

## **JUDICIAL STAFF ATTORNEY ETHICS**

Attorneys in government employment are subject to the same ethical duties and obligations under the Rules of Professional Conduct as attorneys in private practice. Further, the lines between government employment and private practice become blurred when the practices mix, e.g., a government attorney maintaining a part-time private practice, or when a public practice attorney enters private practice or vice versa. Certain ethical issues are particularly unique to attorneys in government employment. These issues generally concern conflicts of interest, confidentiality and successive private employment.

Additionally, staff attorneys for Judges must also be sensitive to the Code of Judicial Conduct. Firstly, the Judicial Code contains a number of instances where the Judge is expressly directed to require his or her staff to comply with a particular portion of the Canons. Secondly, an attorney who works for a Judge should be generally familiar with the contents of the Judicial Code.

At the present time, at a national level, the Model Rules of Professional Conduct have been significantly altered, and the Kentucky Bar Association is presently looking at those revisions. Additionally, at a national level, the Model Code of Judicial Conduct is presently in the process of being significantly overhauled. Fortunately, for our purposes, the Rule and/or Code changes, if any, will be some time in coming to Kentucky.

## LEGAL ETHICS

The typical ethics violation by an attorney is also one of the “lowest in the food chain.” Typically, the most common ethics allegations asserted against an attorney are issues of lack of diligence and lack of communication, as set forth in RPC 1.3 and RPC 1.4. Generally, these allegations arise in situations where the attorney is either a solo practitioner or in a small firm practice. Given the group dynamics of medium to large size law firms, and the bureaucracy surrounding government employment, the types of problems which arise in the areas of lack of diligence and lack of communication, are typically not found. A notable exception which has the potential of creating ethical problems is in the area of under-funded legal aid/public defender/public advocacy bureaucracies.

### CONFLICTS OF INTEREST (SCR 3.130-1.7)

#### Government Attorney Performing More Than One Government Function At the Same Time

\_\_\_\_\_ Occasionally, an attorney, within the scope of his or her government employment, may be asked to perform potentially conflicting duties. For example, these conflicting duties could be:

- (1) Attorney asked to take a legal position potentially adverse to the public interest of the Commonwealth; or
- (2) Attorney asked to defend public agency and public agency's employee in a pending dispute.

Unfortunately, there is no "bright line" rule for determining whether a conflict of interest exists in such matters. While the existence of an actual conflict of interest makes the

issue easier to resolve, frequently the appearance of impropriety alone may be sufficient to create a conflict issue.

Pursuant to Lovell v. Winchester, Ky., 941 S.W.2d 466 (1997), lawyers are subject to the appearance of impropriety standard. Of course, Judges are expressly under an appearance of impropriety standard per Canon 2.

In the final analysis, the determination of a conflict will be based on the facts of a given case.

#### Government Employment/Part-Time Private Practice

By far, the greatest potential for conflict of interest arises when an attorney, while in government employment, also maintains a private practice.

While the problem usually arises from government attorneys exercising a prosecution function, either a County Attorney or Commonwealth's Attorney permitted to maintain a private law practice, the potential for a conflict exists for any government attorney permitted to engage in part-time private practice. Pursuant to KRS Chapter 15, County Attorney and Assistant County Attorneys are permitted to engage in the private practice of law. Subject to certain city class size limitations and population limitations, Commonwealth's Attorneys are also permitted to engage in the private practice of law.

In the event of a possible conflict of interest in a situation where a government attorney maintains a part-time private practice, the ability to identify the attorney's government "client" is important on the issue of waiver. Under Rule 1.7, a conflict of

interest may be waived by the affected clients. This may present a problem for government attorneys. For such attorneys, the more cautious approach taken by the KBA is that the attorney's client is the "public interest." As a result, there is no identifiable "client" to obtain a waiver from in order to avoid a conflict. In the case of a government attorney employed by a state agency, under the general rule, a waiver could be obtained from the agency.

In Kentucky Bar Association v. Lovelace, Ky., 778 S.W.2d 651 (1989), the Supreme Court stated,

"A prosecutor must decline employment in any civil action when there is any reasonable probability that a criminal prosecution might arise from the circumstances of the case. If, after accepting employment in a civil matter a criminal prosecution arises from the circumstances of the case, the prosecuting attorney must withdraw from the civil proceeding and disqualify . . . from handling the prosecution."

