

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-212
Issued: March 1979

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 1: If an attorney, formerly in the employ of a governmental agency, leaves that employment, may he accept private employment in a matter pending in the agency if he gained no substantial knowledge of the matter in the course of his employment?

Answer 1: Yes.

Question 2: ... if he gained substantial knowledge but did not perform any official act and was not counsel of record with respect to the matter?

Answer 2: No.

Question 3: ... if he performed any act with respect to the matter on behalf of the agency?

Answer 3: No.

References: DR 4-101(B); Canon 36 of the Canons of Professional Ethics; Canon 4 and 9 of the Code of Professional Responsibility; ABA Formal Opinion 342 (1975)

OPINION

The above questions have been posed by the following fact situation. Attorney A was employed by a state agency and had been involved in processing a complaint against a participant in the industry the agency regulates. He resigned and attorney B was assigned to handle attorney A's "routine correspondence" in the matter. B's duties were soon taken over by A's official replacement and B had nothing more to do with the case.

Old Canon 36 states that a lawyer who has held public office or otherwise been in the public employ, should not later accept employment "in connection with any matter which he has investigated or passed upon while in such office or employ."

EC 9-3 of Canon 9 of the Code states that accepting employment in connection with "any matter in which he had substantial responsibility prior to his leaving" would give the appearance of impropriety even if it did not exist.

DR 4-101(B)(2) says that “a lawyer shall not knowingly . . . use a confidence or secret of his client to the disadvantage of the client.” Even if he could refrain from using the agency’s confidences to its disadvantage, he might be subject to later accusations that he did not represent the second client with adequate zeal or that he allowed his relation with the first client to restrain his professional judgment.

A decision of whether the subsequent employment is unethical is based primarily upon the degree to which the attorney shared the agency’s confidence in the matter, to which he “investigated or passed upon” the matter, and to which he had “substantial responsibility.”

In addition to the degree of involvement, the ethical question might be subjected to certain policy considerations. ABA Formal Opinion 342 contends that DR 9-101(B) (concerning “substantial responsibility”) should be read in consideration of (1) whether the restriction on later employment might discourage the most competent young attorneys from entering government services, (2) whether such restraints might prevent a layman from obtaining the most experienced and highly qualified counsel, and (3) whether it might also appear that the attorney might use his governmental position to facilitate future employment.

Question 2 is the most difficult of the three and would require more factual information to answer most clearly. The answer essentially depends upon how the attorney gained the knowledge and why he did so.

Old Canon 36 states that the attorney in government employ cannot take a private case in which he “has investigated or passed upon.” The “or” would indicate that even if the attorney did not pass upon or perform an act in relation to the case, investigation would be sufficient to prevent him from taking the case.

ABA Formal Opinion 342 further states that substantial responsibility “. . . contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigation of deliberative processes regarding the transaction or facts in question.” Thus it appears that an official act is not crucial to the determination.

Neither does the Canon require such investigation to consist of confidential information. EC 9-3 raises the standard to whether such an investigation would even appear to contain confidential information.

The answer to Question 2 as presented is no.

If the attorney had gained substantial knowledge of the case upon his own initiative, where it did not pertain to the scope of his employment and was not confidential, a restraint upon future employment based upon such knowledge would appear to be unreasonable in light of policy considerations.

In view of the preceding Code sections cited, the answer to Question 3 would most certainly be no. The ability to perform an act upon the matter on behalf of the agency must indicate the existence of “substantial responsibility” and a matter “passed upon.”

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.