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**FORMAL
JUDICIAL ETHICS OPINION JE-120**

December 22, 2010

**SENIOR STATUS JUDGE PRACTICE OF LAW: SERVING AS CO-COUNSEL,
DEFENDING ATTORNEY CHARGED WITH ETHICS VIOLATION BEFORE THE
KENTUCKY BAR ASSOCIATION**

The Ethics Committee of the Kentucky Judiciary has received an inquiry from a senior status judge regarding the propriety of the judge serving as co-counsel in representing an attorney against whom a Kentucky Bar Association ethics complaint has been filed. The inquiry was as follows:

I have been contacted by an attorney who has undertaken representation of another attorney against whom a Kentucky Bar Association ethics complaint has been made. The attorney who contacted me would like for me to join him in defense of the accused attorney.

[E]thics complaints against attorneys are reviewed in the first instance by the Office of Bar Counsel and if a charge is preferred, a hearing is held and the Board of Governors reviews the case and its decision is the final administrative determination. Throughout the proceeding, the Office of Bar Counsel acts as the prosecution and, of course, attorneys who are charged are entitled to full due process rights with respect to counsel, etc. Upon an adverse determination by the Board of Governors, the convicted attorney is entitled to review by the Supreme Court of Kentucky. The Supreme Court is the only court with any role in the process, and senior judges may not be assigned to sit on the Supreme Court. They serve only in the three lower courts.

The Committee has decided¹ that the answer to the inquiry is “no,” and issues this formal opinion at the request of the senior status judge.

Part A of the Application section of the Code of Judicial Conduct provides for Part-Time Judges or Special Judges:

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge.

- (1) is not required to comply with Canon 4D(3), E, F, and G;
- (2) should not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves. . . .

Canon 4G is the provision which prohibits judges from practicing law. Under the scenario presented, senior judges appear to be exempt from that requirement.

That said, the Guidelines for the Senior Status Program for Special Judges, promulgated by Order of the Supreme Court of Kentucky on September 24, 2004, impose limitations on the practice of law by senior judges. Significantly, a senior judge is not to “associate with a Kentucky law firm” or to “appear in any Kentucky court in an adversarial role and shall not actively participate in litigation in the courts of Kentucky”.

Case law recognizes in certain situations, an administrative agency and its decisions are not the equivalent of a court and its rulings. *See Spencer County Pres., Inc. v. Beacon Hill, LLC*, 214 S.W.3d 327, 329 (Ky. App. 2007) (holding that for purposes of Ky. Const. § 115, “an administrative agency and its decisions are [not] the equivalent of a court and the rulings therefrom”). On the other hand, and as recognized by the inquiry, certain administrative proceedings are judicial in nature and litigants must be afforded procedural due process, including a hearing, the taking and weighing of evidence, an order supported by substantial evidence, and a right of appeal. *E.g., Kentucky Alcoholic Beverage Control Bd. v. Jacobs*, 269 S.W.2d 189, 192 (Ky. 1954).

The Committee’s view is that a senior status judge should not engage in any practice of law involving an adjudicative, adversarial proceeding, whether that proceeding occurs in a court or in an administrative agency. To do otherwise creates an appearance of impropriety under

¹ One member of the Committee concurs in the result, but would restrict the Committee’s reasoning to the prohibitions found in the Guidelines for the Senior Status Program for Special Judges.

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Canon 2. The inherent conflict in permitting a person to serve as an advocate in one proceeding, while having judicial powers in other proceedings, has been recognized and prohibited in other contexts. *See* CR 53.03(2) (prohibiting part time domestic relations commissioners from practicing domestic relations law). The appearance problem is real, and the litigants and attorneys on the opposing side and the attorneys composing the Board of Governors will be placed in a difficult position of potentially ruling against and imposing sanctions on the senior judge's client, knowing that the senior judge either is or very well may soon be in a position to adjudicate one of their cases. *See also*, Canon 2D, which provides: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others." In so noting, the Committee does not impugn the integrity of the inquiring senior judge; rather, the issue concerns the appearance of impropriety and the unintended effect that the status of the senior judge might have on the Board of Governors and opposing parties and attorneys.

Finally, the Guidelines for the Senior Status Program explicitly prohibit a senior judge from associating with a Kentucky law firm. The contemplated employment as co-counsel with another Kentucky attorney to represent the accused attorney appears to be inconsistent with this prohibition.

Please be aware that opinions issued by or on behalf of the Committee are restricted to the content and scope of the Canons of Judicial Ethics and legal authority interpreting those Canons, and the fact situation on which an opinion is based may be affected by other laws or regulations. Persons contacting the Judicial Ethics Committee are strongly encouraged to seek counsel of their own choosing to determine any unintended legal consequences of any opinion given by the Committee or some of its members.

Sincerely,



Arnold Taylor, Chairman
The Ethics Committee of the Kentucky Judiciary

cc: Donald H. Combs, Esq.
The Honorable Laurance B. VanMeter, Judge
The Honorable Jean Chenault Logue, Judge
The Honorable Jeffrey Scott Lawless, Judge
Jean Collier, Esq.