Based on the Court's language in Lovelace, and the position of the Kentucky Bar Association, the conflict of interest rules favor disqualification in the private practice matter rather than disqualification from the favored government employment.

In Kentucky Bar Association v. Marcum & Triplett, Ky., 830 S.W.2d 389 (1992), a County Attorney and the Assistant County Attorney, acting as a private practice law firm, represented a plaintiff in a medical malpractice action against a doctor. The County Attorney and the Assistant County Attorney, acting in their prosecutorial capacity, pursued a criminal prosecution against the doctor for dispensing a controlled substance without a proper medical reason. The Supreme Court held this was a conflict and issued a public reprimand.

In Kentucky Bar Association v. Twehues, Ky., 849 S.W.2d 549 (1993), the Court

lightened the effect of Lovelace by stating:

"We reject the notion that any criminal allegation of misconduct made against the civil client of a prosecutor, regardless of the evidence, requires the prosecutor to immediately withdraw from the representation. Such a rule would be subject to abuse and would effectively prohibit any private practice by a prosecutor."

### **WHO IS THE "CLIENT"?**

\_\_\_\_\_ Many ethical rules, and in particular, Rules regarding conflicts of interest, (RPC 1.7 et seq.), and confidential communications, (RPC 1.6), are dependent upon identifying who is the client. For attorneys in private practice, the identification of the client is rarely, if ever, an issue. (As an aside, ethical problems in private practice on this issue of client identity may arise where the attorney is being paid by a third party, although this practice is specifically authorized by RPC 1.8(f)).

Possible "clients" for the attorney in government employment may be:

- (1) The public interest;
- (2) The government;
- (3) Agency who employs the attorney;
- (4) Official in the agency with whom the attorney has conferred.

The general rule is that the agency in which the attorney is employed is deemed the "client" for the purpose of the Rules of Professional Conduct. In the event the government attorney is specifically assigned to represent a particular employee of the agency, the

employee is deemed to be the "client" for the purpose of maintaining the confidences of the employee/client. ABA Informal Opinion 1413 (1978).

The Connecticut Bar Association, in Informal Opinion 85-13 (1985), held that the individual members of a local government Board were deemed to be the "clients" of the attorney with an expectation of privacy and confidentiality in the event the individual members conferred with the counsel for the Board on Board business. However, the Opinion goes to state that if an individual member was acting adverse to the principles of the Board, the attorney's greater duty was to the Board to notify the Board of the adverse conduct.

### **SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT**

Rule of Professional Conduct 1.11 is expressly designed to limit an attorney from representing a private practice client in a matter in which the attorney had previously participated as a public employee. This Rule is not absolute, and such private employment is prohibited only if certain criteria exists, to wit:

- (1) Attorney must have participated "personally and substantially" as a public employee in the matter now the subject of private practice.
- (2) Public body or government agency may consent to any potential conflict after consultation.

Paragraph (a) of RPC 1.11 also provides for the imputed disqualification of any lawyer in a firm with the ex-government attorney. Another lawyer in such a firm may only take the case if two criteria are met:

- (1) Disqualified attorney does not participate in the matter and receives no portion of any fee; and
- (2) Government agency given prompt written notice to enable government agency to determine compliance with Rule 1.11.

#### Confidential Government Information

If a lawyer, during public employment, obtains confidential information about a person, the lawyer may not later represent another person adverse to the first person. RPC 1.11 provides a slight "safe harbor" provision by stating that the information so obtained must be to the "material disadvantage" of the first person in the private legal matter at issue. This disqualification also extends to any other lawyer in the firm, with the same limitations of Paragraph (a) regarding screening and no receipt of any fee.

Rule of Professional Conduct 1.11 provides, in part, that a public employee shall note:

- (1) Participate in any matter in which the attorney "participated personally and substantially" while in private practice or non-governmental employment;
- (2) Negotiate for private employment with any person, or is a party or an attorney in a manner in which the lawyer is participating "personally and substantially."

## JUDICIAL ETHICS

The Kentucky Code of Judicial Conduct is found in SCR 4.300. The Code is composed of five Canons, some of which contain Sections. In general, the language of the Code is somewhat broad, in many instances aspirational, and in some instances provides bright-line rules.

Canon 1 is purely aspirational, and says little more than to do good and to not do bad.

