

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 92 – 7

December 11, 1992

RE: Retroactive Effect of Newly-enacted Executive Branch Code of Ethics

Your request dated June 18, 1992, to the Attorney General for an opinion regarding the retroactive effect of the Executive Branch Code of Ethics has been referred to the Executive Branch Ethics Commission ("the Commission"). Accordingly, at its November 23 meeting, the Commission issued the following advisory opinion.

The relevant facts are as follows: "John Doe" is a former member of the Worker's Compensation Board ("the Board"), whose term expired on May 1, 1992. Mr. Doe currently represents various parties in worker's compensation claims pending before the Board. However, he had no direct involvement in these claims or knowledge of such claims during his tenure on the Board.

In responding to your requests, three issues must be addressed. First, does the Executive Branch Code of Ethics codified in KRS Chapter 11A.001 et seq. apply to Mr. Doe, whose public service ended prior to the effective date of the Code's effective date? Second, how does KRS 11A.040(8) apply to Mr. Doe, and particularly does it serve as a blanket prohibition barring representation before the agency where he was employed, for a period of one year? Third, how does KRS 11A.040(6) apply to Mr. Doe?

KRS 11A et seq. became effective on July 15, 1992, two and one-half months after Mr. Doe's term on the Board expired.

The Commission concludes that KRS 11A et seq. applies to Mr. Doe, despite his leaving office prior to the effective date of the statute. Section (6) expressly includes "former" public servants in its application. Although one might rely upon the long-standing rule that no statute can be construed to be retroactive unless it is expressly declared to be so, the Commission notes that the Legislature expressly referred to former public servants. It should also be noted the retroactive reach of the statute pertains to former public servants, not former conduct. In other words, the statute applies to proscribed conduct "after" the statute's effective date, notwithstanding that the public servant may have terminated his position before the statute's effective date.

Regarding the second issue, KRS 11A.040(8) states:

A former public servant shall not represent a person in a matter before a state agency in which the former public servant was directly involved, for a period of one (1) year after the latter of:

- a) The date of leaving office or termination of employment; or
- b) The date the term of office expires to which the public servant was elected.

The Commission concludes that KRS 11A.040(8) does not serve as a blanket prohibition and that Mr. Doe may immediately represent clients in legal matters before his former agency, provided that for a period of one year after leaving office such representation does not pertain to matters in which he was directly involved while he was a public servant. Your letter states that Mr. Doe's "term expired May 1, 1992." If that is the same date on which he left office, then the prohibition of KRS 11A.040(8) would continue through April 30, 1993.

Regarding the third issue, KRS 11A.040(6) states:

No present or former public servant shall, within six (6) months following termination of his office or employment, accept employment, compensation or other economic benefit from any person or business that contracts or does business with the state in matters in which he was directly involved during his tenure. This provision shall not prohibit an individual from returning to the same business, firm, occupation, or profession in which he was involved prior to taking office or beginning his term of employment, provided, that, for a period of six (6) months, he personally refrains from working on any matter in which he was directly involved in state government. This subsection shall not prohibit the performance of ministerial functions including, but not limited to, filing tax returns, filing applications for permits or licenses, or filing incorporation papers.

The Commission notes that this issue is moot as to Mr. Doe because more than six months has elapsed since Mr. Doe's term expired May 1, 1992. However, because this issue needs clarification, the Commission will address it.

Regarding KRS 11A.040(6), if Mr. Doe were directly involved in matters "xyz" while he was a public servant, then for six months following the end of his public service, he would have been barred from accepting compensation or employment from a person or business that transacts business with the state in matters xyz. The prohibition in paragraph (6) would have applied even if Mr. Doe had agreed with his new employer that he would not work for it in matters xyz for the first six months. If the company does not engage in matters xyz with the state, Mr. Doe could have accepted employment from it immediately following his public service.

An exception to the above prohibition would have allowed Mr. Doe to "return" to the same business, firm occupation, or profession in which he was involved prior to his public service, even if his employer transacts business with the state in matters xyz. However, for a period of six months following his public service, Mr. Doe would have been required personally to refrain from working on any matter in which he was directly involved in state government, including xyz.