

**KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-38**

Issued: April 1970

*This opinion was decided under the Canons of Professional Ethics, which were in effect from 1946 to 1971. Lawyers should consult the most recent version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.*

**Question:** An attorney accepting a governmental position must use caution in notifying clients of his inability to represent them, and he may be a member of a firm provided his name is not used for advertising.

**References:** Canon 6, 27, 33, 36, 37

**OPINION**

Upon being appointed to a governmental position an attorney proposes to transfer and turn over all his files and library to a law firm for the use and benefit of his clients. The clients will be given notice of the arrangement, they will not be induced to engage the firm, and they may obtain their files from the firm if they desire.

The attorney proposes to become “of counsel” to the firm, there is to be no division of fees for services rendered by the firm or any of its members, but for services rendered the attorney is to be paid a retainer of \$100 a month for a period of two years.

The agreement, in writing, concludes with a statement to the effect that all aspects of the agreement shall be governed by the Canons of Ethics of the American Bar Association and executed in the best interest of the attorney’s clients.

Since the foregoing arrangement may be affected by a number of canons, their application will be discussed in order.

At the outset, Canon 37 may materially affect the agreement unless some direct effort is made by the attorney to preserve such confidences he may have obtained during the attorney-client relationship. While the attorney proposes to fully advise his clients by letter it is the opinion of this Committee that the attorney should retain his files until such time as he may be advised by his clients. in writing, that they may be turned over to the firm. A lawyer’s duty to preserve the confidences of his client extends beyond the term of his employment and should never be disposed in any manner calculated to be of an advantage to the lawyer or a disadvantage to the client.

Under Canon 6 it is the duty of the attorney in this instance to disclose to his clients all the circumstances connected with the agreement with the firm, especially such

information as might influence the clients in the selection of counsel within the firm or out of it. In addition, the attorney must clearly advise his clients of his new position requiring his undivided fidelity in the event of a conflict of interest. He must likewise advise his firm that it cannot undertake to represent any client whose interest may be in conflict with the department wherein the attorney is employed. See ABA Opinions 128 and 192.

While the attorney is not to be a member of the firm the opinions under Canon 27 would permit him to do so provided that he or the firm not use his name as a means of advertising or hold itself out as being in some preferred position by reason of the attorney's "of counsel" connection.

While Canon 33 deals mainly with the formation of partnerships and the attorney here is only "of counsel," opinions cited under this canon clearly point out that members of the firm could not accept employment if the attorney himself could not. ABA Opinion 72.

Finally, the attorney should be advised to observe Canon 36 upon termination of his government service. He should not, after his retirement, accept employment in connection with any matter which he has passed upon while in such service.

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***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.*