KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-166
Issued: May 1977

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 a law firm properly pay its lay employees periodic bonuses computed at predetermined rates as percentages of the firm's gross or net income?

Answer: No.

References: DR 3-102(A); ABA old Canon of Professional Ethics 34; ABA Formal Opinion 303 (1961), 311 (1964); ABA Informal Opinion 792 (1964)

OPINION

DR 3-102(A) provides that a lawyer or law firm may not share legal fees with a non-lawyer as did old ABA Canon of Professional Ethics 34. In ABA Formal Opinion 303 (1961), the ABA Standing Committee on Legal Ethics decided that a law firm could not permit lay employees to participate in its profit-sharing plan because old Canon 34 forbade lawyers to base the compensation of their lay employees on a percentage of net profit. Obviously, if a mere computation of an employee's compensation with reference to net profits is fee-splitting, computation of his compensation with reference to gross receipts is even more clearly fee-splitting. Presumably, in a firm which permitted lay employees to participate in its profit-sharing plan, it is only the lay employee's deferred compensation which would be computed with reference to net profits. Normally his principal compensation would not be. Therefore ABA Formal Opinion 303 condemns computation of lay employees' compensation with reference to gross receipts or net profits, even only in part.

In ABA Informal Opinion 792 (1964), the Committee condemned payment of bonuses to lay employees based on a percentage of gross receipts or net profits, on the reasoning of ABA Formal Opinion 303. Given the reasoning of ABA Formal Opinion 303, Informal Opinion 792 is correct.

In Formal Opinion 311 (1964), the Committee decided that lay employees might participate in a retirement plan under which the employer's contributions were payable only out of net profits, providing each lay employee's share of employer contributions was computed with respect to his other compensation not itself dependent on net profits. Formal Opinion 311 is consistent with the general principles of Formal Opinion 303 and Informal Opinion 792. It appears

that in 1961 the Committee was simply unacquainted with the provisions of almost all profit-sharing plans.

When the Code of Professional Responsibility was adopted by the then Kentucky Court of Appeals, DR 3-102(A)(3) was included. It provides that "[a] lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." Since the exception of DR 3-102(A)(3) is specifically limited to profit-sharing plans, it leaves standing the reasoning of Formal Opinion 303 and the specific decision of Informal Opinion 792. We therefore conclude that a law firm may not pay its lay employees periodic bonuses computed at predetermined rates as percentages of the firm's gross or net income.

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.