

Nebraska Ethics Advisory Opinion for Lawyers
No. 76-5

A COUNTY ATTORNEY WHO PARTICIPATED IN OBTAINING A CONFESSION FROM A DEFENDANT IN A MURDER CASE SHOULD NOT PARTICIPATE IN THE PROSECUTION OF THE TRIAL WHERE THERE IS A POSSIBILITY HE WILL BE CALLED AS A WITNESS PERTAINING TO THE VOLUNTARINESS OF THE CONFESSION.

FACTS

You state that in your capacity as County Attorney you participated in obtaining a confession from a defendant in a murder case. You inquire whether you may participate in the prosecution of the case with the knowledge that there is a possibility you would be called as a witness by the defense during the progress of the case.

Under the law developed in the State of Nebraska pertaining to confessions, it is incumbent upon the State to prove that a confession was voluntary, which question is to be determined in the first instance by the trial judge, and secondly, by the jury. It would thus appear that you would probably have to testify as a prosecution witness either on direct or rebuttal pertaining to the question of voluntariness.

CODE PROVISIONS AND DISCUSSION

DR 5-101(B) of the Code of Professional Responsibility states: "A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness..."

The Nebraska Supreme Court has dealt with this question in several cases, among which is *Frank vs. State*, 150 Neb. 745, 35 N.W. 2d 816:

"As a matter of course, an attorney participates in a trial when he in some manner actively takes part in and conducts the same as an attorney. Roberts v. State, 100 Neb. 199, 158 N.W. 930, Ann. Cas. 1917E 1040, is authority for this proposition that it is improper in a criminal prosecution to allow one who testifies as a witness to the principal facts in the case to also as attorney conduct the trial in the examination of witnesses and argument to the jury, or to conduct himself in any manner inconsistent with his position as a witness or his interest as an officer of the state. In other words, although a competent witness, his function as a prosecuting attorney and as a witness must be disassociated. Therefore, if it is discovered before the trial that he is a necessary witness he should withdraw from any active participation as attorney for the state and have other counsel prosecute the case."

In State vs. Newman, 179 Neb. 746, 140 N.W. 2d 406, our court reaffirmed the holding of the above case:

"In Frank v. State, 150 Neb. 745, 35 N.W. 2d 816, we said: 'A county attorney, being a quasi-judicial public officer, in whom the public has reposed confidence, his evidence is ordinarily given greater weight than that of an ordinary witness, and the natural tendency in such cases is for defendant to question the fairness of a trial when he becomes a witness for the state. Therefore, he should when that becomes necessary, so conduct himself as to foster and demonstrate the fact that he is not actively participating as a prosecutor, but only as a witness, truthfully and impartially giving competent testimony.'"

See, also, Pribvl vs. State, 165 Neb. 691, 87 N.W. 2d

201, which holds to the same effect.

CONCLUSION

It would appear that you "ought" to be called as a witness either by the State or by the defense, and the Committee is of the opinion that you should disqualify yourself from participating in the prosecution of the case.

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