KENTUCKY LEGISLATIVE ETHICS COMMISSION
Legislative Research Commission CLE
June 3, 2024
9:40-10:40 a.m.

THE CODE OF LEGISLATIVE ETHICS: THE LAW'S IMPACT ON LEGISLATORS, LAWYERS, LOBBYISTS AND THE PUBLIC

I. LEGISLATIVE INDEPENDENCE EVOLVES FROM THE STRICT SEPARATION OF POWERS DOCTRINE IN KENTUCKY'S CONSTITUTION

A. Strict Separation of Powers -- Kentucky Constitution, Sections 27 and 28:

Sibert v. Garrett, 246 S.W. 455 (Ky. 1922)
The court held the legislature lacked the authority to appoint members of an executive branch commission, and under the separation of powers provisions of the Kentucky Constitution the task of appointing members to the highway commission was the responsibility of the governor.

Rouse v. Johnson, 28 S.W.2d 745 (Ky. 1930)
The court said the state Constitution, unlike the federal one, only prescribes inhibitions and limitations upon legislative power, and unless the legislative body is so proscribed and limited by the Constitution, its authority is unlimited and it may enact upon any subject.

Arnett v. Meredith, 121 S.W.2d 36 (Ky. 1938)
The Governor's exercise of the veto power conferred upon him by the state's Constitution is a legislative act and involves an encroachment by the executive department upon the functions of the legislative department, and it is one of the excepted "instances hereinafter expressly directed or permitted," as contained in Ky. Const. §28.

Legislative Research Commission v. Brown, 664 S.W.2d 907 (Ky. 1984)
The General Assembly enacted laws giving new powers to the Legislative Research Commission (LRC). The Governor and Attorney General brought this action to declare the statutes unconstitutional. The Supreme Court found certain of the statutes unconstitutional because they purported to create a fourth branch of government and served to keep the General Assembly "in session" following adjournment. Statutes which allowed for LRC veto of proposed regulations violated Ky. Const. §§ 27-28 as a legislative encroachment into executive power. Statutes which gave the legislature power over appointments violated the governor's power to make appointments. A statute which required each branch of government to submit a budget reduction plan was not unconstitutional. A statute giving LRC veto power over executive department reorganization was unconstitutional. The Court held that statutes which usurped or frustrated the executive's constitutional authority were unconstitutional. LRC was recognized as a constitutional agency of the legislative branch, but could not serve as a fourth branch of government.

Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610 (Ky. 1992)
Ky. Const. §27 provides that the powers of government be divided into three distinct units: executive, legislative and judicial. The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy.

Kraus v. Kentucky State Senate, 872 S.W.2d 433 (Ky. 1993)
The court held that the Senate had the inherent power to advise and consent on executive branch appointments of inferior state officers. Ky. Const. §43 provided legislative immunity from suits concerning speech or debate, and the court held that this provision extended to voting on executive appointments.

Fletcher v. Commonwealth ex rel. Stumbo, 163 S.W.3d 852 (Ky. 2005)
After the General Assembly adjourned without enacting an executive branch budget bill for the 2004-06 biennium, the Governor formulated an executive branch spending plan. The issue was whether the Governor could order money drawn from the treasury to fund the operations of the executive branch of government if the General Assembly failed to appropriate funds for that purpose. The Supreme Court held the Governor could not do so. Kentucky is a strict adherent to the separation of powers doctrine pursuant to Ky. Const. §§27 and 28, and in the absence of a specific appropriation or a statutory, constitutional, or federal mandate, the unambiguous language of Ky. Const. §230 prohibited the withdrawal of funds from the state treasury. The Governor had no constitutional authority to exercise legislative powers even when the General Assembly failed to do so. The Governor possessed no "emergency" or "inherent" powers to appropriate money from the treasury that the General Assembly, for whatever reason, had not appropriated.

B. Legislative power vested in General Assembly

Wiggins v. Stuart, 671 S.W.2d 262 (Ky.App. 1984)
The court found that Ky. Const. §43 provided immunity to legislators from civil or criminal actions for acts committed or statements made in their official capacity. The court found that immunity not only applied to speech and debate, but to voting, reporting, and every act in the execution of their legislative duties.

Immunity may not apply in a criminal investigation into a legislator's actions:

United States v. Renzi, 729 F.3d 731 (9th Cir. 2014)
Former U.S. Rep. Rick Renzi of Arizona was convicted on 17 federal corruption charges. His conviction was upheld by the 9th Circuit Court of Appeals.

