



COMMONWEALTH OF KENTUCKY  
**JUDICIAL ETHICS COMMITTEE**  
ADMINISTRATIVE OFFICE OF THE COURTS  
100 MILLCREEK PARK  
FRANKFORT, KENTUCKY 40601  
502-573-2350 OR 800-928-2350

**CHIEF JUDGE JEFF S. TAYLOR**  
COURT OF APPEALS

**DONALD H. COMBS**  
ATTORNEY

**JUDGE JEAN CHENAULT LOGUE**  
CIRCUIT COURT

**JUDGE JEFFREY SCOTT LAWLESS**  
DISTRICT COURT

**ARNOLD S. TAYLOR**  
ATTORNEY CHAIR

**FORMAL**  
**JUDICIAL ETHICS OPINION JE-123**

**February 19, 2013**

This opinion addresses the following question:

**MAY A DISTRICT COURT TRIAL COMMISSIONER CONTINUE TO SERVE  
IN THAT CAPACITY IF THE COMMISSIONER'S LAW PARTNER BECOMES  
AN ASSISTANT COMMONWEALTH'S ATTORNEY?**

The Committee is of the opinion, Judge Taylor dissenting, that if the Commissioner's law partner should become an Assistant Commonwealth's Attorney, there would be an appearance of impropriety and the Commissioner could not continue to serve.

**THE FACTS AS STATED BY THE COMMISSIONER**

The Commissioner offers for consideration the fact that he serves under the authority of SCR 5.000 et seq. and has only the powers specifically listed under SCR 5.030. As to criminal cases he recites that he only has authority to issue search warrants and warrants of arrest; to examine any charge and commit the defendant to jail or hold him to bail or other form of pretrial release; and to accept a plea of guilty at the time the charge is examined, and impose a sentence for an offense punishable only by fine of \$500 or less. He recites that he is not permitted to conduct preliminary hearings, or hold any hearings on which jail is a potential sentence, whether it is a misdemeanor or felony.

The Commissioner advises that the Commonwealth's Attorney does not appear before the District Court in his judicial circuit, and that the Commonwealth's Attorney has never approached him for the issuance of search warrants or warrants of arrest. He advises that his partner would keep no files pertaining to his employment at the partnership office, as all such files are kept at the office of the Commonwealth's Attorney. He states that neither his partner, nor anyone from the office of the Commonwealth's Attorney, would practice before him as Trial Commissioner, and that he would not practice any criminal law in the circuit court while his partner was an Assistant Commonwealth's Attorney.

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### AUTHORITIES CITED BY THE COMMISSIONER

The Commissioner cites the following as support for his position that the appointment of his partner as an Assistant Commonwealth's Attorney would not create a conflict.

On July 24, 1989, the Commissioner wrote the Committee a letter posing the same question now in issue. On August 7, 1989, the Commissioner had a telephone conversation with then Committee Chairman, B. M. Westberry, regarding the question. The Commissioner's handwritten notes memorializing that conversation indicate that a copy of JE 47 would be sent him, with the following response by Chairman Westberry:

No problem but I must disqualify from appearance before me by  
Comm. Attys office.

By letter of August 7, 1989, the Executive Secretary of the Committee sent the Commissioner a copy of JE 47.

In JE 47, published in October of 1983, the question posed was:

Where the county attorney and the trial commissioner for district court are partners in civil practice, must the trial commissioner disqualify himself in all cases in which the county attorney appears, both civil and criminal?

The Committee responded: "Yes, except in emergency situations where a failure to act would result in a frustration of the criminal justice process." The opinion referred to JE 44, published in January of 1983, in which the pertinent question was:

May the partner of a district court trial Commissioner practice in that court? If so, are there any limitations on the practice in which he may engage?

The Committee responded: "He may practice in that court as in any other court. In cases which the trial Commissioner is acting, the latter must disqualify himself in appropriate cases as provided in Canon 3C."<sup>1</sup> In both JE 44 and JE 47 the essential reasoning was that there was an appearance of impropriety.

The Commissioner also cites the Committee to KBA E-214, published in March of 1979, and JE 47 also refers to that ethics opinion.

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<sup>1</sup> Current Canon 3E.

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### OPINION

With due respect for the cited KBA ethics opinion<sup>2</sup> and JE 44 and JE 47, those opinions were issued without the benefit of *Commonwealth v. Brandenburg*, 114 S.W.3d 830 (Ky. 2003), and it is that case by which the Committee is to be guided in responding to the immediate question. There, the Court stated, at 832:

The sole issue before us is whether a trial commissioner who is married to an employee of the Commonwealth Attorney's office, "manifest[s] that neutrality and detachment demanded of a judicial officer when presented with a warrant application for a search and seizure." [Citation omitted] We hold that in the case *sub judice*, the trial commissioner, due simply to her marital status, was not the neutral and detached magistrate that the Fourth Amendment to the United States Constitution, Section 10 of the Kentucky Constitution, and the United States Supreme Court guarantee.

