

Nebraska Ethics Advisory Opinion for Lawyers  
No. 75-4

A LAWYER, WHO IS SERVING HIS COUNTY AS A MEMBER OF THE COUNTY BOARD, WHICH HAS, AS ONE OF ITS DUTIES TO ACT EACH YEAR UPON THE BUDGET PRESENTED BY THE COUNTY ATTORNEY, SHOULD NOT HANDLE CRIMINAL CASES, NEGOTIATING AND DEFENDING THEM AGAINST THE COUNTY ATTORNEY OR ANY MEMBER OF HIS STAFF.

FACTS

An attorney was elected to serve as a County Commissioner of one of the counties in Nebraska for a four year term beginning in January of 1975. Prior to his election, the attorney handled numerous criminal cases, negotiating and defending them against the County Attorney and members of his staff. The County Commissioners have only budgetary authority over the County Attorney's office. The County Commissioners must act each year upon the budget presented by the County Attorney. Being a County Commissioner is only a part time job.

QUESTION PRESENTED

The attorney requests an advisory opinion as to whether or not he may continue to practice criminal law, defending clients in actions prosecuted by the County Attorney or some of his deputies. He is concerned as to whether or not this constitutes a conflict of interest or the appearance of one.

CODE PROVISIONS INVOLVED

Canon 5. A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.

EC 5-1 "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the

interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

Canon 7. A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

DR 7-101 Representing a Client Zealously.

(A) "A lawyer shall not intentionally:

(1) "Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101 (B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process."

(2) "Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105."

(3) "Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-

102 (B)."

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

DR 9-101 Avoiding Even the Appearance of Impropriety.

(B) "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

#### DISCUSSION

County Commissioners are the legislative and executive officers of the county. They do and manage the counties business, Chapter 23, Revised Statutes of Nebraska for 1943, Reissue of 1970 as amended. It is his duty to save money for the county where possible.

The trial of a criminal case is expensive to the county and the taxpayers. Lots of money would be saved if attorneys for persons accused of crimes would plead them guilty or bargain for dismissal of more serious crimes by offering to plead to a lesser crime. The conflict here seems obvious. The lawyer commissioner must adhere to Canon 7 and he should, at the same time, be trying to save money for the county. His situation may very well impair his independent professional judgment either consciously or unconsciously in violation of Canon 5. Full disclosure to both the client, the other commissioners and the county attorneys still leaves the question of whether the public ( in this instance, the county) can give consent. See Informal Decision No. 674 (of the American Bar Association Standing Committee on Professional Ethics) on this point. Informal Opinion No. 855 of the same committee in considering a problem on conflicts of interests of public officials, states:

"Generally speaking, any persons in public offices, including attorneys, have as their primary duty that of performing the functions of the office in a wholly honest,

impartial and ethical manner."

The inquirer is commended for recognizing the potential ethical problem in being placed in a position of having budgetary authority over the County Attorney's office and then opposing the County Attorney in court. This may or may not place the County Attorney in an awkward position in opposing the very attorney in a sensitive matter, who sits in judgment over the County Attorney's budget. We believe this violates Canon 9, as well as being a potential conflict of interest.

We therefore conclude that a lawyer who is one of the county board, should not practice criminal law in that county.

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