

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-326
Issued: September 1987

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: Does a clause in partnership agreement tying a partner's right to certain payments upon withdrawal from his or her firm to a covenant not to compete within a geographical area violate DR 2-108(A)?

Answer: Yes.

References: DR 2-108(A); ABA/BNA Law. Man. Prof. Con. 51:1202, 1203-04; Gray v. Martin, 63 Or.App. 173, 663 P.2d 1285 (1983).

OPINION

A member of the Association states that a partnership agreement allows a withdrawing partner to receive (1) his or her capital account; (2) his or her salary to the date of withdrawal; and (3) his or her share of the profits to the date of withdrawal. Moreover, an additional amount based on a percentage of the withdrawing partner's year's income is also payable conditioned on the withdrawing partner's not practicing in Kentucky for two years after withdrawal.

Disciplinary Rule 2-108(A) provides that a "lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits". It is obvious from the structure of this provision that not every termination of or withdrawal from a relationship can be treated as a retirement. Accordingly, it would appear that the offering of inducements or the conditioning of benefits on the basis of compliance with a non-compete covenant would be in conflict with the disciplinary rules. Grey v. Martin, 663 P.2d 1285 (Or.App. 1983).

Since this request for an opinion involves the requestor's own conduct, as well as that of his or her firm, and involves his or her own future conduct as well as past conduct, it is within our jurisdiction. On the other hand, we decline to issue an opinion regarding the enforceability of the provision, or any other opinion regarding the rights of the parties

under the agreement. Our jurisdiction does not extend to answering “questions of law”, and it is likely that the subject matter of this request is or will be the subject of litigation.

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.