

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-26
Issued: September 1965

This opinion was decided under the Canons of Professional Ethics, which were in effect from 1946 to 1971. Lawyers should consult the most recent version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Should an attorney, any of his partners, or associates, practice before any court, quasi-judicial body or administrative agency, where the appointment or approval of appointment of any member of that court, quasi-judicial body or administrative agency is vested in any governmental office held by the attorney or any governmental commission of which the attorney is a member?

Answer: No.

References: Canon 4, 13, 33

OPINION

By its terms the question is limited to proceedings before one whose membership upon a tribunal vested with the power of deciding issues, whether it be a court or administrative agency, is by virtue of an appointment or an appointment and an approval of that appointment. It is necessarily implied by the use of the verb “practice,” that the issue is presented to the tribunal by an attorney in a formal proceeding, that may well ripen into an adversary proceeding, and that the decision must be on the basis of the law as applied to the facts, rather than an unregulated discretion. Thus, the question has a broad coverage, ranging from practice before any United States Court by a senator, his partners and associates, to that before local boards by city and county officials, partners and associates.

Moreover, as framed, the question is not restricted to those cases in which the particular government, in which the attorney, his partner or associate holds an office, has an interest, either directly or as the representative of the public. Thus, it is evident that the question is framed so as to go beyond conflict of interest and to require a consideration of the proprieties.

There are times when the appearance of the use of improper influence on one charged with the duty of making a decision in a contested proceeding may do as much harm as though such influence had been used. The Canons of Judicial Ethics addresses itself to this problem from the standpoint of the judge. In Canon No. 4 it is stated that:

A judge's official conduct should be free from impropriety and the appearance of impropriety, he should avoid infractions of law; and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

Judicial Canon No. 13 is appropriate and reads as follows:

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

In the same vein the last sentence of Judicial Canon No. 33 declares that the judge

. . . should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

If social or business relations, friendship, and similar associations may give rise to a suspicion that they are an element in influencing the decisions of a judge, how much more would the obligation or indebtedness for an appointment or approval of an appointment have this effect. Certainly the possible obligation to act favorably on the cause of the one who made the appointment or the one approving an appointment will give the appearance of being the most significant element in producing that result.

What is true of the judge is equally applicable to any person holding a quasi-judicial office or membership on an administrative agency, so long as that person decides, or has a voice in deciding, issues involving individual rights that are presented in adversary proceedings. And for a partner or associate of the attorney who appoints or approves appointments to represent clients before that appointee may tend to strengthen the impression of wrong doing by adding the element of camouflage.

Since the judge or one making or having a voice in making a decision must avoid the appearance of improper influences on his official actions because of its detrimental effect upon the public, and since the attorney is an integral part of this undesirable picture, it is as incumbent upon the attorney, as on the judge, to avoid the appearance of improper influences. To relieve the attorney of any obligation because one has already imposed upon the judge is to ignore the fact that each of two parties, the judge and the attorney, are essential to the appearance that must be avoided.

Accordingly, it is our opinion that the question presented should receive a negative answer for the reasons stated herein.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.