

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-145
Issued: July 1976

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 who prepared a deed defend a suit to have the conveyance set aside?

Answer: Qualified yes.

References: DR 5-101(B), 5-102

OPINION

The grantor had two sons, one of whom predeceased him leaving issue. The grantor conveyed all his real estate to his surviving son and the son's wife, in joint survivorship tenancy. The deed was not recorded until after the grantor's death. The issue of grantor's deceased son propose to bring suit to set the conveyance aside. May the lawyer who prepared the deed defend this suit?

As relevant here, DR 5-101(B) provides that a lawyer may not accept employment in litigation if he knows or it is obvious that he ought to be called as a witness concerning any contested matter. DR 5-102 provides that if the lawyer has already accepted employment in litigation, he must withdraw as counsel if (a) he learns or it is obvious that he ought to be called as a witness for his client concerning any contested matter, or (b) he learns or it is obvious that he may be called as a witness for a party other than his client and his testimony may be prejudicial to his client.

We are not advised of the issues the applicant expects to be raised in the suit, and possibly he cannot know what issues will be raised until the pleadings have been completed.

It may be that the pleadings will raise only legal issues such as the legal sufficiency of the deed as an *inter vivos* conveyance or possibly its character as an unattested will. In that case, the applicant may accept employment to defend the suit and may continue that employment unless and until factual issues are raised.

It appears more likely that the complaint will allege undue influence, fraud, lack of mental capacity, nondelivery, and other factual matters which must be contested. We are not advised as to what knowledge the applicant has of these issues and he has any substantial knowledge concerning them, he may not defend the suit. If the complaint does not raise such issues but they nonetheless

arise in the course of the suit (whether by formal amendment to the pleadings, pretrial order, or otherwise), he must withdraw as required by DR 5-102. He must consider the fact that DR 5-101(B) and 5-102 do not shield him from subpoena by the plaintiff.

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.