

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-214
Issued: March 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 1: May a lawyer appointed as Trial Commissioner practice law before the judge who appointed the lawyer?

Answer 1: Yes.

Question 2: May a partner or associate of the Trial Commissioner practice before the Trial Commissioner?

Answer 2: No.

Question 3: May a lawyer serve as a Trial Commissioner and as an Assistant Commonwealth Attorney or Assistant County Attorney at the same time?

Answer 3: No.

Question 4: May a lawyer serve as a Trial Commissioner and a member of the firm serve as an Assistant Commonwealth Attorney or Assistant County Attorney at the same time?

Answer 4: No.

Question 5: May a lawyer who is Trial Commissioner of a district court practice criminal law in the circuit court?

Answer 5: Yes.

Question 6: May a Trial Commissioner represent a party bringing suit against the Commonwealth of Kentucky?

Answer 6: No.

References: DR 5-105(D); Opinion KBA E-61 (1972), E-81 (1974), E-94 (1974), E-97 (1974), E-190; *In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky 1951); *Raney v.*

Stovall, 361 S.W.2d 518 (Ky 1962); C 1958 OAG 42,177; SCR 4.300, 5.030, 5.050, 5.060; ABA Formal Opinion 55

OPINION

Question 1

With the enactment of the Judicial Amendment effective January 1, 1976, the citizens of the Commonwealth of Kentucky expressed their desire that judges should be lawyers. Constitution § 113(5) provides:

In any county in which no district judge resides the chief judge of the district shall appoint a trial commissioner who shall be a resident of such county and who shall be an attorney if one is qualified and available. Other trial commissioners with like qualifications may be appointed by the chief judge in any judicial district upon certification of the necessity therefore by the Supreme Court. All trial commissioners shall have power to perform such duties of the district court as may be prescribed by the Supreme Court. (See SCR 5.030, adopted eff. 1-1-78.)

Constitution § 116 provides:

The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.

Constitution § 123 provides:

During his term of office, no justice of the Supreme Court or judge of the Court of Appeals, circuit court or district court shall engage in the practice of law, or run for elective office other than judicial office, or hold any office in a political party or organization.

Pursuant to this directive the Supreme Court of Kentucky adopted Rule V which applies to Trial Commissioners of the District Court. Of particular interest is SCR 5.060 which implies that a lawyer may practice law before the judge who appointed him. The rule states as follows:

A trial commissioner shall not act as an attorney for any person in any matter in which he has taken any action as a trial commissioner. If a trial commissioner anticipates employment as an attorney in a matter coming before him, he may decline to act in the matter.

Kentucky Supreme Court Rule 5.030 establishes seven areas in which the Trial Commissioner may act. These areas are:

- (a) In criminal cases;
- (b) In juvenile cases;

- (c) In probate matters;
- (d) In civil proceedings;
- (e) To issue writs of forcible entry and detainer and warrants of restitution;
- (f) To issue orders of involuntary hospitalization of mentally ill persons for periods not exceeding seven days or may be otherwise limited by statute; and
- (g) To compel the attendance of witnesses and the production of evidence with respect to any proceedings before him.

It is obvious that the Supreme Court intended the duties of the Trial Commissioner to be ministerial in nature and to provide limited judicial functions.

However, the Supreme Court also has adopted SCR 4.300 which is the "Code of Judicial Conduct." Of particular import is CANON 7 which states that:

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this code.

Clearly, a Trial Commissioner is a judge within the Code of Judicial Conduct. The Judicial Code goes on to state that a part-time judge "should not practice law in the court on which he serves...."

Thus, we are faced with a conflict in the Supreme Court Rules. It is not the function of the Ethics Committee to interpret the Code of Judicial Conduct. However, since lawyers are involved as Trial Commissioners, we are compelled to give advice in this area.

There have been many ethical opinions written by his Committee concerning Trial Commissioners prior to the Judicial Amendment (Opinion KBA E-97 (1974), E-94 (1974), E-61 (1972)). It is our feeling that these opinions are not applicable to the present questions in lieu of the constitutional amendment.

