

Advisory Opinion 1985-7

The Taxation and Revenue Department has requested an advisory opinion concerning a proposal to contract with three or four attorneys, who practice before the Department, to serve as hearing officers. According to the Department, the attorneys would be under continuing contracts, to serve as hearing officers when the Department's internal officer is unable to serve.

The Department indicates that it has designed a procedure to eliminate direct conflicts of interest. The question posed to the committee is whether this proposal creates any appearance of impropriety.

The committee finds that there is an appearance of impropriety. "[O]ne who assumes to act as judge on one day and as advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system." A.B.A. Formal Opinion 161 (May 5, 1936). Although direct conflicts may be avoided by the hearing officers, there is no way to avoid the untoward and inevitable impression created by attorneys who advocate and adjudicate in the same forum.

Hearing officers for the Department are not judges, however, they would clearly be fulfilling judicial roles in a quasi-judicial administrative forum. Because of this, it is appropriate to look at standards for judicial conduct, when determining whether the proposed arrangement might appear improper. See, A.B.A. Model

that reason is less than that of a full-time judge; "a judge pro-tempore is a person who is appointed to act temporarily as a judge. A.B.A. Model Code of Judicial Conduct, Compliance Code Sections A, B. A continuous, although part-time, relationship would preclude the attorneys from representing clients before the Department: "if there is a continuing appointment with more or less permanent tenure of office, although subject to the pleasure of the judge or..... [the agency] it is improper for the appointee to practice any case in the court over which he may preside, and until a reasonable time after he has severed his official connection with that court." *In re Kenton County Bar Ass'n.*, 314 KY 664, 236 S.W.2d 906 (1951). To avoid appearances of impropriety, a part-time judge "should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves . . ." A.B.A. Model Code of Judicial Conduct, *supra*, Compliance Code Section A(2).

To the public, it would seem that an attorney who shares the responsibility for hearing tax cases with two or three others, might be capable of gaining some influence as a result of that position. Such would be unavoidable, despite the absence of any direct conflict or improper motive. Lawyers are prohibited from stating or implying that they are "able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." Code of Professional Responsible Conduct, Canon 9, D.R. 9-101(C). The implications of improper influence are so inescapable that judges are precluded from appearing before their forums; the committee believes that administrative hearing officer should likewise be precluded.