KENTUCKY BAR ASSOCIATION
UNAUTHORIZED PRACTICE OF LAW OPINION U-66
ISSUED: MARCH 2021

Question: Does a non-attorney, who is designated as an "advisor" within the meaning of 34 C.F.R. § 106.45, engage in the unauthorized practice of law when the non-attorney "advisor" engages in actions constituting the practice of law on behalf of a party to a proceeding covered by 34 C.F.R. § 106.45, when such actions are authorized by 34 C.F.R. § 106.45?

Answer: Qualified no.

References: SCR 3.020; SCR 3.700; KBA U-34; 34 C.F.R. § 106.45; *Sperry v. State of Fla. ex rel. Florida Bar*, 373 U.S. 379 (1963); *Penn. v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851); *Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560 (Ky. 1998); *Ky. State Bar Ass'n v. Henry Vogt Machine Co.*, 416 S.W.2d 727 (Ky. 1967).

PROPOSED OPINION

The question has been raised as to whether a non-attorney, who is designated as an "advisor" within the meaning of 34 C.F.R. § 106.45, engages in the unauthorized practice of law when the non-attorney "advisor": (1) engages in actions constituting the practice of law on behalf of a party to a proceeding covered by 34 C.F.R. § 106.45; and (2) when such actions are authorized by 34 C.F.R. § 106.45.

Existing authority supports the conclusion that the representation of a party before a quasi-judicial body of an educational institution, where the party faces a risk of serious sanctions, constitutes the practice of law under SCR 3.020 where the representation involves the rendition of legal knowledge or legal advice. The activities an "advisor" may perform on behalf of a party in a proceeding covered by 34 C.F.R. § 106.45 include activities constituting the practice of law within the meaning of SCR 3.020.

Based on the assumptions that the promulgation of 34 C.F.R. § 106.45 was a lawful exercise of the United States Department of Education's authority under Title IX of the Education Amendments of 1972, and on the assumption that 34 C.F.R. § 106.45 requires a covered institution to permit a party to designate a non-attorney as an advisor, we conclude that activities that 34 C.F.R. § 106.45 permits an "advisor" to perform are "authorized" by federal law, and therefore, would not constitute the unauthorized practice of law when performed by a non-attorney.

I. The representation of a student in a Title IX proceeding before a quasi-judicial body of an educational institution constitutes the practice of law.

SCR 3.020 defines the practice of law broadly as "any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court,

rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services." An individual who represents a party in a proceeding before a quasi-judicial body of an educational institution, where the quasi-judicial body could recommend "serious sanctions against the students, such as expulsion, suspension or something that goes to the person's livelihood or property rights," is engaged in the practice of law. Opinion KBA U-34 (opining that a non-attorney could not appear before a student grievance committee representing another student in proceedings before the student committee where committee functioned as quasi-judicial body and could impose serious sanctions against student).

Some of the tasks 34 C.F.R. § 106.45 authorizes an "advisor" representing a student in a Title IX proceeding to perform involve "legal knowledge or legal advice . . . out of court, rendered in respect to the rights . . . [or] liabilities . . . of [the student] requiring the services." *See Ky. State Bar Ass'n v. Henry Vogt Machine Co.*, 416 S.W.2d 727 (Ky. 1967) (enjoining non-lawyer from examining or cross-examining witnesses before Unemployment Insurance Commission). Opinion KBA U-34 (opining that non-lawyer could not appear before university faculty grievance committee as a representative of another individual involved in the grievance proceedings where grievance committee was quasi-judicial body and non-lawyer would be examining witnesses). *See also Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560, 564 (Ky. 1998) ("Legal representation by a lay person before an adjudicatory tribunal, however informal, is not permitted by SCR 3.700, as such representation involves advocacy that would constitute the practice of law."). For example, 34 C.F.R. § 106.45(b)(6) permits a party's advisor to engage in cross-examination of witnesses at a live hearing. Because the regulation applies to hearings involving the resolution of formal complaints of sexual harassment against a student, we would expect any potential sanctions to be sufficiently serious so as to consider the grievance process quasi-judicial in nature. 34 C.F.R. § 106.45(a). Accordingly, an individual who renders legal advice or knowledge in connection with such a proceeding would be engaged in the practice of law within the meaning of SCR 3.020.

II. The actions 34 C.F.R. § 106.45 authorizes a non-attorney "advisor" to perform on behalf of a party to a proceeding covered by that regulation are authorized, on the assumption that 34 C.F.R. § 106.45 (1) represents a lawful exercise of the United States Department of Education's rule-making authority under Title IX, and (2) requires an educational institution to permit a party to designate a non-attorney as an "advisor."

For purposes of our opinion, we assume that 34 C.F.R. § 106.45 represents a lawful exercise of the Department of Education's rulemaking authority.

34 C.F.R. § 106.45(b)(2)(B) requires a covered educational institution to provide a "written notice" to parties to a grievance process that informs them that "they may have an advisor of their choice, who may be, but is not required to be, an attorney . . . ." We assume, for purposes of this opinion, that this language should be interpreted to mean that a party to a grievance process proceeding covered by 34 C.F.R. §106.45 is entitled to have an "advisor" who is not admitted to the practice of law before the bar of any state or territory of the United States.

Based upon these assumptions, we construe 34 C.F.R. § 106.45 to authorize an "advisor" (as that term is used in the regulation) to perform those actions the regulation permits an advisor to perform. Under long-standing United States Supreme Court precedent:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State's licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity sanctioned by federal license additional conditions not contemplated by Congress. 'No State law can hinder or obstruct the free use of license granted under an act of Congress.'

Sperry v. State of Fla. ex rel. Florida Bar, 373 U.S. 379, 385 (1963) (quoting *Penn. v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1851)).

Accordingly, with the foregoing qualifications, it is our opinion that 34 C.F.R. § 106.45 provides a federal "license" to individuals designated as an "advisor" within the meaning of the regulation to perform the actions the regulation expressly identifies. An advisor performing actions that otherwise constitute the practice of law, but authorized by the regulation, would therefore not be engaged in the unauthorized practice of law.

Note to Reader

This unauthorized practice 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 in part: "Both informal and formal opinions shall be advisory only."