This Committee has, on occasion, recognized the peculiar problems of lawyers practicing in rural areas of the Commonwealth (Opinion KBA E-81 (1974)). The American Bar Association has also recognized this situation. In an ethics opinion written in 1931, the ABA stated that there was "no impropriety in the city attorney of a rural community defending indigent prisoners in cases other than those which it is his duty to prosecute." (ABA Formal Opinion 55). Thus, circumstances have arisen where lawyers in rural communities have been allowed greater latitude than those in an urban setting. It seems that this is once again an appropriate place to make an exception.

We believe that the rules established by the Supreme Court for Trial Commissioners take precedence over the Code of Judicial Conduct. (These rules took effect 1-1-78). Rule V is specific with regard to Trial Commissioners and should govern over General Rule IV. The Supreme Court should be diligent, as they undoubtedly will be, in the supervision of the Trial Commissioners during the transition period which we are facing as a result of the Judicial Amendment.

In no case should attorneys in the Commonwealth of Kentucky feel that the Code of Professional Responsibility is different between the rural lawyer and the urban lawyer. The lack of lawyers in the rural counties makes this rule both practicable and reasonable. Once the attorney accepts the position of Trial Commissioner he should watch himself very closely so as not to give the appearance of impropriety in his activities, i.e., previous clients appearing before him, etc. SCR 4.300 Code of Judicial Conduct.

Question 2

The Kentucky Supreme Court has held that it is improper for a member of a law firm (or any member) of which the Trial Commissioner is a member to appear before that Trial Commissioner (*In re Kenton County Bar Assn*, 236 S.W.2d 906 (1951)). The Ethics Committee of the State Bar Association has also upheld this contention: "It is improper for a partner of a judge to practice in the court over which the judge presides. The same restrictions apply to members or employees of his firm." (Opinion KBA E-61 (1972); CJ: 1958 OAG 42,177). CANON 2 of the Code of Judicial Conduct deals with this question appropriately. SCR 4.300, CANON 2 states:

[A judge] should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him.

This opinion should apply to all attorneys in the Commonwealth, regardless of the community in which they practice. The Trial Commissioner should disqualify himself in all matters in which he might have a relationship (SCR 5.050). Likewise, an attorney should not be allowed to appear before a commissioner where that attorney and commissioner are engaged as partners (in any form) in the practice of law. The appearance of impropriety is simply too obvious.

Question 3

The Constitution of the Commonwealth of Kentucky clearly provides for separation of powers; Constitution § 27 provides:

The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another, and those which are judicial, to another.

The Constitution also states in § 28:

No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted. (The question of whether a lawyer may serve as Trial Commissioner and Assistant Commonwealth Attorney at the same time is not listed among those express exceptions),

Constitution § 69 to 109 provides for the Executive Branch of the Commonwealth of Kentucky. Specifically, the Commonwealth Attorneys are provided for in § 97, subject to § 108; and the County Attorney is provided for in § 99. The Judicial Department is reflected in § 109 to 123.

It is clear that the Constitution of Kentucky establishes that a person may not serve in both the executive branch and the judicial branch at the same time. *See In re Kenton County Bar Assn*, 236 S.W.2d 906 (Ky 1951); *Cf: Raney v. Stovall*, 361 S.W.2d 518 (Ky .1962). Therefore, a lawyer may not serve as a Trial Commissioner and Assistant Commonwealth Attorney at the same time. The conclusion just reached will also apply to those who wish to serve as City Attorney or Assistant County Attorney as well as Trial Commissioner.

Question 4

No opinion necessary.

Question 5

SCR 5.060 indirectly implies that a lawyer acting as a Trial Commissioner may decline to act in a case in which the lawyer represents one of the parties. Assuming that the lawyer did not perform any functions in the case as a Trial Commissioner, the lawyer as well as members of the firm may practice in district court as well as circuit court.

SCR 4.300, CANON 2 sums it up: “A judge should avoid impropriety and the appearance of impropriety in all his activities.”

Question 6

Opinion KBA E-190 stated that a lawyer may not serve two masters at the same time. The issue presented was whether an attorney who was on retainer for a city may bring suit against the city in an unrelated matter. That situation is analogous to the present question. By bringing an action against the Commonwealth of Kentucky, the Trial Commissioner would create a conflict in interest. As SCR 4.300, CANON 2 of the Code of Judicial Conduct states: “A judge should avoid impropriety and the appearance of impropriety in all his activities.”

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.