

**KENTUCKY BAR ASSOCIATION**

**Ethics Opinion KBA E-399**

Issued: May 1997

*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.*

**Question:** When law firms represent adverse parties in a matter, may a lawyer in one of the law firms negotiate for employment with the other law firm? If so must disclosure of the fact of the negotiations be made to the firms' client who is involved in the adverse representation?

**Answer:** If there is an appearance of side-switching by a lawyer who is actually working on the case, the negotiations should not be initiated without the client's consent. If the lawyer is involved in the case or has actual knowledge of protected client information within the meaning of KRPC 1.9 and 1.10, then the lawyer should not negotiate for employment with the law firm representing the adverse party without the client's consent. If the lawyer seeking employment is not involved in the case, the negotiations are not necessarily violative of the Rules, but disclosure to the firm's client may be appropriate and prudent in specific cases.

**References:** KRPC 1.6, 1.7(b), 1.9, 1.10, 1.11(c)(2) and 1.12(b); KRPC 5.1 and 5.2; KBA E-354 (1993); ABA Formal Op. 96-400 (1996) (Job Negotiations With Adverse Firm Or Party).

**OPINION**

KRPC 1.11 and 1.12 contain per se rules for the former government lawyer and for the former judge or arbitrator, which provide that if the former government lawyer or the judge or arbitrator worked personally or substantially on a matter while in government or judicial service, then the former government lawyer, or judge or arbitrator may not negotiate for employment with any person who is involved as a party or attorney in that matter. The KRPC contain no similar, explicit rule relating to lawyers in private practice.

On the other hand, if the lawyer who wishes to change jobs is actually involved in the representation of one of the adverse clients or has actual knowledge of information protected by Rules 1.6 and 1.9(b), the negotiations could suggest a violation of KRPC 1.16 and 1.9, and even lead to the imputed disqualification of the negotiating law firm. See Comment 13 to KRPC 1.10. Compare ABA Formal Op. 96-400 (1996). On the efficacy of screening see KBA E-354 (1993). We also note that KRPC 1.7(b) provides that - "A lawyer shall not represent a client if the

representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

Accordingly, we believe that the lawyer who is actually involved in the representation of one of the adverse clients or who has actual knowledge of information protected by Rules 1.6 and 1.9(b) should not participate in such negotiations without the consent of the lawyer's client obtained after appropriate consultation.

If the lawyer is not involved in the matter and has no actual knowledge of information protected by Rules 1.6 and 1.9(b), there may still be an arguable question of professional duty, depending on the size of the firms involved, the importance of the matter, or other circumstances. There is no per se rule requiring notification of the client, or disclosure and consent in this context. However, we believe that if the negotiations would lead to an arguable question of professional duty, the lawyer seeking employment should consider consulting with other member of his or her firm. See KRPC 5.1 and 5.2.

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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.*