

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-301
Issued: January 1985

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 client consent or “screening” permit a former judge’s firm to participate in a matter in which the former judge “ruled on the merits” while on the bench?

Answer: Qualified yes.

References: KBA E-287; MOPC 91:4503; ABA Former Op. 342 (1975); N.Y.C. Op. 889 (n.d.).

OPINION

This request seeks clarification of KBA E-287, which held that neither an ex-judge nor his or her associates or partners may represent a party in whose case the judge previously ruled on the merits.

KBA E-287 did not address the relevance of several authoritative constructions of the Code of Professional Responsibility and the Code of Judicial Conduct. Specifically, the ABA/BNA Manual on Professional Conduct points out at page 91:4503:

The disqualification of a neutral decision-maker from subsequent representation in related matters is necessary to maintain public confidence in the judicial process. *Cf.* ABA Model Code of Judicial Conduct, Canon 3. Public confidence could reasonably be expected to suffer if it were apparent that a judicial officer had interests that affected the judge’s impartiality in a matter. However, when all parties to a dispute consent to a judicial officer’s subsequent participation as a lawyer, any threat to public confidence is substantially eliminated because the parties themselves vouch for the propriety of the conduct. *Cf.* ABA Model Code of Judicial Conduct, Canon 3(D), which states: ‘A judge... may, instead of withdrawing from the proceeding, disclose... the basis of his disqualification. If (after) disclosure, the parties... all agree... the judge is no longer disqualified, and may participate in the proceeding.’

The same text also points to ABA Formal Opinion 342 (1975), which approved of “screening” to avoid imputing to a law firm employing a former government lawyer that lawyer’s hypothetical disqualification. The same considerations justify “screening” as a means of avoiding the harsh results of imputed disqualification that arise in this context. Specifically, it is not acceptable to create a class of persons who are automatically prevented from moving back into law practice when leaving government service. MOPC at 91:4502 (approving the “screening” of former judges).

We note that the Committee on Professional Ethics of the Association of the Bar of the City of New York recently issued Opinion 889, approving “screening” in this context. That opinion states:

A law firm may represent three clients in pending litigations that were assigned to one judge after that same judge resigns from the bench and joins the law firm. If the judge had acted on the merits of the client’s disputes as a judge, the judge must not represent those same clients and the law firm must institute an effective mechanism to screen the judge from the cases. The clients should be advised of any circumstances that might cause a question to be raised concerning the propriety of their continued representation. When a judge is disqualified from working on a matter but his firm will continue to appear, an affidavit must be filed with the court in which the matter was pending to give the court the opportunity to review the screening mechanism. Opinion 889, DRs 5-105(D), 9-101 (A)(B); EC 9-3; ABA 342.

Whether or not “screening” can resolve this problem in a particular case is a matter that should be determined by the parties and the trial court. In any event, the conflict must be resolved by consent or prior court approval.

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.