

Executive Branch Ethics Commission
ADVISORY OPINION 08-9
May 9, 2008

RE: Does employee's involvement in matters of previous clients create conflict of interest?

DECISION: No, provided employee abstains from involvement of former clients for a reasonable period of time.

This opinion is issued in response to your March 27, 2008 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the May 9, 2008 meeting of the Commission and the following opinion is issued.

You request an opinion regarding representation of your agency by a staff attorney in legal matters where the attorney has previously represented clients with adverse interests to your agency while that attorney was employed by another state agency. You provide the relevant facts as follows. The attorney in question is employed by the Justice and Public Safety Cabinet (the "Cabinet"), Office of Legal Services, which assigns attorneys to represent various departments within the Cabinet. These departments are often on opposite sides of legal issues from the attorney's former employer (during 2004), the Department of Public Advocacy ("Public Advocacy"). While with Public Advocacy, the attorney represented juvenile criminal defendants for public offenses in Juvenile Court, for status offenses in Family Court, for transfer cases/appeals in Circuit Court, and for traffic cases in District Court.

Some of the youth represented by the attorney are now committed to the custody and supervision of the Department of Juvenile Justice ("DJJ"), an agency within the Cabinet. While DJJ maintains records of individuals in its custody, you indicate that there is no easy, definitive way to determine from these records the names or identities of all of the attorneys who have represented the committed youth in criminal proceedings. You state that limiting the assignment of cases from the metropolitan area where the attorney previously represented such defendants will not ensure preclusion of a conflict because families/youth often move to another county, and this could result in a youth being committed to DJJ from multiple counties. This fact poses the possible scenario of the attorney defending the agency against claims made by a juvenile defendant who previously was represented by the attorney in proceedings which ultimately led to the youth's commitment.

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To date, the attorney has been assigned to handle matters on behalf of the Cabinet which do not involve possible conflicts with former clients represented by the attorney or the Public Advocacy office in which the attorney was previously employed. You ask whether a conflict exists that would prohibit the attorney from representing DJJ in matters unrelated to the underlying criminal charges or commitment of the youth; for instance, may the attorney defend DJJ in Personnel Board appeals and agency disciplinary actions? You state that DJJ employees are disciplined for actions involving youth who previously might have been represented by the attorney, and that a former youth client could become a witness in a proceeding and be subject to cross-examination by the Cabinet attorney. You ask whether this conduct would create a perception of impropriety of ethical conflict under KRS Chapter 11A.

KRS 11A.020(1)-(3) provides:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.
- (2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.
- (3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

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Also, KRS 11A.030 provides:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

- (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
- (2) The effect of his participation on public confidence in the integrity of the executive branch;
- (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
- (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch;
or
- (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

In Advisory Opinion 98-31 (a copy of which is enclosed), the Commission encouraged the Department of Insurance to develop internal policies for employees to abstain from matters involving a previous employer for a reasonable period of time. See also Advisory Opinion 04-20, enclosed. Similarly, the Commission believes that, in order to avoid any real or perceived conflicts of interest, the attorney in question should abstain for a reasonable period of time from any matters involving a former client, whether related to the underlying criminal charges or commitment of the former client or in Personnel Board appeals or other agency disciplinary actions. For such abstention, the attorney should follow the guidance laid out in KRS 11A.030 and the requirements set forth in KRS 11A.020(3) above. The Commission recognizes that it may not always be readily apparent to the attorney in question that a former client is involved in any given matter, but believes that as soon as such a potential conflict becomes apparent, the attorney should abstain from any further involvement.

Notwithstanding this guidance, the Commission notes that the attorney in question held the position of concern in 2004, and is of the opinion that a reasonable period of time has already

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passed in this regard. However, this would not preclude the agency from developing a policy to the contrary. Likewise, as you indicated you also are soliciting an opinion from the Kentucky Bar Association, which may be more restrictive regarding the attorney-client relationship than discussed herein, and should be adhered to accordingly.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb

Enclosures: Advisory Opinion 98-31
Advisory Opinion 04-20