

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-104
Issued: January 1975

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 who as city attorney represented the civil service commission of that city in a claim by an employee for a disability pension later represent that individual after leaving office in litigation by the city to reduce the amount of his pension?

Answer: No.

References: DR 9-101(B); EC 9-3

OPINION

During his term of office, a city attorney represented the civil service commission of his city in a claim by a city employee to recover disability pension benefits. Later, and after the attorney left office, the city undertook to reduce the amount of the pension. The former city attorney seeks to represent the individual in the resulting litigation, and we are asked whether this is proper.

Old Canon 36 expressly prohibited an attorney in public office or public employ from acceptance of employment after his retirement from office in connection with any matter which he investigated or passed upon while in such employ. The rationale of this rule was expressed in ABA Formal Opinion No. 134 (dated May 15, 1935). There, it was held that if an attorney actually acquired information in confidence while in public employment, he could not later use it in favor of an individual whose interest was in conflict with that of the employer. Even if he did not acquire it, said the Committee, the public would infer that he had been retained by the individual in order to derive some advantage from the attorney's former connection with his public employer.

DR 9-101(B) is equally specific in frowning upon such employment. It provides:

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

EC 9-3, discussing the basis for the rule, notes that acceptance of employment under such circumstances would give the appearance of impropriety, even if none exists.

From an examination of these rules, we are compelled to conclude that the questioned employment is improper. If the attorney represented the civil service commission during hearings on the employee's claim for pension benefits, he obviously had "substantial responsibility" in the matter. For him now to undertake representation of that same employee in litigation regarding the same matter would create the very appearance of impropriety that DR 9-101(B) was designed to guard against. Therefore, such employment cannot be permitted.

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.