRS 69.110 obligates the Commonwealth Attorney to attend civil cases and proceedings in the Circuit Court where the Commonwealth has an interest.

For purposes of conflicts analysis, the Commonwealth Attorney's client is the Commonwealth. This is true whether the Commonwealth Attorney is acting as prosecutor or is participating in civil cases under KRS 69.110. Assuming that the position to be taken by the private client in the condemnation case is directly adverse to the Commonwealth, then Rule 1.7(a) would preclude the Commonwealth Attorney from undertaking the representation, unless the Commonwealth Attorney "reasonably believes the representation will not be adversely affected" and both clients consent.

Rule 1.7(b) provides an alternate basis for prohibiting a Commonwealth Attorney from representing a private client in a condemnation case with the state, because the representation would be "materially limited" by the Commonwealth Attorney's "responsibility to another client to a third person, or by the lawyer's own interest." As this Committee noted in a 1981 opinion, the Commonwealth Attorney "is an officer of

the State, derives his authority from the State, is paid by the State, and is an employee of the State. It is axiomatic that a lawyer who is an employee will not take any action against the employer. Since the Commonwealth is a party to a condemnation action, the Commonwealth Attorney would have a conflict of interest in representing the other side since the Commonwealth is a party in the action.” KBA E-241 (1981). The Commonwealth Attorney’s personal interests, as well as his or her obligations as an employee of the state, would preclude the representation under Rule .1.7(b).

The Committee recognizes that part-time Commonwealth Attorneys are permitted to engage in private practice, but this right is conditioned on compliance with the applicable rules of professional conduct. As this Committee observed in KBA E-350 (1992), “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.”

Finally, under the current Rule 1.10, disqualifications under Rule 1.7 are imputed to all members of the Commonwealth Attorney’s firm. Specifically, Rule 1.10 (a) provides that “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. Application of this rule to the question before us means that the Commonwealth Attorney’s disqualification is imputed to all members of his or her 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). 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.”