Renzi included property owned by one of his associates in a federal land transfer bill, with the proceeds from that transaction secretly going to pay off a $700,000 debt to Renzi.

During the FBI's investigation of Renzi, federal agents secretly taped his phone calls, including conversations involving lawmakers not targeted in the probe. Renzi's lawyers challenged the use of the FBI-recorded phone calls on the grounds the Justice Department had violated the Speech or Debate Clause, a constitutional privilege that prevents lawmakers and staffers from facing legal action over official legislative acts.

The 9th Circuit held that Renzi was not impermissibly questioned about his legislative acts in violation of the Speech or Debate Clause. ". . . the Supreme Court has made equally clear that the Speech or Debate Clause does not make members of Congress supercitizens immune from criminal responsibility."

Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989)
Students and local school districts filed a declaratory judgment action against the General Assembly in which plaintiffs alleged that state's system of school financing resulted in an inefficient system of common school education in violation of Ky. Const. §183.

The Supreme Court held that the state's school finance system created and funded by the General Assembly was unconstitutional. The Court said the evidence clearly demonstrated that the General Assembly had not met its constitutional mandate to enact legislation to provide for an efficient system of common schools throughout the state.

The Court recognized that the judiciary has no authority to order the General Assembly to enact specific legislation, or to exercise "supervision" over the actions of the General Assembly.

Philpot v. Patton, 837 S.W.2d 491 (Ky. 1992)
Two Senators asserted that Senate Rule 48 violated Ky. Const. §46 and sought an order to require committee action on legislation the Senators introduced. The Supreme Court held the controversy was moot because the legislative session in which Senate Rule 48 was enacted and in which the senators introduced the legislation had adjourned. The court also held that due to the provisions of Ky. Const. §46, a rule that allowed a committee's final meeting to occur without reporting a bill would have been subject to a judicial challenge.

Baker v. Fletcher, 204 S.W.3d 589 (Ky. 2006)
State employees requested declaratory and injunctive relief against the Governor**,** after a failure to enact a comprehensive balanced budget appropriating revenues to fund the Executive Branch occurred. The result of the alleged failure was that the Governor issued an executive order giving state employees a 2.7 percent raise despite the fact that they were entitled to at least a five percent increment pursuant to KRS 18A.355. The Supreme Court held that the Governor did not have the power to suspend statutes but that the General Assembly had such a power. Moreover, the Court found that the General Assembly could retroactively suspend statutes, pursuant to KRS 446.080(3), if the legislature clearly manifested its intent to do so and the evidence showed that the General Assembly had intended such a result by the language it used in bills that it passed regarding the budget.

C. Legislative Ethics, Discipline, and Expulsion

Section 38: Each House of the General Assembly shall judge of the qualifications, elections and returns of its members, but a contested election shall be determined in such manner as shall be directed by law.

Section 39: Each House of the General Assembly may determine the rules of its proceedings, punish a member for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause, and may punish for contempt any person who refuses to attend as a witness, or to bring any paper proper to be used as evidence before the General Assembly, or either House thereof, or a Committee of either, or to testify concerning any matter which may be a proper subject of inquiry by the General Assembly, or offers or gives a bribe to a member of the General Assembly, or attempts by other corrupt means or device to control or influence a member to cast his vote or withhold the same. The punishment and mode of proceeding for contempt in such cases shall be prescribed by law, but the term of imprisonment in any such case shall not extend beyond the session of the General Assembly.

Section 43: The members of the General Assembly shall, in all cases except treason, felony, breach or surety of the peace, be privileged from arrest during their attendance on the sessions of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House they shall not be questioned in any other place.

D. Constitutional change enhances legislative independence

Beginning in the late 1970's, the General Assembly proposed, and the voters have approved several amendments to the state's Constitution which strengthened the Legislature by altering the years of legislative elections, authorizing more frequent legislative sessions, removing executive branch leadership from the General Assembly, and providing flexibility in legislative session meeting dates.

In 1979, voters approved changes to Sections 30, 31, 36, and 42 to provide for legislative elections in even-numbered years, which separated those elections from the gubernatorial election; approved annual sessions of the General Assembly; and allowed legislators to establish a session calendar which provides a "veto recess" so legislators can consider overriding gubernatorial vetoes.

In 1992, the voters repealed Section 83, thereby removing the Lt. Governor as President of the Senate, and allowing Senators to elect their own leader.

In 2000, Sections 36 and 42 were amended to change the legislative session in odd-numbered years from a 10-day session limited to organizational matters to a 30-day session at which legislation can be enacted.

