

Nebraska Ethics Advisory Opinion for Lawyers
No. 98-2

AS A GENERAL RULE, A PROSECUTOR SHOULD WITHDRAW FROM A CRIMINAL CASE IF HE OR SHE IS TO TESTIFY IN THE MATTER ON BEHALF OF THE STATE. A PROSECUTOR NEED NOT WITHDRAW IF CALLED TO TESTIFY BY THE DEFENSE UNLESS THE PROSECUTOR'S TESTIMONY WOULD BE PREJUDICIAL TO THE STATE'S CASE.

FACTS

A County Attorney's office prosecuted a prisoner for stabbing to death another prisoner. The defendant was found guilty and sentenced to death. One of the witnesses for the prosecution testified that he observed the defendant stab the decedent. That witness has now recanted his testimony saying that it was false and that the lead prosecutor in the case threatened him and coached him in connection with his testimony. The convicted defendant is now requesting a new trial based on this newly discovered evidence and wishes to depose three of the prosecutors in the County Attorney's office.

STATEMENT OF QUESTION OR ISSUE

If a prosecutor is to be called as a witness in a criminal case by the defense, is it necessary for the prosecutor to withdraw from the matter?

STATEMENT OF APPLICABLE CANONS, DISCIPLINARY
RULES
AND ETHICAL CONSIDERATIONS

DR 2-110(B): Mandatory Withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment if:

(1) ...

(2) The lawyer knows or it is obvious that his or her continued employment will result in violation of a disciplinary rule.

(3) ...

DR 5-102: Withdrawal as Counsel When the Lawyer becomes the Witness.

(A) If, after undertaking employment in a contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm ought to be called as a witness on behalf of his or her client, the lawyer shall withdraw from the conduct of the trial and his or her firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in his or her firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness other than on behalf of his or her client, the lawyer may continue the representation until it is apparent that his or her testimony is or may be prejudicial to the client.

DR 5-105 (D) If a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, associate or any other lawyer affiliated with the lawyer or his or her firm may accept or continue such employment.

EC 5-9: Occasionally a lawyer is called upon to decide in a particular case whether the lawyer will be a witness or an advocate. If the lawyer is both counsel and witness, he or she becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An

advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10: Problems incident to the lawyer-witness relationship arise at different states; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, the lawyer's decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that the lawyer will be called as a witness because his or her testimony would be merely cumulative or if the lawyer's testimony would relate only to an uncontested issue. In the exceptional situation where it would be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he or she will likely be a witness on a contested issue, the lawyer may serve as advocate even though he or she may be a witness. In making such decision, a lawyer should determine ... the materiality of the lawyer's testimony, and the effectiveness of the lawyer's representation in view of his or her personal involvement. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his or her becoming or continuing as an advocate.

Canon 9: A lawyer should avoid even the appearance of professional impropriety.

DISCUSSION

Two of this Committee's prior opinions, [76-5](#) and [90-1](#), appear to be relevant. The first opinion holds that a county attorney who participated in obtaining a confession from a defendant should not participate as a prosecutor in the trial where he may be called as a witness concerning the voluntariness of the confession. The second opinion held that a public defender should not represent a convicted defendant seeking to overturn the conviction on the grounds of ineffective

representation by another lawyer in the public defender's office. Although both are distinguishable on their facts, they are analogous and both result in disqualification of counsel.

Turning to the applicable disciplinary rules and keeping in mind the fact that compliance with DR's is mandatory, we find the same result dictated by DR 5-102 in the instance where a lawyer may be called as a witness on behalf of his or her client. Withdrawal is not required when the lawyer may be called as a witness other than on behalf of his or her client until it is apparent that testimony may be prejudicial to that client. Herein lies the key to resolving the issue presented.

Defense counsel proposes to call members of the County Attorney's office as witnesses on behalf of the defendant. There is no indication that members of the County Attorney's office will be called as witnesses by the State.

The Committee sees three additional considerations. First, the issue of defense tactics in attempting to disqualify the prosecutor. If all a defendant had to do in order to disqualify a prosecutor was to allege prosecutorial misconduct, the criminal justice system would become unworkable. An annotation appearing at 54 A.L.R. 3rd 100 (1974) deals in part with the subject of the duty of a prosecutor to withdraw. The cases collected at Section 16 of the annotation all, except one, hold that there is no duty on a prosecutor to withdraw when called as a witness by the defendant. The one contrary holding came out of California and is based on the appearance of impropriety. The Nebraska Supreme Court dealt with the issue in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The Court stated that as a general rule, a prosecutor should withdraw from a case when he testifies for the prosecution but that the rule does not apply when the defense calls the prosecutor as a witness.

The second consideration is the essence of EC 5-9: Whether continuing as counsel adversely affects the State's case. This, of course, is a decision outside the

scope of this Committee.

Consideration should also be given to Canon 9: Whether staying in the case would have the appearance of professional impropriety. This decision is also outside the purview of the Committee.

CONCLUSION

As a general rule, a prosecutor should withdraw from a criminal case if he or she is to testify in the matter on behalf of the State. A prosecutor need not withdraw if called to testify by the defense unless the prosecutor's testimony would be prejudicial to the State's case.

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