

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 06-3

April 10, 2006

RE: Are Commonwealth's attorneys subject to the provisions of
KRS Chapter 11A?

DECISION: Yes, except when covered by KRS Chapter 15.733.

This opinion is issued by the Executive Branch Ethics Commission ("Commission") upon its own initiative. This matter was reviewed at previous meetings of the Commission, beginning December 17, 2004, and is a reconsideration of Advisory Opinion 93-7.

In its attempt to properly interpret KRS Chapter 11A, the Commission revisits the issue of whether Commonwealth's and county attorneys, and their staffs, are subject to the Executive Branch Code of Ethics ("Code"). In Advisory Opinion 93-7, the Commission determined that neither Commonwealth's nor county attorneys are subject to the Code based on the fact that they are elected only by voters of a county or local district, and are not, in most of their duties, "accountable to the executive branch of state government." Upon further review, the Commission reverses this earlier opinion regarding Commonwealth's attorneys.

The Commonwealth's attorney program is made up of 57 elected Commonwealth's attorneys and their staffs. Commonwealth's attorneys and their staffs are employees of the Unified Prosecutorial System ("UPS"), as are county attorneys and their staffs. Pursuant to KRS 15.700, which established the UPS in order to "maintain uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the Commonwealth," the Attorney General is the chief prosecutor of the Commonwealth. The Prosecutors Advisory Council ("PAC") was established in KRS 15.705 to administer the UPS and is administratively attached to the Office of the Attorney General ("OAG"). The Attorney General, by statute, is chairman of the PAC, which is responsible for, but not limited to, the preparation of the budget of the UPS as well as its continuing legal education and program development. Within the OAG is the Prosecutors Advisory Council Services Division, which performs staff services for the PAC and UPS. The compensation of each Commonwealth's attorney and his staff is paid out of

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the State Treasury pursuant to KRS 15.755. Unlike the county attorneys, who act as legal advisers to the county in which they serve as well as criminal prosecutors under the UPS, the Commonwealth's attorneys serve in their official capacities within their judicial circuits as criminal prosecutors only, so they have no duties outside of those that fall within the mission of the UPS.

While KRS 18A.115(1)(v) excepts Commonwealth's attorneys and their respective appointees from the classified service, this fact is irrelevant in determining whether Commonwealth's attorneys are subject to the Code. Numerous individuals and positions excepted from the classified service by KRS 18A.115(1) are public servants as defined in KRS 11A.010(9) and therefore subject to the Code, including, for example, the Governor, cabinet secretaries, and division directors. Furthermore, since KRS 18A.115(1) states in its opening paragraph that: "The classified service . . . shall comprise all positions in the state service now existing or hereafter established, except the following. . .", it is clear that all the positions listed therein, including the Commonwealth's attorneys, while not within the merit system, are still considered to be in state service.

KRS 11A.015 provides that an agency directed by statute to adopt a code of ethics shall be exempt from KRS Chapter 11A. During the 1994 General Assembly, the legislature passed a law requiring the governing body of each city and county to adopt a code of ethics for city and county officials and employees. This legislation, codified as KRS 65.003, states that "the elected officials of a city or county to which a code of ethics shall apply include the mayor, county judge/executive, members of the governing body, county clerk, county attorney, sheriff, jailer, coroner, surveyor and constable, but do not include members of any school board." Although county attorneys are listed as elected officials to whom a code of ethics adopted by the local governing body would apply, and thus would presumably be exempt from KRS Chapter 11A, the Commonwealth's attorneys are not. Thus, it does not appear that the Commonwealth's attorneys are elected officials of a "city" or "county", but rather are elected officials of the "state", within the executive branch.

This situation is similar to that of the Property Valuation Administrators ("PVAs"), who also are not listed in KRS 65.003, but rather are elected "state" employees of the Revenue Cabinet. (See Advisory Opinion 92-10.) Much as the PVAs are under the direction, instruction, and supervision of the Revenue Cabinet pursuant to KRS 132.420, the Commonwealth's attorneys are under the general supervision of the OAG through the UPS pursuant to KRS 15.700. Employees of agencies administratively attached to the OAG, just as employees of the Revenue Cabinet, are considered to be state officials/employees within the executive branch of state government.

The Commission recognizes that KRS 15.733 provides guidance for Commonwealth's attorneys as to when a prosecuting attorney must disqualify himself from prosecuting a case on the basis of a conflict of interest. The Commission believes that such specific statutory guidance in this area complements the provisions in KRS Chapter 11A, but does not cover the many other possible conflicts of interest, and other ethical concerns, that may exist for Commonwealth's attorneys and their staffs. Further, the specific guidance in KRS 15.733 applies only to prosecuting attorneys and not to other employees of the UPS.

Based on the facts presented above that Commonwealth's attorneys and their staffs are employees of the UPS, that Commonwealth's attorneys and their staffs are paid out of the State Treasury, that although specifically exempted from classified service they are within the state service, and that they are not included in KRS 65.003 as elected "city" or "county" officials, it is the opinion of the Commission that Commonwealth's attorneys and their staffs are "public servants" as defined in KRS 11A.010(9), presented below, and thus are subject to the Executive Branch Code of Ethics in matters that are not addressed by KRS 15.733, such as in the general operation of their offices, personal conflicts, acceptance of gifts from vendors, etc. The Commission believes that the Code does not extend to "proceedings" as that term is defined in KRS 15.733(1)(a), so that a possible violation of KRS Chapter 11A by a Commonwealth's attorney or an assistant would not require disqualification of prosecutorial duties unless a potential violation of KRS 15.733 also existed.

Furthermore Commonwealth's attorneys (but not their staffs) would be considered "officers" as defined in KRS 11A.010(7) below.

- (9) "Public servant" means:
 - (a) The Governor;
 - (b) The Lieutenant Governor;
 - (c) The Secretary of State;
 - (d) The Attorney General;
 - (e) The Treasurer;
 - (f) The Commissioner of Agriculture;
 - (g) The Auditor of Public Accounts; and
 - (h) All employees in the executive branch including officers as defined in subsection (7) of this section and merit employees;

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(7) "Officer" means all major management personnel in the executive branch of state government, including the secretary of the cabinet, the Governor's chief executive officers, cabinet secretaries, deputy cabinet secretaries, general counsels, commissioners, deputy commissioners, principal assistants, division directors, members and full-time chief administrative officers of the Parole Board, Board of Tax Appeals, Board of Claims, Kentucky Retirement Systems board of trustees, Public Service Commission, Worker's Compensation Board and its administrative law judges, the Occupational Safety and Health Review Commission, the Kentucky Board of Education, the State Board for Adult and Technical Education, the Council on Postsecondary Education, and any person who holds a personal service contract to perform on a full-time basis for a period of time not less than six (6) months a function of any position listed in this subsection;

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: John A. Webb

Enclosures: Advisory Opinion 93-7
Advisory Opinion 92-10