E. BOPTROT and its legacy

"Operation BOPTROT" was the FBI's name for a serious investigation of public corruption in Kentucky. From the beginning of the investigation in 1990 until the case was closed in 1995, the federal government secured 21 convictions, including 15 from legislators.

The name "BOPTROT" came from the investigation's initial focus on the General Assembly's Business Organizations and Professions (BOP) committees and legislation concerning harness tracks, where horses known as trotters race.

The investigation began after the FBI was notified that a state senator who was leaving office and looking for lobbying work told a harness track official that she could "fix" legislation that harness track officials didn't like for $100,000. Using cooperating witnesses and wiretaps, the FBI spent the next 18 months secretly uncovering wrongdoing, such as lawmakers accepting cash payments from lobbyists. The investigation revealed that corruption was behind some of the most heavily debated pieces of legislation that had recently been before the General Assembly. Although the investigation initially focused on harness racing issues, it grew over time to uncover wrongdoing related to a banking issue as well as plans for a health care company's expansion.

The investigation became known to the public in 1992 when a lobbyist who had agreed to cooperate after being confronted by the FBI began to tell others about the case. On March 31, 1992, toward the end of the 1992 General Assembly, dozens of FBI agents descended on the State Capitol, issuing subpoenas, gathering information from potential witnesses, and collecting documents.

Guilty pleas were offered quickly from most of those indicted in Operation BOPTROT. Those who went to court were convicted. Charges ranged from extortion to racketeering to lying to the FBI.

Among the convictions resulting from the BOPTROT case were those against:

- A House Speaker, convicted of extortion, racketeering and lying to the FBI;
- A Senate Minority Leader, convicted on charges that he agreed to accept profits for his help in passing a banking bill;
- 13 other legislators and a top legislative staffer, convicted of a variety of crimes;
- The state's "dean" of lobbyists and former chairman of the Kentucky Harness Racing Commission, convicted of accepting bribes.

To examine its practices and recommend changes, the General Assembly established a Task Force on Governmental Ethics and in 1993, lawmakers approved a sweeping legislative ethics reform package.

The reform plan included provisions to:

- Require the registration of lobbyists, as well as detailed reports on lobbyists' expenditures and actions.
- Limit the amount of food and drink lawmakers can receive from lobbyists and prohibit most gifts.
- Prohibit lobbyists from making campaign contributions to legislative candidates.
- Prohibit lawmakers from becoming lobbyists for two years after serving in the General Assembly.
- Require more detailed financial disclosures from lawmakers to reveal possible conflicts of interest.
- Create the Kentucky Legislative Ethics Commission - made up of non-legislators - to enforce the new ethics rules.

The ethics reforms prompted by BOPTROT were among the strongest in the nation and have been credited with changing the political culture in Kentucky's Capitol.

II. CODE OF LEGISLATIVE ETHICS -- KRS 6.601 TO 6.849

A. Early and recent challenges to the Code

Associated Industries v. Commonwealth, 912 S.W.2d 947 (Ky. 1995)
Business association initiated declaratory judgment against attorney general and state ethics officials, contending that various legislative and executive ethics codes were unconstitutionally vague or overbroad. The Supreme Court determined that legislative and executive ethics statutes were neither overly broad nor violative of AIK's freedom of association under Ky. Const. Sec.1 or U.S. Const. Amend. I. The court held that under the strict scrutiny test, rights of association and petition can yield to a compelling governmental interest such as insuring the proper operation of government and deterring corruption, as well as the appearance of corruption.

Schickel v. Dilger, 925 F.3d 858 (6th Cir. 2019); *cert denied* **Schickel v. Troutman**, 140 S.Ct. 649 (2019)
A legislator and legislative candidate challenged the constitutionality of various statutes in the Code of Legislative Ethics, including:

- The ban on gifts to legislators from lobbyists;
- The ban on campaign contributions from lobbyists to legislators, including a ban on regular session contributions from PACs and lobbyists' employers; and
- The ban on lobbyists soliciting campaign contributions for legislators or serving as campaign treasurers.

The 6th Circuit upheld the constitutionality of the gift ban, contribution ban, and regular session contribution ban, and held that the legislator and legislative candidate did not have standing to challenge lobbying restrictions that prevent lobbyists from serving as campaign treasurers or soliciting contributions for legislators/legislative candidates.

