

Nebraska Ethics Advisory Opinion for Lawyers
No. 75-3

NEITHER A COUNTY ATTORNEY NOR HIS PARTNER MAY PROPERLY REPRESENT A LANDOWNER IN CONDEMNATION PROCEEDINGS INSTITUTED BY THE STATE OF NEBRASKA WHERE THE LAND IS IN HIS OWN COUNTY, AND THIS PRECLUDES NOT ONLY ACTUALLY HANDLING THE LAWSUIT BUT ALSO COUNSELING AND REPRESENTING THE LANDOWNER DURING THE NEGOTIATION STAGES PRIOR TO CONDEMNATION. THE PROHIBITION DOES NOT APPLY TO CONDEMNATION PROCEEDINGS BROUGHT IN A COUNTY OTHER THAN THAT IN WHICH THE COUNTY ATTORNEY SERVES IN SUCH CAPACITY.

The opinion of the Advisory Committee is requested with reference to the propriety of a County Attorney representing landowners in condemnation proceedings instituted by the State of Nebraska. Specifically the following situations are encountered by the State and upon which the opinion of the Advisory Committee is now sought. These situations are:

1. A county attorney actually handling the lawsuit for the landowner in his own county.
2. A county attorney's partner handling the lawsuit for the landowner in the county attorney's own county.
3. A county attorney or his partner giving advice and representing the landowner during the negotiation stages and up to the time of the filing of the condemnation.
4. A county attorney representing a landowner but in proceedings brought in a county other than his own.
5. A county attorney's partner in the same situation as No. 4 above.
6. A county attorney and his partner representing

a landowner in the county attorney's own county, but with the county attorney offering to have a special county attorney appointed to aid the State. (In this single circumstance the county attorney is the only resident attorney within the county; he and his partner living in adjoining counties).

A proper determination of the rights and duties of a county attorney is governed by the statutes outlining the duties of the county attorney. Section 23-1201 Revised Statutes 1943 provides in part as follows:

"It shall be the duty of the county attorney to prosecute or defend on behalf of the State and County all suits, applications or motions, civil or criminal, arising under the laws of the State in which the State or the County is a party or interested; provided he may be directed by the Attorney General to represent the State in any action or matter in which the State is interested or a party."

Section 23-1206 declares:

"No prosecuting attorney shall receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business which it shall be his official duty to attend; nor shall he act or be concerned, as an attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution, commenced or prosecuted, shall depend, or depending upon the same state of facts, investigated by him, while acting as county coroner."

These statutes define the broad duties of a county attorney requiring him to appear on behalf of the county and the state and specifically in actions under the direction of the Attorney General in which the state is an interested party. Condemnation proceedings are civil. It is certain that no criminal action could arise from such

proceedings either before the institution of condemnation or thereafter. The statute provides also for additional compensation in civil actions initiated by the Attorney General.

Canon 6 provides in part as follows:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

The Code of Professional Responsibility covers the subject in DR5-101, 105; DR9-101. The rule is thus stated:

"This obligation forbids the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed, and the acceptance of employment that involves or may involve the disclosure or use of confidences reposed in him by a former client. Thus it is a ground for suspension or disbarment for an attorney to represent, without the knowledge or consent of all parties, parties with conflicting or adverse interests, as where a city or prosecuting attorney acts as counsel for persons having interests adverse to the interests of the public." 7 Am. Jur. 2nd Section 34, p. 63.

Opinion 39 holds: "A public prosecutor may not properly accept private employment in connection with any matter which he has investigated or is investigating in his official capacity."

Opinion 261 holds that in states in which it is made the statutory duty of the prosecuting attorney to appear and

resist suits for divorce when remaining undefended, it was then held that a prosecuting attorney in divorce actions cannot ethically represent a private party thereto. This opinion is based on the "manifest public policy of the State to have divorce proceedings carefully scrutinized to the end that they shall not be collusive and that the prosecuting attorney shall appear in such proceedings in the name and on behalf of the State where there is no bona fide appearance of counsel for defendant or where it appears to the trial Judge that there is a probability that the proceedings are collusive. This contemplates that the prosecuting attorney shall remain free to appear in such proceedings in the name and on behalf of the State... The proper performance of the official duties of the prosecutor in a divorce action would be interfered with, were he or his deputy to accept employment therein on behalf of one of the parties."

The opinions are numerous and consistent that a public prosecutor may not properly defend persons accused of crime either in his own State or adjoining States and this prohibition applies with equal force to deputies and to partners.

