

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-106
Issued: March 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 1: May an attorney who is counsel for a Board of Aldermen on a personal service contract write a legal opinion when requested to do so by the board about the constitutionality of a proposed city building and housing code if the attorney represents clients in his private practice who are either tenants or landlords and therefore subject to the code?

Answer 1: Yes.

Question 2: In the circumstances of Question 1, must the attorney reveal the names of his clients who are tenants and landlords to the board?

Answer 2: No.

Question 3: In the circumstances of Question 1, if the board has not requested a legal opinion from the attorney on the pending building and housing code, must the attorney at this time inform the board of the names of all clients he represents who are either tenants or landlords?

Answer 3: No.

References: DR 5-105: EC 5-14, 5-15

OPINION

An attorney employed as counsel for a Board of Aldermen on a personal service contract inquires whether, if requested to do so, he may write a legal opinion for the board on the constitutionality of a proposed city building and housing code in view of his representation in his private practice of tenants and landlords who would be subject to the code. He further inquires whether, with or without a request by the board for a legal opinion on the code, he must reveal to the board the names of his clients who are tenants and landlords. The attorney advises that he did not participate in the drafting of the proposed code.

The rules applicable to this situation are found in DR5-105. It provides:

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

In commenting on this provision, EC 5-14 notes that maintaining independence requires a lawyer to refuse employment that will dilute his loyalty to a client. In EC 5-15 it is observed that an attorney asked to represent multiple clients having potentially different interests should weigh the effect on his independence of judgment and consider the possibility of creating divided loyalty. Under the former Canons, the test was whether the attorney was being asked to advocate for one client that which representation of another client required him to oppose.

Here, the attorney involved would not be asked to act in the traditional role of advocate. His only concern and that of the board would be the constitutionality of the proposed code. He would not be asked to pass upon any portion of the code as it applies specifically to his individual clients, and in any event there is no indication that the code would unfavorably affect tenants and landlords. Consideration of these factors convinces us that representation of the board in this matter would not result in any necessary division of loyalty. There would of course be a conflict if after passing upon the constitutionality of the code, the attorney then undertook in his private practice to question such constitutionality on behalf of one or more of his clients, but that is not the case here. In the absence of such circumstances we cannot say that his independent professional judgment would be adversely affected by the contemplated representation. It is of course a matter of judgment in each case, but on the facts presented we see nothing that would do violence to the requirements of DR 5-105. If the attorney sees any possibility that his judgment in behalf of a client might be affected, he should make full disclosure of such possibility to both the board and his clients. With their concurrence he could continue in this matter.

In the event disclosure to the board and clients is required, we are asked whether the attorney must also reveal to the board the names of clients who are tenants and landlords. While in such circumstances the board would be entitled to know that he represents those within the area to be regulated, we see no reason for disclosure of the identity of the individual clients who are either tenants or landlords. The board's only interest is the general question of constitutionality. Without

additional facts not presented by this inquiry, the identity of clients affected by the legislation is immaterial.

The third question presents similar considerations. If an attorney on contract to a board has no duties with respect to a code under consideration by the board, we find no ethical obligation upon him to reveal the names of clients who might be affected in the event the code is adopted.

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.