B. Legislative Ethics Commission - The Code created the Legislative Ethics Commission as an independent agency within the legislative branch with the authority to address legislative ethics violations and enforce the Code, relating to lobbyists, employers of lobbyists, legislators, and candidates. **KRS 6.651-6.666.**

The Commission has jurisdiction to accept sworn complaints of Ethics Code violations, and may investigate and adjudicate a complaint. **KRS 6.686-6.691.**

The Commission also provides public disclosure of lobbying spending, legislators' and legislative candidates' financial disclosures, and the identities of lobbyists and their employers. **KRS 6.666, 6.791, 6.807, 6.821, and 6.829.**

The Commission provides education and guidance, both informally and formally, to persons affected by the Code. **KRS 6.701-6.716.** The Commission renders advisory opinions. **KRS 6.681.**

The Commission has subpoena power under **KRS 6.666.** It may assess fees and fines, may adjudicate sworn complaints, and may recommend to the full House or Senate additional discipline of legislators, including their censure or removal from office. The Commission may also revoke an employer or legislative agent's registration for up to 5 years. **KRS 6.691.**

III. The Ethics Code- Legislators

A. General standards of conduct for legislators -- KRS 6.731 provides that violations are ethical misconduct, and may also be subject to criminal sanction.

A legislator, by himself or through others, shall not intentionally:

1. Use or attempt to use influence as a legislator in any matter involving substantial conflict between his or her personal interest and his or her duties in the public interest (Class A Misdemeanor). **KRS 6.731(1).**
   OLEC 95-12*: A legislator whose employer seeks to obtain a service contract with a state agency may not serve as his employer's representative in negotiations or otherwise engage in negotiations with the state agency. A legislator should be wary of potential conflicts in his private employment and personal interest and his duties in the public interest.*

2. Use official position or office to obtain financial gain for himself/herself, any members of his family, or a business associate of the legislator. (Class D Felony). **KRS 6.731(2).**
   OLEC 93-19, ***01-03****: A legislator may not use his or her official legislative stationery for private business correspondence whether the stationery is paid for with public or private money. Depending on the surrounding circumstances, a private business communication on official legislative stationery could well fall within the proscriptions of KRS 6.731(2) or (3). The effect of the use of the official stationery for private business is the same regardless of who pays for the stationery.*

3. Use or attempt to use official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in direct contravention of the public interest at large (Class A Misdemeanor). **KRS 6.731(3).**
   OLEC 06-03, OLEC 07-02*: A legislator may not ask a lobbyist to solicit campaign funds for a political party or a legislative campaign.*

4. Use public funds, time, or personnel for his private gain or that of another, unless use authorized by law (Class A Misdemeanor) **KRS 6.731(4).**
   See ***OLEC 93-51***, ***93-61***, ***95-1***: *A member of the General Assembly may contact a state agency regarding a private business interest. However, the legislator should make clear to the agency that such contact is made as part of private sector activities and not in an official capacity.*

5. Use public funds, time, or personnel for partisan political campaign activity unless authorized by law or election to constitutional or party offices in the General Assembly (Class A Misdemeanor). **KRS 6.731(5).**
   See ***OLEC 93-58, 94-38, 95-15, 01-02:*** A member of the General Assembly is prohibited from requesting a legislative staff person to perform any activity during the workday not associated with the performance of legislative duties. In addition, a member of the General Assembly is prohibited from using a legislative staff person in partisan political campaign activity during the workday.

6. Use his official legislative stationery to solicit a vote or contribution for his or another person's campaign for election or reelection to public office, or use the great seal of the Commonwealth on his campaign stationery or campaign literature. (Ethical Misconduct) **KRS 6.731(6).**

<u>Guidelines for Kentucky legislative mailings</u>

The Legislative Ethics Commission has published guidelines to assist legislators when questions arise regarding the drafting of legislative mailings. The guidelines include the following:

The Commission recognizes that there can be a fine line between what might appear to be partisan and political and what is nothing more than informing constituents on legislative matters. Nevertheless, the Commission is charged with drawing that line, as is each legislator, and in order to help legislators in doing so, the Commission offers these guidelines.

In determining whether a mailing crosses the line between one which may be paid for with public funds and one which should be paid for with campaign funds, the Commission believes that under the statute the issue to be resolved is whether the mailing appears to be intended to influence the outcome

of an election or to raise funds for an election campaign. If so, then it constitutes "partisan political campaign activity."

