Nebraska Ethics Advisory Opinion for Lawyers
No. 80-9

THE PROPRIETY OF LAWYERS WHO FORMERLY SERVED ON THE STAFF OF THE CITY ATTORNEY REPRESENTING CLIENTS IN ACTIONS AGAINST THE CITY DEPENDS UPON THE FACTUAL SITUATION PRESENT IN EACH CASE.

FACTS

An opinion is requested concerning the propriety of lawyers who have left the city attorney's staff representing clients in actions against the city. The letter from the inquiring attorney states as follows:

> "The problem or question essentially relates to whether an attorney who leaves the employ of the City may subsequently file causes of action against the City which involve issues directly related to matters upon which he furnished legal guidance or advice during his employment with the City.

> "We have had instances wherein an attorney or attorneys on our staff, who have been assigned to represent specific departments, boards or functions have subsequently left our employ and then filed actions relating directly to matters that were considered, and the subject of, legal advice or guidance by that same attorney during the time that he was employed by the City."

DISCUSSION

It is not clear from this letter whether the actions filed against the City involve the same parties with whom the City was dealing at the time the attorney was on the staff or whether they are simply claims of the same general nature made by other parties.

Since the request is not directed to a specific factual situation, our response must be somewhat general.

This letter refers to DR 9-101(B) which provides:

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

DR 9-101(B) applies to one who has been "* * * a public employee." Thus it is not restricted to those whose public employment was in the capacity of a lawyer. For this reason, the standard is probably not as strict as would be the case if the ruling dealt solely with those whose public service was as a lawyer.

The ABA Opinions applying DR 9-101(B) interpret specific factual situations and do not attempt to re-define "substantial responsibility." We do not believe that an attempt on our part to further define that term in the absence of a specific factual situation would be helpful. This is particularly true since, I believe, that a stricter standard is applicable to one whose public service was as a lawyer.

DR 4-101(B) provides in part as follows:

> "(B)   Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

> (1)   Reveal a confidence or secret of his client.

> (2)   Use a confidence or secret of his client to the disadvantage of the client."

DR 4-101(A) defines "confidence" and "secret" as follows:

> "(A)   'Confidence refers to information protected by the attorney-client privilege

under applicable law, and 'secret' refers to other information gained in the professional realtionship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."

EC 4-4 provides in part:

"The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. * * *"

EC 4-5 provides in part:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client * * *."

EC 4-6 provides in part:

"The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. * * *"

The above considerations apply whether the lawyer, while on the City Attorney's staff, had any direct participation in the case or not. As stated in ABA Formal Opinion No. 134:

"As the prosecution 'originated' in the office to which counsel was attached as a paid lawyer, he was in a position of confidence and had opportunity to know the facts upon which his client, the state, predicated the prosecution. If he actually acquired such information, manifestly he could not properly use it in favor of a defendant whose

interest was in conflict with the interest of the state. But even if he did not so acquire it, the public would naturally infer that he was retained by the defendant that some advantage in the defense of the case might derive from his former connection with the prosecutor's office.

"Representation of conflicting interests is forbidden by Canon 6. It is forbidden whether it is concurrent or at different times.

"A lawyer retiring from public employ cannot utilize or seem to utilize the fruits of the former professional relationships in subsequent private practice involving a matter investigated or passed upon either by himself or others of the public legal staff during the time he was identified with it. * * *"

CONCLUSIONS

The foregoing considerations suggest these conclusions:

1.   A former member of the City Attorney's staff cannot properly represent a client whose action against the City was being handled by the City Attorney's staff while he was a member of that staff whether or not he handled the matter personally.

2.   A former member of the City Attorney's staff may not use against the City any confidences or secrets obtained in his capacity as a member of the City Attorney's staff.

3.   Because of the appearance of impropriety, a former member of the City Attorney's staff generally should not represent a client on a matter that was being defended by the City Attorney's staff while he was a member thereof even though no actual secrets or confidences are revealed or taken advantage of.

4.   In the absence of an abuse of confidence or secret, a former member of the City Attorney's staff may represent clients with respect to matters that were not being handled by the City Attorney's office at the time he was a member thereof even though these matters involved issues of a kind the lawyer handled for the City.

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