

# ADVISORY ETHICS OPINION 93-06

## SYNOPSIS:

A law firm may make payments over time to a partner and member who is leaving the firm to join the local prosecutor's office when such payments are part of a bona fide, arms-length separation agreement and bear no relation to his or her action as a prosecutor. This same conclusion applies regardless of whether the lawyers are organized as a corporation, partnership, or some combination of the two.

## FACTS:

Partner Z of XYZ, P.C. (and a partnership) law firm is leaving to take a job with the local prosecutor. XYZ has represented and will represent criminal defendants who have been charged by the local prosecutor.

XYZ is in the process of working out a separation agreement with partner Z. The *partnership* owns real estate of which Z will claim an equitable interest. Z will also claim some interest in the corporation.

XYZ would like to pay Z her separation payments over the course of two to three years. Z is concerned about DR 8-101(3) which precludes a lawyer holding public office from accepting "anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action" and DR 9-101 which addresses the avoidance of even the appearance of impropriety.

It would be a hardship for XYZ to payoff Z in a lump sum prior to Z joining the prosecutor's office. Z is amenable to a longer-term payout but is concerned about the ethical implications. All parties are curious as to whether Z's interest in the partnership, which involves only real estate, is distinguishable (for ethics purposes) from any equitable interest she may have in the professional corporation.

## DISCUSSION:

DR 2-107(B), in general, sanctions a law firm's payments to a former partner or associate pursuant to a separation or retirement agreement. There are some restrictions on such agreements, not raised here.<sup>1</sup> In this case, the XYZ law firm plans to pay partner Z, over time, for her interests in real estate held by the partnership and the professional corporation. So long as both types of payments are part of a bona fide separation agreement (which otherwise complies with the ethics and legal rules applicable to lawyers) and the amounts of the payments would be considered fair and reasonable in an arm's length transaction, which the facts presented imply, there is no violation of the Vermont Code of Professional Responsibility.

The requesting parties have raised DRs 8-101(3) and 9-101 as potential concerns. DR 8-101(3), quoted in relevant part above, is clearly inapplicable to the facts presented. The planned payments from the law firm to lawyer Z will be pursuant to a separation agreement and not to influence her actions as a prosecutor. A fair, written separation agreement should remove any future questions that may rise on this propriety of the firm's payments to lawyer Z. A third party appraisal of the assets for which lawyer Z is being compensated may also be considered if the parties want to add an extra level of protection.

The DR 9-101 concern is legitimate and the Committee's response can only be to advise compliance with the applicable rule. DR 9-101(C) provides that "a lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any . . . public official." At a minimum, this rule means that XYZ law firm cannot or imply that it can use its separation agreement with Lawyer Z to influence matters related to the prosecutor's office. Lawyer Z and the law firm will have to decide on a case-by-case basis in the future whether the Canon 5 disciplinary rules on conflicts of interest may apply.

Finally, the Committee takes great pleasure in satisfying the parties' curiosity on whether the type of entity in which a law firm operates makes a difference in applying the Code. The short answer is no. The Code expressly applies to lawyers and law firms; there is no sound distinction between law firms practicing as partnerships, corporations, or in any other form or combination of forms. Similarly, the Code applies to lawyers' and law firms' behavior, regardless of whether they are practicing law. The best known application of this principle was the discipline under the Code of lawyers involved in the "Watergate" incident -conduct which was a far cry from what is generally accepted as the practice of law. Thus, it makes no difference whether XYZ partnership only holds real estate; if X and y buyout Z's interests in that partnership to influence Z in her future role as a prosecutor or otherwise violate Code obligations, they are subject to discipline.

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<sup>1</sup> See Opinion 88-3.