In resolving this issue, the Commission will look at the content of the mailing, the extent of its dissemination, and the timing of its dissemination. Some questions to be considered with respect to each of these factors are:

1) Content - Does the mailing contain only factual information, or does it contain language by the sender or another which is personally laudatory of the sender or laudatory or condemnatory of a political party or its members as such? Does the communication contain information about endorsements of the sender by various groups as opposed to merely reporting his or her legislative activity?

2) The Mailing - Is the mailing an individual letter to an individual constituent or other person who has contacted the legislator regarding the subject matter of the letter, or is it an unsolicited mailing to a large group of people whose names have been taken from voting lists or from membership lists of organizations which might be expected to support the sender with votes or campaign donations? Of course, a "newsletter" or report to a large number of constituents expressing a legislator's views on legislative issues, his or her legislative actions or those of the legislature in general would not, per se, be violative of the Code but would be scrutinized as to timing and content.

3) Timing - Did the mailing, particularly one sent to a large number of people, go out at a time close to an election at which the sender will be a candidate? If such a mailing is made within 60 days of an election, depending upon the particular circumstances of the case, and the content of the mailing, it would certainly be suspect as intended to influence the election even if the election itself were never mentioned.

7. While in the discharge of a legislator's duties, a legislator shall not become intoxicated by the use of liquor or any controlled substances. (Ethical Misconduct) **KRS 6.731(7).**

B. Legislators and Public Agencies

1. **KRS 6.737** prohibits legislators and legislative candidates from having certain contracts with state agencies and universities, except under certain circumstances. (Class D felony/voids contract).
   a. *See:* ***OLEC 11-01:*** *The Code of Legislative Ethics does not forbid a corporation owned by a legislator from contracting with a local entity, which is a corporate body and political subdivision, to furnish professional services to that entity under a contract let after public notice and competitive bidding.*

2. **KRS 6.741** prohibits legislators, a legislator's spouse, or business owned or controlled more than 5% by the legislator or spouse from leasing or selling real property to a state agency, with a few exceptions. (Class D felony/voidable contract).

3. **KRS 6.744** provides restrictions on representing clients in court or before a state agency and using improper influence.

   KRS 6.744(1) - A legislator, by himself or through others, shall not use or attempt to use any means to influence a state agency in direct contravention of the public interest at large. Absent an express threat of legislative reprisal, nothing in this subsection shall prevent a legislator from contacting a state agency on behalf of a person or constituent, to make a legislative inquiry, or to obtain information relating to a person or constituent who has requested legislative assistance.

4. **KRS 6.744(3)-(7) –** Areas in which a lawyer/legislator may and may not practice -- Restrictions on representing clients**:**

a. **KRS 6.744(3) -** A legislator who is licensed in a profession, may, for compensation, represent a client before a state agency in ministerial functions; adversarial proceedings and negotiations related thereto; workers' compensation proceedings; unemployment compensation proceedings; and other matters not prohibited by **KRS 6.744(5)-(7)**.

b. **KRS 6.744(5)** prohibits a lawyer/legislator, or other licensed professional, from representing a client for compensation before a state agency in proceedings related to:

i. Contracting for the purchase, sale, rental, or lease of real property, goods or services from a state agency;
ii. Any proceeding relating to rate making;
iii. Adoption, amendment or repeal of any administrative regulation;
iv. Obtaining grants of money or loans;
v. Any proceeding before the Public Service Commission; or
vi. Licensing or permitting, however, a legislator may represent a client in a ministerial function regarding licensing and permitting, adversarial matters related to a previously-issued license or permit, or matters related to driver licensing.

c. **KRS 6.744(6)** prohibits a lawyer/legislator or other licensed professional from representing the Commonwealth or any state agency for compensation.

d. **KRS 6.744(7)** prohibits a lawyer/legislator from maintaining an action for money damages against the Commonwealth or a state agency in which either is the principal defendant except: a. An appeal of an action by the state against the client; b. Cases before the Workers Compensation Board; or c. Unemployment compensation cases.

5. **KRS 6.744(8) - A lawyer/legislator's partners -** A legislator's properly licensed partner may practice cases which the legislator is precluded from handling by the Code of Legislative Ethics. However, the legislator must report on his or her annual financial disclosure form the names of the agencies before which the partners practiced and the names of the clients represented.

