

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-207
Issued: January 1979

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 files a joint petition in an uncontested divorce represent either of the parties in subsequent related litigation if an adversary attitude develops between the parties?

Answer: No.

References: DR 5-105(A)(B)(C); EC 5-14, 5-15, 5-16, 9-2; ABA Formal Opinion 33 (1931), 167 (1937); ABA Informal Opinion 885 (1965), 1125 (1969), 1157 (1970)

OPINION

There have been no KBA or ABA opinions dealing directly with this question. However, a similar situation was discussed in ABA Informal Opinion 1125 (1965). In this case the attorney had represented the wife in a domestic problem, and three years later was retained by the husband in a divorce action. The wife gave her consent to this, but later withdrew it. In this case, the Committee on Ethics said:

“... we feel it would be best for the attorney to withdraw from representing the husband in the case. We feel that it was unfair for the wife to give her consent and then withdraw the consent for the attorney to represent her husband, but even in view of the unfairness of this action on the part of the wife, the Committee feels that there could be a possible conflict of interest.”

The Committee seems to be saying that had the wife not withdrawn her consent, the attorney could have represented the husband. However, EC 5-15 states very clearly:

“A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment....”

ABA Informal Opinion 1157 (1970) posed the question: “... can Attorney B assume dual representation of defendant husband and ex-wife 2, even with the consent of ex-wife 2?” This

representation was after the decree and property settlement with wife 2, and would be in connection with a suit involving wife 1, but the Committee said:

“... the Committee is of the opinion that Attorney B should not accept representation in this matter, nor continue to represent the husband although the wife 2 has given her consent. The facts very clearly indicate a difference of interests between the husband and wife 2 and would very possibly lead to Attorney B divulging confidences of his client.

In the question posed, one of the parties necessarily becomes a former client of the attorney. If the attorney retains a spouse as a client, the former client becomes an adverse party in the same action in which he was once represented by the attorney. ABA Formal Opinion 33 (1931) and 167 (1937) both stand for the proposition that an attorney cannot accept employment in an action against a former client if he once represented the client in the same action. ABA Informal Opinion 885 (1965) states that “the lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact.” Considering that the situation posed by the question does appear to be a conflict of interest, the answer is found in EC 9-2: “When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” For an attorney to represent one party in litigation when he has represented both parties prior to litigation would certainly give rise to the possibility of disclosure of confidences and could potentially prejudice the former client. Therefore, the attorney should withdraw from employment in this situation.

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.