

Nebraska Ethics Advisory Opinion for Lawyers
No. 71-2

A LAW FIRM OF WHICH A COUNTY ATTORNEY IS A MEMBER MAY NOT ETHICALLY REPRESENT CLIENTS IN DIVORCE CASES INVOLVING MINOR CHILDREN.

CODE PROVISIONS INTERPRETED:

CANON 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

EC 9-2 ".While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

FACTUAL SITUATION

A county attorney is a member of a law firm which accepts divorce cases. The county has supplied the county attorney with a special assistant to handle all cases wherein the county attorney is disqualified for any reason. Further, the county has provided funds which would permit the special county attorney to represent the State of Nebraska in any action against either party to a divorce for child neglect or other criminal offenses.

QUESTION

May the inquiring law firm ethically represent clients in divorce cases involving minor children?

DISCUSSION

Formal Opinion No. 77 of the ABA suggests that the prosecuting attorney should avoid all impropriety, and likewise avoid the appearance of impropriety. In that vein Formal Opinion No. 192 states:

"Many opinions have been written by this committee applying each of these Canons. Opinions 16, 30, 34, 77, 118, and 134 relate to Canon 6, and pass on questions concerning the propriety of the conduct of an attorney who is a public officer in representing private interests adverse to those of the public body which he represents. The principle applied in those opinions is that an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests."

Formal Opinion 16 asserts that the public cannot waive the disqualification of a public attorney. Formal Opinion No. 674 suggests that it is immaterial that the public attorney's duties are only part time.

Inquiry of county attorneys in both heavily and sparsely populated counties reveals a marked difference in approach to this problem. In one populous county no one in the county attorney's office is permitted to handle a divorce case involving minor children. Staff members are permitted to participate in divorce cases absent facts which require criminal proceedings. In other counties, county attorneys are counsel in divorce cases where there are minor children.

The inquiring county attorney has taken one unusual precaution to avoid the appearance of impropriety by procuring the appointment of a special deputy county attorney to act for the State in matters where the county attorney is disqualified. Despite this safeguard, situations may arise where the inquiring law firm

represents a party in a divorce action against whom the special deputy county attorney may institute criminal proceedings for child neglect or willful failure to pay child support. In such a circumstance how could the inquiring law firm represent their client without a conflict of interest between the public and private duties of the county attorney?

CONCLUSION

This committee concludes that in divorce actions where minor children are involved a law firm of which a county attorney is a member should not be counsel for either party.

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