OLEC 93-41 *- The Code prohibits a lawyer/legislator from representing for compensation the Commonwealth or any state agency. Therefore, a lawyer/legislator is prohibited from receiving compensation related to activities of his or her firm in areas the lawyer/legislator is not permitted to practice under the Code.*

OLEC 93-62 *- The Code of Legislative Ethics places no restrictions on the areas of law in which a properly licensed partner of a member of the General Assembly may practice.*

OLEC 94-39 *- A lawyer/legislator may represent a client for compensation in an agency enforcement matter including administrative hearings, settlement negotiations, or judicial appeals. The fact that the outcome of such proceedings may impact a subsequent permit eligibility would not constitute a violation of KRS 6.744(5)(e) of the Code. A lawyer/legislator is prohibited by the Code from representing a client for compensation in a state agency enforcement action that is based on questions relating to permitting, including a possible permit revision.*

OLEC 98-4 *- It is not permissible for a lawyer/legislator's associate to represent a county water company before the Public Service Commission because the lawyer/legislator is a sole proprietor of the firm, and is prohibited by the Code of Ethics from representing a client in any proceeding before the PSC. It is not permissible for the associate to use the legislator's name in correspondence or on stationery in a matter in which the lawyer/legislator is precluded from handling.*

OLEC 02-03 *- A lawyer/legislator may represent a client for compensation before the Revenue Cabinet in contesting the amount of income tax assessed against a client. No fee contingent upon the outcome of the matter may be charged by the legislator.*

The Rules of Professional Conduct -- SCR 3.130[1.16], provides that a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation if it will result in violation of the Rules of Professional Conduct or other law.

6. **Representation of lobbyists or their employers -** A legislator may represent a lobbyist or the employer of a lobbyist in any matter not otherwise precluded by the Code of Legislative Ethics or the Rules of Professional Conduct.

   KRS 6.787(2)(l) requires that the legislator list the names of any such clients on his or her annual financial disclosure form. *See* **SCR 3.130[1.6](b)(4)**. A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law. *See also* Comment [10] "Other law may require that a lawyer disclose information about a client. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client. If, however, the other law supersedes this Rule and requires disclosure, (the Rules) permit the lawyer to make such disclosures as are necessary to comply with the law."

7. **General considerations before accepting employment to represent a client in any transaction involving state government:**

   KRS 6.744(10) requires the legislator to consider:
   a. Whether the matter is being brought to him in an attempt to obtain improper influence over the state agency;
   b. Whether there is a reasonable possibility that the state agency will be unduly influenced because of his participation; or
   c. The effect of his participation on public confidence in the integrity of the Legislature.

   Rules of Professional Conduct -- SCR 3.130[8.4](d): It is professional misconduct for a lawyer to state or imply an ability to influence improperly a government agency or official.

8. **Other provisions relating to legislators and state agencies:**

   KRS 6.744(2) provides that a legislator shall not, for compensation, appear before a state agency as an expert witness.

   KRS 6.744(9) forbids a contingent fee contract for representation by a legislator before any state agency.

   KRS 6.754 states that a legislator shall not advocate or cause the employment, promotion, transfer, or advancement of a member of the legislator's family to an office or position in the executive branch of state government.

9. **Rules of Professional Conduct: SCR 3.130(1.11): Special conflicts of interest for former and current government officers and employees:**

   (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

   (2) shall not:

   (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

   (ii) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially . . .

See SCR 3.130(1.11) Comment [4]: This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government.

Whitaker v. Commonwealth, 895 S.W.2d 953 (Ky. 1995)
It is clear from the language of this rule that it is the relationship between the lawyer and the client that must be the focus of the conflict examination.

OLEC 94-32 *held that a lawyer/legislator may not represent a defendant in a lawsuit when it is likely that a cross-claim against the Commonwealth for indemnification will be required.* ***OLEC 96-3****: A legislator may properly advocate the purchase of his land for a county economic development project as long as he does not use his "official position" to advance the project and makes it clear to the government officials involved that his interests are private and not related to his service in the General Assembly.*

C. Legislators - Other Offices and Additional Compensation.

Separation of powers (Ky. Const. 27 & 28) and Incompatible office provisions (Ky. Const. 165), mean that legislators have restrictions on which other offices they may assume while serving as a legislator.

