

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-99
Issued: September 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.

Question: May an attorney appearing on behalf of clients to have an individual declared incompetent later accept an appointment as committee for that individual where requested to serve by both those initiating the inquest and those who oppose it?

Answer: Yes.

References: DR 5-105; EC 5-15

OPINION

An attorney previously appeared at an inquest on behalf of petitioners to have an individual declared incompetent. At the conclusion of the hearing, the individual was found incompetent, and both the petitioners and those who resisted the inquest have requested the attorney's appointment as committee. He now inquires whether there is a conflict in these facts which would prevent acceptance of the appointment.

Former Canon 6 forbade representation of conflicting interest except by express consent of all concerned upon full disclosure of the facts. The operative rule is now found in DR 5-105. It provides:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such

representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

From this it will be observed that two circumstances must combine for an attorney to represent multiple interests. An informed consent must be obtained after full disclosure of the facts, and it must appear that the attorney can adequately represent all interests involved. Mere consent of both clients does not of itself accord complete exoneration, and as noted by Wise, Legal Ethics, Second Edition, page 258, an attorney must search his own conscience to discover any latent impropriety even after consent is obtained. It was further noted in ABA Informal Opinion C-753 (dated March 31, 1964) that if the conflicting interests are so adverse as to become hostile or antagonistic, the representation must be declined. If an attorney has any doubts, under EC 5-15 he must resolve all doubts against the representation.

Here, it is clear that the attorney in question has obtained the consent of all who have an interest in his appointment. In fact, it is only at their request that his appointment is under consideration. From all that appears, it must be assumed that the consent to this appointment was the result of a full disclosure of all material facts. The question thus becomes whether the attorney can adequately represent all interests involved. As committee, he would presumably have a desire to preserve and protect his ward's estate. Such protection would be in the interests of all concerned. For this reason there would appear to be nothing antagonistic or hostile in his representation as committee for the incompetent. Accordingly, the Ethics Committee has concluded that unless there is some impropriety known to the attorney that is not apparent from his inquiry, he may properly undertake the position in question. In the event any facts should later come to the attorney's attention that might make impossible fair representation of all interests involved, the attorney would of course be expected to withdraw from his position.

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.