Canon 2 generally directs a Judge to avoid impropriety and the “appearance of impropriety” in all of his or her activities. The word “all” means “all.” The key concepts in this Canon are the express reference to “appearance of impropriety,” and the proscription to not lend the prestige of judicial office to the private interests of the Judge or other persons.

Appearance of impropriety means there is no impropriety in fact. The “appearance” standard is a reasonable person’s standard based on a person having knowledge of all material and relevant facts.

Canon 2 prohibitions generally fall into the following categories:

- (1) Lending prestige of office for private interest.
- (2) Conveying or permitting other to convey the impression of being in a special position to influence the Judge.
- (3) Testifying voluntarily as a character witness.
- (4) Membership in organization which practices invidious discrimination which stigmatizes excluded persons as inferior.



Canon 3 discusses, in detail, the various duties of a Judge. Those duties are broken down in the following categories:

- (1) Adjudicative responsibilities.
- (2) Administrative responsibilities.
- (3) Disciplinary responsibilities.

Canon 3 also discusses the circumstances under which a Judge should disqualify himself or herself. The remittal of disqualification provisions provide a very specific process which the Judge must follow if the disqualification is to be waived by the parties.

Canon 4 discusses numerous extra-judicial activities of the Judge, and limitations under those activities, including:

- (1) Avocational activities.
- (2) Governmental, civic or charitable activities.
- (3) Financial activities.
- (4) Fiduciary activities.

Canon 4 specifically prohibits a Judge from being an arbitrator or a mediator, or engaging in the practice of law. The express exceptions are pro se representation, and the giving of legal advice or the drafting or reviewing of documents for members of the Judge's family.

Lastly, Canon 5 discusses the political conduct of a Judge as it relates to the Judge's own judicial race, and other campaign and elective office activities.

The last portion of the Judicial Code discusses the application of the Code to part-time Judges, Special Judges and temporary Judges.

Certain portions of the Judicial Code expressly refer to the staff of the Judge.

Canon 3 of the Kentucky Code of Judicial Conduct directs a Judge to perform his or her duties “impartially and diligently.” In several instances within this Canon, the Judge is expressly directed to take steps to be sure that his or her staff also complies with certain ethical guidelines.

For example, under Canon 3B, regarding the adjudicative responsibilities of the Judge, the Judge shall require his or her staff:

- (1) To be patient, dignified and courteous to persons with whom the Judge deals with in an official capacity. (Canon 3B(4)).
- (2) By words or conduct, not manifest bias or prejudice including, but not limited to, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status.” (Canon 3B(5)).

Judges also have a number of administrative responsibilities separate from their adjudicative responsibilities. Canon 3C(2) directs the Judge to require his or her staff:

“To observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.”

Canon 3B(7) contains the prohibition against ex parte communications. The text of the Canon does not expressly refer to any duties or responsibilities of the Judge’s support staff. However, the Commentary to the Code reads, in relevant part:

“A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge’s staff.”

A Judge also has ethical limitations on his or her extra-judicial activities, including civic or charitable activities. These limitations are set out in Canon 4C. In those limited instances in which a Judge may participate in a charitable or civic organization, there are specific limitations on the level of participation and involvement which the Judge may have in any fund-raising activities. The Commentary to the Code specifically provides a similar limitation on the Judge’s staff. In particular, the Code Commentary reads, in part:

“In addition, a judge must also make reasonable efforts to ensure that the judge’s staff, Court officials and others subject to the judge’s direction and control do not solicit funds on a judge’s behalf for any purpose, charitable or otherwise.”

## **JUDICIAL ORGANIZATIONS IN KENTUCKY**

### **Judicial Ethics Committee**

The Committee was created by the Supreme Court Rules, i.e., SCR 4.310.

Provides formal and informal Judicial Ethics Opinions. Formal Judicial Ethics Opinions are available on the Administrative Office of the Court/State Library website page.

Judicial Ethics Opinions are advisory only and are not binding on the Judicial Conduct Commission.

Judicial Ethics Opinions are subject to judicial review by the Supreme Court at the request of the affected party within a fixed time period, and by the Supreme Court, at any time.

#### Judicial Conduct Commission

The Judicial Conduct Commission is a constitutional body created by Kentucky Constitution §121. The Rules concerning its procedures and the Judicial Code are set forth in SCR 4.000 et seq.

Decisions of the Judicial Conduct Commission are subject to review by the Supreme Court.