1. **KRS 6.764** prohibits a legislator from accepting any appointment as an officer or employee of the Commonwealth or any state agency, and prohibits a legislator from serving on any special district board if the board has the authority to levy taxes or set rates. (Ethical Misconduct)

2. **KRS 6.751(1)** prohibits a legislator from accepting compensation, other than that provided by law, for performance of his legislative duties. (Class A misdemeanor)

3. **KRS 6.747** prohibits legislators from accepting honoraria, requires LRC permission to accept prepaid or reimbursable out-of-state travel, and prohibits lobbyists and employers from furnishing out-of-state transportation or lodging for a legislator. (Ethical Misconduct)

D. Family Members of Legislators

1. **KRS 6.754** provides that a member of a legislator's family shall not be employed or appointed to an office or position in the legislative branch. (Ethical Misconduct)

2. **KRS 6.754** provides that a legislator may not advocate for or cause the employment of a member of the legislator's family, or participate in any action relating to the discipline of the member of the legislator's family, in the legislative or executive branch. (Ethical Misconduct)

3. **KRS 6.751(2)** prohibits a legislator or a legislator's spouse from soliciting or accepting anything of value from a lobbyist or a lobbyist's employer. (Class B Misdemeanor)

E. Required Statements of Financial Disclosure by Legislators and Legislative Candidates

KRS 6.781-6.793 require legislators and legislative candidates to file detailed statements of financial disclosure covering the previous calendar year, which are published on the Commission's website. This includes the names of any clients who are lobbyists or lobbying employers. Failure to file the disclosures or omitting required information is a Class D misdemeanor.

OLEC 12-01: *KRS 6.787(2)(f) requires that each source of gross income in excess of $200 received during the preceding year be reported by legislators on their annual financial disclosure form. This includes the source of any receipts from gambling in excess of $200.*

See above: **SCR 3.130[1.6](b)(4) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law or court order.**

F. Conflicts of Interest

Section 57 of the Kentucky Constitution requires a legislator who has a personal or private interest in a measure or bill before the General Assembly to disclose that fact and not vote upon pain of expulsion. However, **Stovall v. Gartrell** states that a legislator would have to have an interest in a bill such that he or she would be affected in a different way from others in the same classification of persons affected. 332 S.W.2d 256 (Ky. 1960); See also OAG 20-03 (stating that a legislator would only have to recuse and not vote on legislation under Section 57 if the member has a "peculiar special interest" in legislation such that he will be affected in some way different from a proper classification of members of the public).

KRS 6.761 sets forth conflict of interest provisions, and prohibits voting or other legislative action on matters in which a legislator, family member or business associate will derive a direct monetary gain or suffer a direct monetary loss**.**

> ***OLEC 07-03****: the Code of Legislative Ethics does not forbid a legislator who is an unpaid director of a non-profit entity furnishing medical care from voting on a state budget which contains a line item appropriation for the non-profit entity.* ***OLEC 08-01****: If the legislation has a similar effect on all facilities forming the class which might become eligible to offer casino gaming, a legislator who is an employee of such a facility may sponsor or support legislation relating to gaming or a proposed constitutional amendment to allow gaming. However, if the legislation applies only to the facility that is the legislator's employer, then the legislator should abstain from voting and disclose his interest in the legislation in accordance with KRS 6.761(2).*

IV. The Ethics Code-Legislative Agents and Employers

1. **KRS 6.611** specifically defines lobbying, legislative matters, legislative agent, and other relevant terms, and also contains important exclusions.

2. A "legislative agent" or lobbyist is an individual who is engaged (paid) during at least a portion of his/her time to lobby as one of his/her official responsibilities. **KRS 6.611(22)(a). KRS 6.611(27)** contains the definition of the term "lobby".

3. Registration and reporting requirements for lobbyists and their employers include:

    a. **KRS 6.807** requires lobbyists and employers to register within seven days following engagement of a lobbyist, and file periodic spending reports. Intentionally failing to register is a Class D felony.

    b. **KRS 6.821** sets forth the information which lobbyists and employers are required to file six times per year, including all compensation paid to lobbyists, all expenditures on events to which legislators are invited, and all amounts spent on advertising which appears during a legislative session and which supports or opposes legislation.

4. Regulation of lobbyist and employer activities with respect to campaign contributions:

    a. **KRS 6.811(5)** prohibits a lobbyist from directly soliciting, controlling, or delivering a campaign contribution for a legislator or candidate.

    b. **KRS 6.811(6)** prohibits a lobbyist from making a campaign contribution to a legislator, candidate, or a campaign committee.

c. **KRS 6.811(7)** prohibits an employer of a lobbyist from making a campaign contribution to a legislator, candidate, or caucus campaign committee during a regular session of the General Assembly.

d. **KRS 6.811(8)-(9)** prohibit an employer from employing a legislator or former legislator as a lobbyist until two years after the legislator leaves office; and prohibit a lobbyist from lobbying for compensation that's contingent on action on legislation.

e. **KRS 6.767** prohibits legislators and candidates from accepting campaign contributions from lobbyists at any time; and during a regular session, a legislator or candidate shall not accept a campaign contribution from an employer of a lobbyist or a PAC.

i. This subsection does not apply to candidates for the General Assembly in a special election held during a regular session of the General Assembly, or a member of the General Assembly who is a candidate contemporaneously seeking election to a statewide office.

