

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-165
Issued: March 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 part-time public defender, appointed to represent a needy person pursuant to KRS Chapter 31, privately charge his client a fee for services rendered pursuant to his appointment?

Answer: No.

References: KRS 31.070, 31.120(3), 31.25, DR 1-102(A); Opinion KBA E-6 (1962), E-76 (1973)

OPINION

DR 1-102(A)(4) denounces lawyer conduct which involves dishonesty, fraud, deceit, or misrepresentation. In Opinion KBA E-76 (1973), we decided that a county attorney might not properly charge his client a fee for services where he had a statutory duty to perform the same services in the name of the Commonwealth for the use and benefit of his client, without charge to his client. We cited DR 1-102(A)(4). The same principle applies to an appointed part-time public defender. When the court has determined that a criminal defendant is a needy person, he is entitled to free representation unless and until the court makes a contrary redetermination.

By definition, an appointed public defender's client has been found to be a needy person by the court. Following his appointment, the public defender may find that his client is in fact able to pay an attorney fee. That circumstance does not justify the public defender in charging him by private agreement, even if the public defender reduces his claim under KRS 31.070 by the amount his client agrees to pay. KRS Chapter 31 provides for the case that a person found to be needy will subsequently be found to be able to pay an attorney fee. If the public defender has been paid pursuant to KRS 31.070, he obviously may not collect an additional fee from his client by private agreement, see Opinion KBA E-6 (1962). If he has not been paid pursuant to KRS 31.070, the court may order his client to pay a fee or partial fee, KRS 31.120(3); but that is a matter for the court, not the public defender, to decide.

At its first extraordinary session of 1976, the General Assembly enacted Senate Bill 23, Section 2 of which provides:

31.250 Acceptance fees by public defender prohibited

(1) No attorney participating in a public defender plan shall accept any fees for the representation of any needy person as defined in this chapter from that person or any one for his benefit and the fees for representation of that person shall be limited to the fees provided in this chapter

(2) Any attorney participating in a public defender plan who receives or attempts to collect a fee from a needy person as prohibited by subsection (1) above shall be guilty of a Class D Felony.

By reason of the foregoing statute, the conduct described in the question would violate DR - 1-102(A). However, we wish to make clear our opinion that it would violate DR 1-102(A)(4) quite aside from the statute.

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.