

EXECUTIVE BRANCH ETHICS COMMISSION

**ADVISORY OPINION 96-9**

March 19, 1996

RE: Must employee recuse himself from conferences involving clients of a law firm whose members are customers of employee's private business?

DECISION: Yes.

This opinion is in response to your January 19, 1995 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the February 6 and March 19, 1996, meetings of the Commission, and the following opinion is issued.

You state the relevant facts as follows. You are employed by the Natural Resources and Environmental Protection Cabinet as an Assessment Conference Officer within the Office of Administrative Hearings. In your state position, you conduct informal conferences requested by coal companies after penalties are assessed on a company by the Division of Field Services in the Department of Surface Mining. These conferences allow a company to present facts which it feels would justify lowering or dismissing the civil penalties assessed. Usually, the Cabinet does not send an attorney to the conferences, and, although companies may be represented by counsel, few are represented. Following the conference, you issue a conference officer's report and recommendation, which either affirms, raises, lowers, or dismisses the penalty. A company may then file exceptions to this report and request a formal administrative hearing before a Cabinet administrative hearing officer. You work in the same offices as these administrative hearing officers and their support personnel.

You have started a closely-held corporation, owned by yourself and your wife, which takes clients bass fishing for a set rate. Among the persons who took the first trip were two partners in a law firm. This law firm represents clients before the Cabinet, although neither of the two partners has represented a client before the Cabinet, and none of the attorneys in the firm have ever appeared for a client at a penalty assessment conference at which you presided. According to the General Counsel of your Cabinet, members of the partners' law firm represent entities regulated by the Cabinet and appear before administrative hearing officers, who are your coworkers.

Additionally, you state that you have a personal friend, a senior partner in a law firm, who appears before the Cabinet.

You ask whether there is any breach of the Executive Branch Code of Ethics resulting from your operation of the bass fishing business and whether you must excuse yourself from conducting conferences at which an attorney for the law firm would appear on behalf of a client or from conducting conferences for all clients of the law firm. Additionally, you ask whether you must excuse yourself from conferences at which your personal friend from the law firm would appear on behalf of a client.

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KRS 11A.020(1)(a) and (c) provide:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

...

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family.

You are required, as part of your official duty, to make decisions that affect the clients of the firm, whose members you seek as customers for your fishing trips. Although the partners of the firm who went on the fishing trip have not personally appeared in front of you, their clients do appear before you at penalty assessment conferences. In addition, your co-workers are administrative hearing officers who review decisions relating to these clients. Others members of the firm of which your customers are partners appear before these officers in administrative hearings.

The Commission believes that you are in a position to influence agency decisions with relation to the firm's clients. Thus, seeking customers for your fishing trip who are partners in the firm would be a substantial conflict between your duties in your capacity as conference officer and your interest in your private business. Therefore, you should abstain from any decisions, as part of your official duty, with regard to clients of the firm, if you continue to take any members of that firm on fishing trips in connection with private business. Such abstention should be disclosed in writing to your supervisor as required by KRS 11A.020(3):

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

The Commission believes if you immediately and permanently cease your outside business activity with any members of the law firm, you will not be precluded from conducting assessment conferences involving clients of the firm whose partners have previously been customers of your private business. In addition, you are not precluded from conducting penalty

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assessment conferences for clients of the firm if the firm's representation of the client is not related to a penalty assessment conference or an administrative hearing relating to a penalty assessment.

The Commission recommends that you review the considerations set forth in KRS 11A.030 in determining whether you should abstain from conducting an assessment conference at which your personal friend would appear on behalf of a client.

11A.030 Considerations in determination to abstain from action or official decision -- Advisory opinion.

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

(1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;

(2) The effect of his participation on public confidence in the integrity of the executive branch;

(3) Whether his participation is likely to have any significant effect on the disposition of the matter;

(4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or

(5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

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BY: Lynda M. Thomas, Vice Chair