*Brandenburg* went on to discuss the application of the Code of Judicial Conduct, SCR 4.300. The Court noted that Canon 2 of the Code states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." Canon 3E(1) requires that a judge disqualify himself when his impartiality "might reasonably be questioned". The Court also said:

SCR 5.070 makes trial commissioners of the district court subject to the Supreme Court's rules governing the retirement and removal of judges. Also, SCR 5.050 governs the disqualification of trial commissioners and holds that "[a] trial commissioner shall disqualify himself in all matters in which he has an interest, relationship or bias that would disqualify a judge."

At 833, the Court stated:

The Court of Appeals has addressed such a situation in *Dixon v. Commonwealth*, Ky.App., 890 S.W.2d 629 (1994), wherein it held that a trial commissioner who was the law partner of the County Attorney was not a neutral and detached magistrate capable of making probable cause determinations for search warrants. *Id.* at 630. The court in *Dixon* found that the mere association with the

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<sup>2</sup> While this Committee takes no issue with the substance of KBA E-214, it should be noted that ethics opinions of the Kentucky Bar Association apply only to lawyers. Judges, and those persons acting in a judicial capacity, are governed by the Kentucky Code of Judicial Conduct, SCR 4.300 et seq.

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County Attorney created an appearance of impropriety, in violation of Canon 2 of the Code, which destroyed the trial commissioner's character as a neutral and detached issuing authority. *Id.* at 631. We agree with the Court of Appeals' reasoning in *Dixon*, and hereby extend the holding of that case to apply to situations such as in the case at bar, where the trial commissioner is the spouse of an employee of the Commonwealth Attorney's office.

Referring to its own opinions on similar matters, the Court stated:

However, this Court has spoken to this issue on only a few instances. In *O'Hara v. Kentucky Bar Association*, Ky., 535 S.W.2d 83 (1975), we affirmed an ethics opinion adopted by the Kentucky Bar Association that stated a trial commissioner could not be a member of the same law firm as the Commonwealth Attorney.

*Brandenburg* concluded, at 834:

Today's opinion takes a harsher stance against the propriety of judges and trial commissioners having close personal relationships with others who may be in a position to influence their decision-making. We reiterate that there need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns.

Returning to *Dixon, supra*, the Committee perceives no difference, for purpose of analysis, between a trial commissioner being a partner of a county attorney or being the partner of an attorney for the Commonwealth, since both county and Commonwealth's attorneys have prosecutorial duties.

The opinion in *O'Hara, supra*, is a model of brevity, but powerful in its simplicity.<sup>3</sup> The Court said:

The appellants, members of the same firm who have occupied those positions for a number of years, argue that there have never been accusations or insinuations of impropriety during the time of this professional association or of a failure to fulfill the duties required

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<sup>3</sup>The Committee recognizes that the Court was considering a KBA ethics opinion, but believes the principles involved are directly on point.

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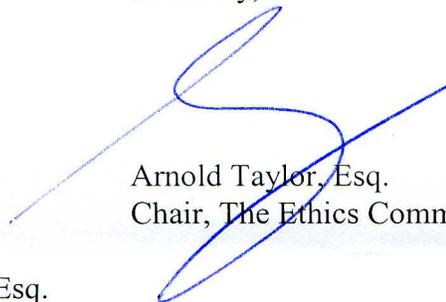
by their respective offices. They point out the unlikelihood or virtual impossibility of effecting any impropriety with regard to their respective offices. The appellees say that no impropriety is suggested with regard to these appellants.

The point is not whether impropriety exists, but that any appearance of impropriety is to be avoided. We are of the opinion that such association carries with it an appearance of impropriety so that it should not be permitted.

The Committee believes that the conclusions of the Court in *Brandenburg*, *Dixon* and *O'Hara* compel our opinion that, should the law partner of the inquiring Commissioner become an Assistant Commonwealth's Attorney, there would be an appearance of impropriety, and the Commissioner could no longer serve as a commissioner.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,

A handwritten signature in blue ink, appearing to be "Arnold Taylor", written over a light blue horizontal line.

Arnold Taylor, Esq.  
Chair, The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.  
The Honorable Jeff Taylor, Judge  
The Honorable Jean Chenault Logue, Judge  
The Honorable Jeffrey Scott Lawless, Judge  
Jean Collier, Esq.