

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-258
Issued: May 1982

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: May an attorney who is a member of the Board of Directors of a Legal Service Program represent a client in a case when the adverse party is represented by an attorney of the same Legal Service Program?

Answer: Qualified yes.

References: DR 5-105(D); Canon 5; ABA Formal Opinion 345; ABA Informal Opinion 1395; KBA E-242

OPINION

The question presented to the Committee was addressed by the ABA Committee on Ethics and Professional Responsibility in Informal Opinion 1395 (1977) and later reconsidered in Formal Opinion 345 (1979). However, the Kentucky Bar Association is not bound by opinions of the ABA.

In answering this question, the central consideration is the role of the Board of Directors of the Legal Service Program. A Board whose members directly participate in program client representation should be considered in a different light than a Board which is restricted solely to establishment of Board policy for the program, not the management of or direct participation in program client representation and whose rules insulate the staff from any influence of the Board with respect to individual cases. The former situation is analogous to situations contemplated by DR 5-105(D), which provides that partners or associates of a lawyer required to decline or withdraw from employment may not accept or continue that employment.

The question as to this situation was answered by this Committee in KBA E-242, which addressed the question of whether two public defenders in the same law office could ethically represent codefendants in a single criminal case. The Committee there concluded that it would be a conflict of interest. This conclusion is clear considering the nature of the Legal Service Program. If the program is one in which the Board members directly participate in program client representation then the Board member and a staff attorney would be in a situation analogous to that of two members of the same law office representing adverse parties, which is prohibited. Thus, in situations where the Board member directly participates in program client representation, it is

settled that a conflict of interest would exist if one program client was represented by the Board member and an adverse program client was represented by a staff attorney.

If on the other hand, Board members do not directly participate in the representation of program clients, a different situation exists. This is the situation addressed in ABA Formal Opinion 345. In that opinion, the ABA Committee concluded that the provisions of Canon 5 would not necessarily be violated by the representation by a Board member or his firm of a client involved in litigation with a client represented by counsel provided by a legal service program. In this situation, the program staff attorneys are the attorneys for the clients. The Board members do not represent program clients. Therefore, no attorney client relationship exists between the Board member and the program client, so the problem is not one of an attorney representing clients with conflicting interest (ABA Formal Opinion 345).

There are, however, problems with a Board member's representation of a client adverse to a program client, in such situations. The nature of the clientele of Legal Services Programs tends to be lower income groups. As such, these clients may tend to be submissive and to acquiesce in the representation, feeling they have no choice, but at the same time feeling concerned that they may not be getting independent representation. Thus, the possibility of an appearance of impropriety exists, even though no actual impropriety may exist (ABA Formal Opinion 345).

Accordingly, full disclosure of the situation should be made, and if in the course of representation it becomes apparent that the lawyer's independent judgment is being affected, he should withdraw.

Although problems may exist with a Board member in this situation, there are compelling reasons for allowing such representation. By doing so, Legal Service Programs benefit because active and experienced practitioners are able to serve on the Board. Otherwise, such practitioners would be forced to choose between service on a Board and representation of the clients. Also, in smaller communities it would be very difficult to secure qualified members for a Board who would not, at one time or another, represent a client adverse to a program client. Additionally, it is in the best interest of the indigent client to offer competent volunteer legal counsel.

Although this Committee did not feel that compelling reasons were presented in KBA E-242, it is the Committee's feeling that in situations where the Board members do not directly participate in the representation of program clients, the compelling need for available competent legal counsel outweighs any possible appearance of impropriety in cases where the Board member represents a client adverse to a client represented by an attorney of the same Legal Service Program.

The lawyers on both sides must be sensitive and alert to all ethical problems and if in the course of representation it becomes apparent that independent representation is not being afforded on both sides or one or other of the clients perceives that it is not afforded no matter what the reality then the Board lawyers should assist in change of counsel for the client.

In those situations where the firm of the Board member is large enough to provide a lawyer other than the Board member to represent a client who is in dispute with a client of the program, the Committee feels that this would be preferable to having the Board member directly involved in the presentation.

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.