

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-82
Issued: January 1974

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

May an attorney also licensed as an insurance agent execute bonds as attorney-in-fact for an insurance company:

Question 1: In cases in which he has an interest?

Answer 1: No.

Question 2: In cases coming before him in his capacity as criminal trial commissioner in quarterly court?

Answer 2: No.

Question 3: In cases in which he does not have an interest?

Answer 3: Qualified Yes.

References: Canon 5; DR 2-103, 2-104, 5-101, 5-107; Canon 2, 5C(I), Canons of Judicial Ethics

OPINION

An attorney also licensed as an insurance agent has been asked to execute bonds as attorney-in-fact for an insurance company. This would be done largely as a matter of convenience because of the attorney's proximity to the courthouse and would include cases in which the attorney had an interest, as well as those coming before him in his capacity as criminal trial commissioner in quarterly court and cases in which the attorney was in no way involved. He inquires whether this may ethically be done.

Canon 5 of the Code of Professional Responsibility provides that a lawyer should exercise independent professional judgment on behalf of a client. DR 5-101, adopted in conjunction with this Canon, requires that an attorney refuse employment if the exercise of his professional judgment reasonably may be affected by his own business interests. Former Canon 35 (now DR 2-103, 2-104 and 5-107) further provides that the services of an attorney should not be controlled or exploited by a lay intermediary. Commenting on intermediaries, Wise has noted in *Legal Ethics*, Second Edition, page 208, that:

Into this personal, direct and confidential relationship the lawyer should not permit intrusion of an intermediary, especially one whose very existence may induce violation of the canons prohibiting solicitation, advertising and representation of conflicting interests.

Issuance of a bond by an attorney on behalf of his own client violates each of these provisions. An attorney obtaining a bond in such circumstances would be in the employ not only of his client, but of the issuing company as well. It is not uncommon for a claim to arise under a bond. In that situation the attorney would necessarily be torn between a divided loyalty to his two employers and would face an untenable position. His ability to exercise independent professional judgment on behalf of his client would be impaired and the duty of absolute fidelity to his client would become impossible.

A similar conclusion must be reached in regard to the second inquiry. In the event an attorney executed a bond on behalf of a defendant appearing before him in his capacity as a trial commissioner in a criminal court, the question of bond forfeiture could and in all probability would frequently arise. Again, the attorney would be confronted with an inconsistency that cannot be tolerated. Such conduct would, in addition, violate the letter and spirit of the Canons of Judicial Ethics. Canon 2 provides that a judge should avoid impropriety and the appearance of impropriety in all his activities. Canon 5C(I) imposes upon a judge this additional responsibility:

A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

Clearly, in executing bonds in his own court a judge would at the very least create the appearance of impropriety and would certainly involve himself in frequent business transactions with those appearing before his court. If for no other reason, such conduct would fail to meet the standards of our profession.

Somewhat different considerations are involved where the attorney does not represent the party for whom he executes the bond. From what we have previously said, it is clear that an attorney could not accept employment from those for whom he executed bonds. The potential problem of indirect solicitation or utilizing an outside business as a feeder for his law practice would thus be avoided. At the same time, the undesirable inconsistency of employment previously referred to would not exist. The Committee has accordingly concluded that there would not necessarily be any ethical prohibition against execution of bonds as attorney-in-fact when confined to those not represented by the attorney.

However, there is an additional question raised by this inquiry which the Ethics Committee may not properly answer. KRS 387.070(4) prohibits acceptance of a practicing attorney or judge as surety on the bond of a guardian. KRS 395.140 enjoins a county court from acceptance of any judge of a county court or practicing attorney of that court as surety on the bond of a personal representative. Finally, by the provisions of RCr 4.10 no attorney

may act as surety on any bail bond, nor engage directly or indirectly in the business of bonding in any of the courts of this state. Whether, or to what extent, the actions presented by the present inquiry would be violative of these provisions raises legal questions which this Committee cannot, and properly should not, attempt to answer.

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.