In *Ress vs. Sheppard*, 84 Neb. 268; 120 NW 1132, the Nebraska statute was interpreted to mean that it prohibits a county attorney from becoming financially interested in civil suits dependent on facts that might warrant commencement of criminal prosecution. The court said:

"The County Attorney is the public prosecutor and his office is quasi judicial. In the discharge of the functions of that office he is called upon to exercise a sound discretion to distinguish between the guilty and the innocent, and to refrain from prosecuting those persons whose guilt is so doubtful that in his judgment justice will not be subserved by prosecutions, and there should not be anything in the way of private interest to possibly sway that judgment or to tempt him to depart from a disinterested

and conscientious discharge of his duty."

In definition of public policy, the Court stated:

"Anything that tends clearly to injure the public health, the public morale, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy."

The cases and the opinions interpreting the rule with reference to conflict of interest of a public prosecutor are based on facts in which criminal prosecutions are, or may be involved. The statutes are not intended to prevent the county attorney from representing a private citizen under all circumstances but are defined to preclude such employment when the interest of the public and the private individual are or might be in conflict. In this situation the Canon that an attorney may not represent conflicting interests comes into play.

In *Roach vs. Roach*, 174 Neb. 266; 117 NW2nd 549, the court held that no conflict of interest appeared. This was a case in which plaintiff's attorney was deputy county attorney in the suit for divorce. He undertook to show adultery on the part of the defendant as a ground for divorce. It was contended that the prosecuting attorney was prohibited from accepting attorney's fees in a civil case where the facts, if established, would constitute a crime under the laws of this state. The alleged offense related to acts in another county. The Court held that there was no conflict of interest and further stated that the purpose of the statute was to protect the public by making certain that the duties of county attorneys are not influenced by private interests.

In *State vs. Richards*, 165 Neb. 80; 84 NW2nd 136, the facts were that the county attorney was the attorney for the administrator of the estate. As attorney for the estate and as attorney for the county he appeared before the county court and settled the liability of the

estate for inheritance tax and for the amount of the tax. In that case the Supreme Court said:

"It is also brought out by the evidence adduced that no one ever questioned the inheritance tax assessed; that no damage resulted therefrom; that the federal authorities used the same values for assessing federal estate tax; and that no fraud, deceit, or unscrupulous practice was involved. But for conduct to be unethical it is not necessary that some damage result therefrom because of fraud, deceit, or unscrupulous practice. As said in Opinion 49, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 134: "An attorney should not only avoid impropriety but should avoid the appearance of impropriety." See also Opinion 77, of the Committee on Professional Ethics and Grievances of the American Bar Association, page 118: "... it is the duty of an attorney in public employ to be and remain above all suspicion, even at personal financial sacrifice."

"This, and comparable situations, undoubtedly present difficult problems for county attorneys who have a private practice, as most of them have to in order to make a living in view of the low salaries paid for such office in most of the counties of the state. However, because of that fact, we cannot see fit to lower the ethical standards of the profession applicable thereto. In the situation here the problem could have been met, as it was in the Dryden estate hereinafter more fully discussed, by the appointment of special counsel to represent the county. What is the practical solution of the problem it is difficult to visualize. Every attorney, who is also a county attorney, will have to meet each individual situation as he is confronted with it in his private practice.

If this was the only matter for our consideration herein we would only admonish respondent and advise him to be more careful in the future of his dual responsibility as long as he is the county attorney."

On the authority herein set forth it is submitted that the questions posed by the Attorney General's office should be answered as follows:

Situations No. 1, 2, 3 and 6 prohibit the County Attorney from representing a private landowner.

In situations 4 and 5 there is no conflict of interest.

Situation No. 6 is a close and doubtful question. May a County Attorney temporarily vacate his office, have a special county attorney appointed to aid the state and then represent the private landowner? Is the county attorney authorized to provide for the appointment of a special county attorney to permit him to retire temporarily from that office and represent the landowner. The Richards case opens the door for this procedure. Does such procedure injure "the public confidence in the purity of the administration of the law?" If it does it is contrary to public policy regardless of any statute. I am unable to find an opinion of the A.B.A. shedding light on its solution.

With reference to situation No. 6 it is my view that the attorney should not only avoid any impropriety but should avoid the appearance of impropriety. Having accepted the office of county attorney and the salary of that office with the assurance that additional compensation can be paid him for additional services performed at the instigation of the Attorney General, he should regard his office and the salary as a retainer and should not accept employment from a landowner in condemnation proceedings brought against him.

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