

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-245
Issued: July 1981

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 an attorney who does an estate planning for a husband and wife, later represent either one in a subsequent divorce action?

Answer: Qualified yes.

References: Opinion KBA E-207; ABA Informal Opinion 885, 1125; Canon 4, 9; EC 9-2- DR 4-101(B), 5-105(A)(C); *In re Advisory Opinion of Kentucky Bar Assn*, 613 S.W.2d 416 (Ky. 1981)

OPINION

There have been no formal KBA Opinions dealing directly with this question. However, KBA E-207 is very enlightening on the matter. The KBA Opinion quotes ABA Informal Opinion 885 (1965): “The lawyer should avoid representation of a party in a suit against a former client, where there may be the appearance of a conflict of interest or a possible violation of confidence, even though this may not be true in fact.”

This position is consistent with Canon 4 and Canon 9 of the Code of Professional Responsibility. Canon 9 states the duty of a lawyer to avoid even the appearance of impropriety. As KBA E-207 points out, EC 9-2 states that “(where) 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.”

Canon 4 states the duty of a lawyer to preserve the confidences and secrets of a client. DR 101(B) states that, “a lawyer shall not knowingly: (1) (reveal) a confidence or secret of his client; (2) (use) a confidence or secret of his client... unless the client consents after full disclosure.” The “consent” provision appears to allow for conditional representation in the present situation. However, this is also dealt with in KBA E-207, citing ABA Informal Opinion 1125 (1965), the KBA Opinion gives the relevant facts and proceeds with the ABA recommendation.

In this case the attorney had represented the wife in a domestic problem, and three years later was retained by the husband in a divorce action. The wife gave her consent to this, but later withdrew it. In this case, the Committee on Ethics said: “ ... we feel it would be best for the attorney to withdraw from

representing the husband in the case. We feel it was unfair for the wife to give her consent and then withdraw the consent for the attorney to represent her husband, but even in view of the unfairness of this action on the part of the wife, the Committee feels that there could be a possible conflict of interest.”

The possibility of conflict of interest is what concerns this Committee. In, *In re Advisory Opinion of Kentucky Bar Assn*, 613 S.W.2d 416 (Ky. 1981) the Court stated “The point is not whether impropriety exists, but whether the appearance of impropriety is to be avoided....”

There can be no doubt that a lawyer in doing an estate plan has received privileges and communications in regards to disposition of the property of the parties. It is assumed in this question that the parties were with the lawyer during the estate plan. If this were true, both privilege and communications would be waived by the parties in doing the estate plan and therefore the lawyer could represent either party in a subsequent divorce action. However, if the estate plan consisted of separate meetings with the individual there would be no waiver of the privileges and confidences under the Code of Professional Responsibility. In such case the lawyer may not represent one party in the divorce action against the other party. The fact that many matters concerning the divorce are freely discoverable under the Civil Rules does not adequately cover all the factual situations that could be relevant in the estate plan (a bastard child unknown to the other spouse, a prior marriage and divorce unknown to the other spouse, etc.). These items obviously may have an effect upon the dissolution of marriage case. In such a case we believe that DR 5-105(A) is applicable and that the lawyer should decline the proffered employment because the exercise of independent professional judgment on behalf of the client will be, or is likely to be adversely affected. The Committee does not feel that such could be cured by full consent and disclosure under DR 5-105(C) because it is not obvious that the lawyer could adequately represent the interest even with the disclosure and consent.

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.