

Nebraska Ethics Advisory Opinion for Lawyers
No. 74-2
(Supplement to Opinion No. 72-13)

A CITY OR VILLAGE ATTORNEY WHOSE DUTIES INCLUDE PROSECUTING VIOLATIONS OF ORDINANCES AND STATE STATUTES MAY NOT VOLUNTARILY REPRESENT ANYONE CHARGED WITH A CRIME UNLESS HIS EMPLOYMENT AS ATTORNEY FOR THE DEFENDANT IS APPROVED BY AN ORDER OF THE COURT WHEREIN THE CASE IS PENDING.

An exception to our [Formal Opinion 72-13](#) pertaining to prosecutor conflict is hereby recognized when the employment of the attorney is approved by the court wherein the case is pending.

In [Formal Opinion 72-13](#) we concluded that where a city (or village) attorney is charged with the duty of prosecuting persons accused of violating ordinances or state statutes, he may not ethically represent persons accused of criminal offenses in any court.

Our [Opinion 72-13](#) cites certain applicable provisions of the Code of Professional Responsibility, particularly EC 5-14 and EC 9-6, and numerous Formal and Informal Opinions of the Standing Committee on Professional Ethics of the American Bar Association. We have since reviewed Informal Opinion 1285 of the Standing Committee.

It has been called to our attention by many members of the Nebraska Bar that the prohibition created by our [Formal Opinion 72-13](#) is making it difficult, if not impossible, for many persons accused of crime to obtain adequate and competent representation in our courts and that perhaps the need of our profession to provide such representation overrides the possibility of creating the appearance of impropriety on the part of lawyers to whom such employment is offered.

While the Committee still adheres to the reasoning and

conclusions set forth in our [Formal Opinion 72-13](#), we now conclude that we cannot longer ignore the very real problem that exists, particularly in the rural and sparsely settled areas of our state, for persons accused of crime to secure the services of a lawyer of their choice. We must recognize that we, as an organized bar, have a responsibility to do everything within our power to provide such representation in our courts.

We now conclude that there should be an exception to our conclusion in [Formal Opinion 72-13](#) whenever the court where the criminal case is pending enters an order approving the employment of the lawyer by the defendant accused of crime, even though the lawyer, or one or more of his partners, might also be serving as a city or village attorney. The entry of such an order by the court will in all cases be construed as a finding that the refusal of such permission would place an unreasonable burden on the defendant to secure adequate and competent counsel and that no impropriety or appearance of impropriety will result from the employment of the attorney to represent the defendant in that particular case.

Lastly, we would remind all Nebraska lawyers of the growing practice of lawyers and legal firms to enter into contracts with cities and villages to furnish legal services in civil matters only. Under such contracts of employment, the lawyer does not become, per se, a public official and is therefore not bound by the prohibition contained in our [Formal Opinion 72-13](#).

We also adhere to our [Formal Opinion 72-14](#) wherein we held that the prohibition contained in our [Formal Opinion 72-13](#) did not pertain to the situation where a city or village attorney is appointed by a judge to defend a person accused of a crime.