

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-391

Issued: July 1996

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.7, which was amended. 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.

The Committee has received a number of questions regarding the limitations imposed by the Rules of Professional Conduct on lawyer assistance to charitable organizations in their fund raising activities, and with regard to a lawyer providing estate planning services to donors of charitable organizations.

Question 1: May a lawyer enter into an agreement with a charitable organization pursuant to which the lawyer will charge a reduced fee to the organization or the organization's member for estate planning services, conditioned on a bequest to the organization?

Answer: No.

Question 2: May a lawyer agree to provide *pro bono* wills or other estate planning services for the members of a church or other charitable organization?

Answer: Qualified yes.

Question 3: If a lawyer serves on a charitable organization's "planned giving committee" which offers estate planning seminars to potential donors, may the lawyer later accept employment from a client who attended the seminar?

Answer: Qualified yes.

Question 4: If a donor has *already decided* to give a bequest to a charity, but wants the charity to recommend a lawyer to provide the legal services

necessary to effectuate the gift or bequest and/or pay any lawyer fees associated with the making of the gift or bequest, may a lawyer accept such representation?

Answer: Qualified yes.

References: Indiana Op. 8 of 1986; (lawyer may not participate in a program where charity or its members are charged a reduced fee for the preparation of a will); Nevada Formal Op. 5 (June 16, 1987) (lawyer may not charge reduced legal fees for estate planning services upon condition that savings be paid to charity); New York City Op. 81-69 (estate planning services may not be conditioned on a gift or bequest to the charity); New York County Op. 656 (1980) (lawyer may not participate in a church sponsored program to write wills for free upon condition of will containing gift to church); compare: Oregon Formal Op. 1991-116 (lawyer who represents charity and serves on its Board of Directors may represent donor who desires to create charitable remainder trust and prepare will leaving bequest to donor); and Philadelphia Inquiry 91-34 (lawyer may, on his own, advertise that he will prepare free "living will" for anyone who has [already] given a gift to a particular charity); KBA E-293 (1984); ABA Informal Opn. 1288.

OPINION

Any agreement between a charitable organization and a lawyer to provide services for its members and/or benefactors must comply with the provisions of the Kentucky Rules of Professional Conduct prohibiting third-party solicitation. Specifically Rule 7.20(2) prohibits any lawyer from giving "anything of value to a person for recommending the lawyer's services." By offering services at a reduced fee or by conditioning services on a gift or bequest results in the lawyer giving the organization something of value as consideration for offering legal services. "Although in form it is the charitable organization which solicits members of the public in connection with the preparation of their wills, in substance it is the lawyer who, by participating in the plan, offers his professional services and solicits the employment." See New York County Opinion 656 (November 1980). Consequently, the offering or recommendation of services may not be conditioned on a gift or bequest to the charitable organization. However, ethical considerations do not prevent a lawyer from offering services on a pro bono basis to members of the organization.

With regard to Questions 2, 3, and 4, in each instance the lawyer must evaluate the relationship between the lawyer and the charity, the relationship between the donor client and the charity, and the relationship between the lawyer and the client. This evaluation must involve an analysis of the potential for a conflict of interest, and the resolution of such conflicts. Agreements between a lawyer and a charitable organization for the recommendation of services

or for providing services to members and benefactors of the charity is fraught with the possibility of conflict of interest. However, a blanket prohibition of such arrangements is not necessary. Instead the lawyer must evaluate each relationship on a client by client basis as discussed herein. Rule 1.7(b). The client may consent to any possible conflicts of interest after consultation.¹ Rule 1.7(b)(2). However, if the lawyer is unable to reasonably conclude that the representation will not be adversely affected by the relationship with the charity then the client cannot be asked to consent to the representation.

A lawyer must, at all times, ensure that the lawyer's professional judgment is not compromised by influences outside the lawyer-client relationship. A situation where the lawyer's independent judgment may be compromised could likely arise in an arrangement which allows for payment of the lawyer's estate planning services from funds of the charitable organization. Rule 1.8(f) provides, in effect, that a lawyer may accept payment from a third person as long as there is no interference with the lawyer's professional judgment and as long as the client consents after consultation.² The ABA Ethics Committee has expressed concern that such a representation may result in a reluctance on the part of the lawyer to give independent advice to a donor client without seeming disloyal to the organization. *See* ABA Informal Op. 1288. However, we are of the view that if the decision to donate to the charitable organization is a result of the donor's independent decision making process, and the lawyer is satisfied that such decision is the decision of the donor free of undue or inappropriate influence of the charitable organization, then the lawyer may proceed with the transaction. In coming to a reasoned decision the lawyer must be satisfied that the donor has the economic capacity to make the intended gift, the competency to honor and understand the transaction, and its affect on the donor and the donor's family who are natural objects of the donor's bounty. It is preferable that the donor's commitment to the charity be in writing.

The lawyer must also ensure that the client's confidentiality is maintained as required by Rule 1.6. Rule 1.6 prohibits a lawyer from revealing information concerning the lawyer-client relationship unless the client consents after consultation. Consequently an agreement that allows a lawyer to provide services only if a gift or bequest is made would violate the obligation of

¹The Model Rules of Professional Conduct define "consult" or "consultation" as denoting "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." A lawyer is obligated to disclose to the client the existence of the conflict, that multiple representation is sought, and then disclose the implications thereof, including its risks and *advantages*. In this regard pages 125 through 127 of the American Bar Association's text, *Annotated Model Rules of Professional Conduct*, Second Edition, (1992) contain numerous citations and commentary on this issue of client "consultation," and is suggested reading for a further understanding of the requirements for and the meaning of "consultation." This Committee, as a matter of course, recommends that all communications between a lawyer and the client, regarding questions of conflict, be in writing, and that the client's consent be in writing.

² Also, see Comment 9 to Rule 1.7 which provides that "A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client.".... It is preferable that the donor's commitment to the charity be in writing.

confidentiality. However this obligation should not affect the situation where the benefactor notifies the charity of an intent to provide a gift or bequest and requests a recommendation or asks the charity to provide the services of a lawyer to effectuate the gift.

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.