

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-283
Issued: January 1984

Question 1: May an attorney directly or indirectly solicit funds for a defendant in a criminal case to pay for costs as well as the lawyer's legal services?

Answer 1: Qualified yes.

Question 2: May an attorney representing a criminal defendant participate directly or indirectly in such fund raising efforts to pay for costs as well as the lawyer's legal services by requesting others to solicit the necessary funds?

Answer 2: Qualified yes.

References: KRS 242.230; EC 2-17, 2-17, 2-19; DR 2-106; Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691; Goldfarb v. Virginia State Bar, 421 U.S. 733, 44 L.Ed. 2d 572, 95 S.Ct. 2004; In re Primus, 98 S.Ct. 1893 (1978); NAACP v. Button, 371 U.S. 415, 9 L.Ed. 2d 405, 83 S.Ct. 328; KBA v. Stewart, Ky., 588 S.W.2d 833; SCR 3.135; DR 3-102; DR 7-102(A)(2).

OPINION

A duly licensed and regularly practicing member of the Kentucky Bar Association requested an opinion on the following facts:

I represent a man and wife charged with bootlegging (KRS 242.230). In anticipation of a conviction, I am creating a record for appeal on broad issues reaching the magnitude of both the Kentucky and United States Constitutions, with potential significant consequences for a multitude of people. My clients cannot afford the legal services for such an appeal. May I, as their attorney, solicit funds for their defense? For their appeal? If so (in either case) may I so solicit by advertisement? By appeal through the news media? If I may not, may another attorney not otherwise connected with the case do so?

An attorney has every right to charge reasonable compensation for the services proposed to be rendered and the necessary costs necessary to perform the work. (EC 2-17, 2-18, 2-19, DR 2-106). The lawyer has every right to state the fee and the terms of the lawyer's employment in the presence of the proposed client, and if the prospective client brings members of the family or friends with him/her, the lawyer has the right to state the terms in the presence of these other persons. Assuming the client is indigent, the client would have every right to use any lawful means to raise money for the defense in a criminal action including advertising for funds, soliciting funds and even standing on the corner with a bucket similar to one used by the Salvation Army. The client, of course, would not have any right to engage in a fraud or hoax.

Lawyers are frequently employed by neighborhood or area groups to resist zoning proposals, annexations or to incorporate cities. The fees involved would be beyond the means of an individual, so the people get together, collectively select a committee to secure a lawyer. The lawyer selected states the fee will be “x”, whereupon the entire group is convened, the hat is passed and the necessary funds are raised. Any lawyer who has been in the general practice of law for any period of time has undoubtedly been involved in this sort of process, and there is nothing unethical or wrong about it. Often the lawyer appears before the entire group, answers questions and tells the group what the lawyer proposes to do for the group in return for the stated fee, and participates directly in the solicitation of money to pay the legal fee and the costs of the work. Frequently a dodger, or written statement, is circulated among the members of the group with the lawyers knowledge and appropriation and the paper contains a request for money to be used for attorney’s fees. Forbidding this sort of practice would deprive the people of adequate legal services for a reasonable price.

When the Supreme Court of the United States decided Bates v. State Bar of Arizona, 433 U.S. 350, 53 L.Ed. 2d 810, 97 S.Ct. 2691, the practice of law became a new ball game. Canons and disciplinary rules prohibiting some solicitation and more advertising became seriously compromised. Bates said a lawyer has a First Amendment right to advertise although the states could adopt reasonable regulations. A casual awareness of the yellow pages in the phone books and a cursory observance of lawyer television ads, all in accord with KBA rules (see SCR 3.135), causes one to ponder whether or not there is any rule against advertising/solicitation. This is hard medicine for old timers to swallow. Goldfarb v. Virginia State Bar, 421 U.S. 733, 44 L.Ed. 2d 572, 95 S.Ct. 2004, says that a state may no longer prescribe a minimum fee schedule for lawyers. The Supreme Court of the United States in In re Primus, 98 S.Ct. 1893 (1978), and NAACP v. Button, 371 U.S. 415, 9 L.Ed. 2d 405, 83 S.Ct. 328, vindicated the right of public service lawyer organizational to directly solicit. KBA v. Stewart, Ky., 588 S.W.2d 833, upheld the right of lawyers to send a fee schedule to prospective real estate clients.

The Bar and the Supreme Court of Kentucky condemns direct solicitation of lawyers for professional remuneration.

Solicitation and advertising are closely intertwined here. It can be cogently advanced that the purpose of the proposal might be to secure clients and employment rather than funds for a particular client or unfairly advertise a lawyer’s prowess and skill.

There are some practical problems involved in the proposed course of conduct.

1. There is no monitoring process available to determine whether the amount of the fee to be sought is a reasonable one and not excessive for the services the lawyer proposes to give. DR 2-106.
2. If the conduct is permitted then the lawyer might have the right to employ a professional fund raising organization similar to the ones many charities use, and this could be construed as dividing a legal fee with a lay person, which would be contrary to the Code DR 3-102.
3. Any portion of the fee secured should be remitted in the event the services were not fully performed.

4. This sort of conduct should not be limited to a “cause celebre”.
5. The lawyer must be cognizant of DR 7-102(A)(2) as follows:

Representing a client within the bounds of the law.

(A) In his representation of a client, a lawyer shall not: (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such a claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

Because the proposal does not violate any rule of the Supreme Court of Kentucky, any canon of professional responsibility, or any disciplinary rule, we conclude that the lawyer’s proposed conduct would not violate any rule of professional conduct. We qualify this by returning once again to the practical consideration of stating the total fee needed and remission of an unearned portion of the fee secured by method and point out that failure to adhere to these warnings could result in a bona fide charge of unprofessional conduct, i.e., excessive fees, dividing a fee with a lay person, failure to make the terms of employ clear. Also, the lawyer should consider and comply with SCR 3.35 (now Rules 7.01-7.60) if applicable.

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). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”