

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-373

Issued: November 1994

The Rules of Professional Conduct are amended periodically. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: A Law Firm and the Jefferson County Commonwealth Attorney's Office wish to implement a Program pursuant to which a newly admitted lawyer would be provisionally or conditionally hired by the Firm, but before being identified with the Firm and before performing any legal services on its behalf, would serve a two-year term as an employee of the Commonwealth Attorney. The new prosecutor would be paid by the Commonwealth Attorney at the going rate, but the Firm would contribute an additional \$10,000 that would be available for a salary supplement. The Firm and the Commonwealth Attorney ask (1) whether the payment of the salary supplement poses any ethical problems; (2) whether members of the Firm can continue to practice criminal (defense) law; and (3) whether the firm's client's must be advised of the "relationship"?

Answer: (1) Yes. (2) No. (3) Need not be answered.

References: Seth v. State, 592 A.2d 436 (Del. 1991); Massachusetts Op. 91-2 (1991); KRS 15.740; KBA E-275 (1983); E-211 (1979).

OPINION

In a few states programs have been approved allowing a local firm to "loan" one or more associates or junior partners to the prosecutor's office without that "loan" resulting in disqualification of other firm members from defending in other criminal cases. Such programs are popular because the law firm gets a training program and the public gets a subsidized, and presumably high quality, temporary employee. One way or the other, these programs involve some sort of payment of subsidy to the "loaned" employee or to the prosecutor's office.

Such payments or subsidies present no ethical problem in the abstract. The difficulties, if any, arise from conflicts of interest, possible threats to client confidentiality, the possibility of adverse public reaction to an appearance of impropriety, and the need for informed client consent.

KRS 15.740 clearly states that "the commonwealth's attorney and county attorney shall not act as defense counsel in cases in which he is a party." See also KBA E-211 (1979). Partners and associates of an assistant commonwealth's attorney are likewise prohibited from acting as defense counsel. See KBA E-275 (1983).

If a law firm wished to conditionally hire a new lawyer who will work for the prosecutor's office before coming to the Firm it may do so. It may provide whatever financial or "time-in grade" incentive it wishes to provide if and when the lawyer actually joins the firm. It does not seem necessary or desirable for the Committee to approve a program that invites a firm practicing criminal (defense) cases to be in the position of providing funds to the prosecutor's office, whether or not the firm's clients consent, and whether or not there may be some incidental benefit to the public. See KBA E-275 (1983).

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.