

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-255
Issued: November 1981

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 a lawyer employ a former lawyer who is presently disbarred or under suspension to perform duties for the lawyer?

Answer: Qualified yes.

References: DR 3-101(A); Canon 9; KBA U-14; SCR 3.020, 3.470; ABA Informal Opinion 7, 1046, 1434; Howton v. Morrow, 106 S.W.2d 81 (Ky. 1937); Lester v. Kentucky Bar Assn., 532 S.W.2d 435 (Ky. 1975)

OPINION

The purpose of this opinion is to reconsider KBA E-228. The Ethics Committee hereby overrules and replaces KBA E-228 with the following opinion.

In Informal Opinion 7, the American Bar Association stated “an attorney should not employ a disbarred lawyer even to do only office work and see no clients, ‘because of the practical difficulty of confining his activities to an area which does not include the practice of law and be cause such employment would show disrespect to the courts.’” Ethics opinions in other states are at best conflicting.

In Kentucky, the Court in Howton v. Morrow, 106 S.W.2d 81 (Ky. 1937), held that “practicing law” is not confined to performing services in actions and proceedings in courts of justice, but includes giving advice, preparing wills, contracts, deeds, mortgages, and other instruments of legal nature.

The Court in 1975, in dicta, held that a disbarred attorney may serve as a “law clerk” to an attorney, however, the court will look behind the title and examine the duties performed to determine the real nature of the work. Lester v. Kentucky Bar Assn., 532 S.W.2d 435 (Ky. 1975).

In SCR 3.020 the court defines what the practice of law is:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy

in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefore. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

Further, SCR 3.470 “Attorney Aiding Unauthorized Practice” provides:

Any attorney who knowingly aids, assists or abets in any way, form or manner any person or entity in the unauthorized practice of law shall be guilty of unprofessional conduct.

See also DR 3-101(A) which states: “A lawyer shall not aid a non-lawyer in the unauthorized practice of law.” There are those in the legal profession who may argue that the best interest of the organized Bar would be served by hiring employees who have been disbarred, suspended, or have resigned from the practice of law. However, there seems to be no rule per se excluding the hiring of these individuals. It would seem that the best interest to society, as well as to the ex-lawyer, is that they should be employable within the legal system to undertake certain functions that are not the unauthorized practice of law.

Accordingly, with some trepidations, the Ethics Committee feels that the ex-lawyer can be employed with certain General Provisos, as well as Specific Provisos, as follows:

General Provisos

1. The individual may do anything a lay person could do.
2. The individual may perform such work which is of a preparatory or ministerial nature.

Specific Provisos

1. The individual may not have any contact whatsoever with a client of a lawyer.
2. The individual is not a Paralegal within SCR 3.700.
3. The individual may not have an office, or place, in the lawyer’s facility.
4. The individual may perform any drafting acts, as long as they are submitted in draft form only to the responsible lawyer for approval.
5. The individual may perform clerical aspects of a probate matter.
6. The individual may do an abstract title examination.
7. The individual may provide legal research to a lawyer.

It seems clear to the Ethics Committee that an attorney who hires a suspended, disbarred, or resigned attorney does so at the attorney's own risk. If the previous lawyer engages in any unauthorized practice, the lawyer employing that person will be guilty of unprofessional conduct and will be appropriately disciplined by the Supreme Court of Kentucky.

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.