

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-287
Issued: May 1984

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>), especially Rules 7.01-7.50 and the Attorneys' Advertising Commission Regulations, before relying on this opinion.

Question 1: May an ex-judge presently in private practice represent a party in whose case the judge ruled on the merits of as a judge?

Answer 1: No.

Question 2: May a partner or associate of the ex-judge above represent the party?

Answer 2: No.

References: KBA E-20, E-41; EC 9-2, 9-3; DR 9-101(A), 5-105(D); Kentucky Bar Association v. Fitzgerald, Ky., 652 S.W.2d 77

OPINION

This committee in KBA E-20 looked at a similar question and ruled that a Circuit Judge who had not been called upon to pass on the merits of the case but only on perfunctory motions not considering the merits of the action could take a case in the private practice. The opinion specifically noted that the judge or lawyer should at all times avoid by every means any actions which would cause the public to question the propriety of the actions, or which would tend to cause doubt in the mind of the public as to our judicial process.

In KBA E-41 this committee allowed a former judge to render legal services for a person charged with a contempt of court violation in which the lawyer when judge entered the judgment. The committee noted that the lawyer may not attack the underlying judgment or appeal the underlying judgment since this would be taking an inconsistent position.

The Code of Professional Responsibility provides:

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a

lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. 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.

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

DR 9-101 Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

In Kentucky Bar Association v. Fitzgerald, Ky., 652 S.W.2d 77 (1983), the Supreme Court had an occasion to review DR 9-101(A). In that case the former judge sought to represent a person who received custody of children by him as judge against the natural mother who was now seeking to transfer custody.

The Court viewed such conduct and stated, "... a lawyer should avoid professional involvement in matters for which he has previously exercised substantial judicial responsibility since to accept employment would give the appearance of impropriety even if none exists". (Page 77).

The Ethics Committee is aware that there are many reasons for judges to leave the bench. Unfortunately, the pay scales in the Commonwealth of Kentucky may be the leading factor. However, the judge accepts the benefits, as well as the detriments of the position, and certainly knows of the provisions in the Code of Professional Responsibility

The real question here is what constitutes an act by a judge on the "merits"? This committee has reviewed many dictionaries and has been unable to come up with an acceptable definition for the word "merits". It is this committee's opinion that the word "merits" refers to the judge taking an action in a case in which the former judge had, and exercised, substantial responsibility as a judge. This may consist of a mere signing of an Agreed Order, Ruling on any Motion, Setting Bond, etc.

If the ex-judge is precluded from the representation, no partner or associate may take the case. DR 5-105(D).

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.