OLEC 05-01*: A legislator may not solicit a campaign contribution from a legislative agent (lobbyist) for any of the four caucus campaign committees.* ***OLEC 06-02****: A legislator may solicit campaign contributions for a caucus campaign committee so long as the legislator complies with the standards governing solicitation for his or her own campaign committee (e.g. may not solicit a lobbyist).* ***OLEC 07-04****: A legislator may not solicit a contribution from a lobbyist for a political party.*

f. **KRS 6.811(9)** prohibits a legislative agent from going on the floor of either house of the General Assembly without an invitation, while the house is in session. (Class B misdemeanor).

5. **Gift Prohibitions-**

a. **KRS 6.811(4)** prohibits lobbyists and employers from offering or giving "anything of value" to a legislator, legislative candidate, or the spouse or child of a legislator or candidate. **KRS 6.751(2)** prohibits a legislator or a legislator's spouse from soliciting or accepting anything of value from a lobbyist or a lobbyist's employer. (Class B Misdemeanor). "Anything of value" is broadly defined to include food and beverages, pecuniary items, tangible gifts, discounts, real or personal property, offers of employment, contracts, stocks, automobiles, and "any other thing that is pecuniary or compensatory in value." KRS 6.611(2)(a).

b. Exceptions are listed in the definition of "anything of value" in **KRS 6.611(2)(b)**, and include events to which recognized groups are invited, promotional items, educational items, and other listed exceptions.

V. Other key provisions of the Code of Legislative Ethics

1. **Use of Confidential Information.** Legislators can't intentionally disclose or use confidential information acquired in the course of their official duties, if the primary purpose is to further their own economic interest or that of another person (Class D felony) **KRS 6.734**.

2. **Solicitations. KRS 6.626** specifies that a legislator may solicit contributions on behalf of charitable, civic, or educational entities provided the solicitations are broad-based and not directed primarily at lobbyists.

See: ***OLEC 07-04****: A legislator may not solicit a contribution for a political party from a lobbyist, because a party is not a "civic entity".*

3. **KRS 6.696** requires forfeiture of legislator's retirement benefits if convicted of a felony related to their legislative office.

4. **KRS 6.757** prohibits a former legislator from registering as a lobbyist until after two years have elapsed since the date the legislator left office.

5. **KRS 6.716** requires annual ethics training for legislators.

Provisions of the Code, formal opinions, forms, and other helpful materials may be found in the KLEC Guide available on KLEC's website at http://klec.ky.gov

VI. ETHICAL VIOLATIONS – A DOUBLE EDGED SWORD THAT CAN CUT A LAWYER/LEGISLATOR OR LOBBYIST TWICE

A. Violation of several provisions of the Code of Legislative Ethics constitutes either a Class D felony, [see e.g. KRS 6.731(2), 6.737, 6.741 and 6.761] or a Class A misdemeanor [see e.g. KRS 6.731(1)(3)(4) and (5) and KRS 6.797(2)(b)]. Also, KRS 522.030 (1)(c) makes it a Class B misdemeanor for a public servant to violate any statute relating to his office.

"*Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney.*" **K.B.A. v. Profumo**, 931 S.W.2d 149 (Ky. 1996). *See also* ABA Model Rules of Professional Conduct 8.4, Comment [5].

B. The Rules of the Supreme Court

SCR 3.320 provides that when any member of the Kentucky Bar Association has been convicted of a felony or a Class A misdemeanor, a copy of the judgment shall be filed with Bar Counsel for action under **SCR 3.160** governing the initiation of disciplinary cases.

SCR 3.166 provides that any attorney who pleads guilty or is convicted of a felony shall be automatically suspended from the practice of law. *See* **K.B.A. v. Haggard**, 57 S.W. 3d 300 (Ky. 2001)

SCR 3.130[8.4](b) provides that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. *See* **K.B.A. v Colston**, 54 S.W. 3d 158 (Ky. 2001); **K.B.A. v. McKinney**, 900 S.W. 2d 605 (Ky. 1995)

Acquittal or dismissal of a criminal charge won't necessarily preclude professional discipline. *See* **K.B.A. v. Vincent**, 282 S.W. 2d 335 (Ky. 1955)