

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-119
Issued: July 1975

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 practicing attorney who is a trial commissioner in the Quarterly Court of one county represent a defendant in a criminal action in another county?

Answer: Yes.

References: *In re Kenton County Bar Assn*, 314 Ky. 664, 236 S.W.2d 906 (1951); DR 8-101; Canon 9; Opinion KBA E-57 (1972), E-61 (1972), E-70 (1973); EC 9-1, 9-2

OPINION

In re Kenton County Bar Assn, 314 Ky. 664, 236 S.W.2d 906 (1951), the Court of Appeals held that a judge of a “subordinate court” may not represent defendants in criminal litigation in the courts of his own county, even though there is no general statutory limitation on his practice of law. This holding obviously applies to Quarterly Court judges and trial commissioners, Opinions KBA E-57 (1972), E-61 (1972). The question is whether this rule should or should not be extended to a Quarterly Court commissioner’s criminal practice outside his own county. In Opinion KBA E-61 (1972), Question I and the answer thereto, if read alone, would indicate that trial commissioners may not represent criminal defendants anywhere. But the body of the opinion merely states that trial commissioners are subject to the limitations of the Kenton County rule. We therefore do not believe that Opinion KBA E-61 decided the question now presented. See also Opinion KBA E-70 (1973). DR 8-101(A) provides “a lawyer who holds public office shall not: ... Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.” We do not believe there is any real possibility that the trial commissioner’s office would or could be of any aid to him in defending a criminal case outside his own county. Even in his own county, his public exposure is low and his powers limited. DR 8-101(A) does not prohibit the proposed representation. There is no real incompatibility between the proposed representation and the trial commissioner’s duties as such. Such real incompatibility could exist only if it were true that representation of criminal defendants implies a personal bias against fair and impartial enforcement of the criminal laws. A substantial segment of the lay public (including law enforcement officers) in fact believe some such notion. It is nonsense, of course.

There remains a question of possible appearance of impropriety, denounced by Canon 9. Canon 9 states “A lawyer should avoid even the appearance of professional impropriety.” The

theory of Canon 9 is that sometimes otherwise proper conduct should be avoided because of the high probability that it will appear to be improper to uninformed persons, EC 9-1, 9-2.

We should be cautious about the use of Canon 9 in resolving ethics questions. First, it provides a too convenient means of avoiding real questions. More importantly, in resolving a particular ethics question, Canon 9 is of no significance until we have first determined that there is no real impropriety under some other rule. If there were, we would resolve the issue under that other rule and would have to resort to Canon 9. When we do resort to Canon 9, we say we are going to credit some more-or-less baseless lay notion. There must be some limits on how far we go in this direction.

It is clear to us that the Court of Appeals decided the Kenton County case on the appearances issue. With respect to judges of “subordinate courts,” the Court considered the following notions:

- (a) A judge who represents criminal defendants in other courts in his own county utilizes his position to further his professional success;
- (b) He lends the prestige of his office to defense of an alleged criminal; and
- (c) Demonstrates that he cannot perform his judicial duties fairly and impartially.

The Court did not attempt to support the truth of these notions but found that the public or a substantial part of the public believe them to be true. The Court decided to credit them for the sake of appearances. As applied to the case of a Quarterly Court trial commissioner defending a criminal case in another county, these notions become patent nonsense, which Canon 9 does not require us to indulge.

We find that the proposed representation is not actually improper and does not even appear to be improper.

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.