

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-272
Issued: July 1983

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 a law school faculty member represent a party in a lawsuit (including a class action) when an opposing party is the state (or state official agency)?

Answer: Qualified yes.

References: Canon 4, 5, 7, and 9; EC 2-1, 2-16, 2-27, 2-28, 2-32, 9-2 and 9-12; DR 2-110, DR 5-105(A), 5-101, 5-105, DR 9-101 and 9-101(B); SCR 2.540; KBA E-200; ABA I.O. 1060; KRS 164.160 and 164.285.

OPINION

A law school faculty member who represents a client in an action against the state may raise two ethical issues: (1) if the faculty member teaches at a state institution, he or she might be representing both sides of a law suit (DR 5-105(A)); (2) the attorney/faculty member might be subject to pressure from state officials which would prevent the attorney from zealously and independently representing the client (Canon 7 and 5), or preserving the confidence of the client (Canon 4) or which would make it appear that the faculty member is acting with impropriety (Canon 9).

Faculty members and organizations associated with law schools may serve an important role in making available quality legal service (EC 2-1) even for unpopular clients (EC 2-27, 2-28) and the indigent (EC 2-16). It is not uncommon for faculty members to be sought out for special assistance in cases which are particularly unusual or complex. Such consultations can lead to the improvement of the legal system, the advancement of legal education and the representation of clients who otherwise might have difficulty securing adequate representations. Civil Rights and certain criminal cases may be particularly appropriate for participation by a law faculty member. For this reason, faculty members are, from time to time, sought for, or appointed to, difficult cases by judges, lawyers and bar associations.

It cannot be said that the typical full-time school faculty member is an attorney representing the state or a state agency in the same way a county attorney, Commonwealth Attorney or university attorney (attorney representing the legal interests of the university) represents the state or a state agency. The basis of this assertion is the necessity to address any appearance of impropriety that may arise from the participation of a law faculty member in his or her respective

college's clinical program(s) pursuant to Supreme Court Rule 2.540 with deference thereto, and in a manner consistent with the spirit of this opinion. The university or the state is not the client of the professor, therefore, the faculty member is not representing both sides of a legal dispute by representing a party who has interests adverse to the state. We assume, without deciding, that each of the Commonwealth's universities are separately and distinctly incorporated. See KRS 164.160, 164.285. Accordingly, there is no conflict of interest in one faculty member taking a case against another university within the state's higher education system. Thus, while it may be apparent that the university or the Commonwealth is not the client of the law faculty member, the appearance of impropriety within the scope and meaning of Canon 9 generally and EC 9-2 specifically may more acutely arise if the law faculty member chooses to participate in an action against his or her respective university. In such instances, the distance between the interests of one to the other is not sufficient to overcome "... Even the Appearance of Impropriety." DR 9-101. Nor is a faculty member generally a state employee within the meaning of DR 9-101(B) in that a faculty member ordinarily does not have substantial responsibility for representing the state or establishing state policy. Consistent with this rationale, it follows that it is likewise of little significance, in and of itself, that the law faculty member is paid by a check drawn by the Commonwealth. See KBA E-200. The ABA has noted the special nature of the "teaching bar" in their roles as faculty members. See ABA Informal Opinion 1060.

When a law faculty member represents a client opposing the state, his or her zealous or independent representation may theoretically be jeopardized by: pressure exerted by state officials on the faculty member (e.g., threatening to terminate the faculty position), potential economic loss to the university and association with students who may clerk for law firms representing the state in the matter (DR 5-101, 5-105). Generally the same objections could be raised to students participating in an action against a state agency in a law clinic under the student practice rule. Indeed many of these potential problems may exist when a faculty member represents a party with interests adverse to anyone who could influence the university.

The nature of universities eliminate many of these potential problems. Academic freedom and tenure, for example, should guarantee the independence of an attorney/faculty member. This should insulate a faculty member against inappropriate political pressure from state officials and university officers. Even a faculty member without tenure has the protection of academic freedom which would help assure independence. It is unlikely that any suit in which the faculty/attorney participates would directly and substantially affect funding for the faculty member's position. There are, of course, circumstances in which an attorney/faculty member should not represent a client. Ordinarily, a faculty member should not represent a client in suing the faculty member's own university. However, the law faculty member serves an important role within the university setting. As long as the university permits or encourages such service, such conduct is beneficial and allowable short of actual litigation. Once the representation (of an individual or group within the university setting) reaches the litigation stage of the Court of Justice, the faculty member should withdraw from the representation. The practice of full-time law faculty members is also limited by the ABA law school accreditation standards. (Standard 402.)

To avoid even the appearance of impropriety, however, where a faculty member is serving a counsel (or where a student serves under a student practice rule) whether or not the state is a party, the following principles and cautions should be observed:

1. the faculty member should inform the client of the faculty member's association with the law school (in the case of class actions this may require the use of reasonable alternatives to providing notice to all members of the class, see generally EC 9-12);
2. every effort should be made to remove any control of, and association with, the law school and the university; the university should play no role whatsoever in the case or the relationship between the faculty/attorney and the client;
3. any effort by an adverse party to affect the representation by the faculty/attorney by means of political or other pressure on or through the university or agency of the state would be highly inappropriate and unethical and should be reported by the faculty/attorney to the client, the bar association, and in the appropriate circumstances to the court;
4. should the faculty member perceive any conflict of interest, or threat to independent and zealous advocacy, he or she should withdraw from the case pursuant to EC 2-32 and DR 2-110; the client may discharge the attorney or a court may order the attorney's withdrawal if there is concern about a potential conflict;
5. the faculty/attorney should particularly avoid any discussion of the case with any student who might be clerking or otherwise working for any attorney representing an adverse party and should exercise extreme care to safeguard the privacy of the records of a client; the records of the client should not be maintained in an office at the law school if they might be observed by a potentially adverse party.

The fact that the university faculty member may receive compensation for representation of clients against the state or in another university does not change this opinion. We assume that the university, as well as the American Bar Association, places adequate controls upon members of the full-time law faculty engaging in the private practice of law. However, caution members of the university law school that they should not use the status of their position because the public might be misled. We believe the better practice is for the faculty member not to use the title of a professor, nor the law school's name and address, in any pleadings or documents.

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.